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ADAMS'

ILLUSTRATIVE CASES

ON

THE LAW OF SALES

SELECTED BY PROFESSORS OF LEADING LAW
SCHOOLS

ST. PAUL, MINN.
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1893

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PREFACE.

ADAMS' ILLUSTRATIVE CASES ON SALES is one of a series of "Selected Cases" issued by the publishers for the use, more especially, of law students. The name "Adams," given to this volume, is not the name of editor or compiler; but since every book, like every person, must have a name for identification, this title has been arbitrarily chosen for that purpose, and for advantages in cataloguing. The cases are not the selection of one person, but of leading law-school professors. They are published without headnotes, but a table of contents by subject and an index are given. The cases named by different instructors as most desirable for illustrating any one branch of the law naturally differ, and, in order that this collection may be most useful to different classes, it has been made very comprehensive. As a natural consequence, it will be found to contain more cases than will probably be required by any one school. But the cases not used by one school may be the very ones most wanted in another, and it is hoped that many teachers will thus find among the cases here given all that they would have selected. The matter has been so arranged typographically that each case begins at the top of a new page, and is fronted by a blank page or two, to be used for annotations in the class room. This makes a note book in conjunction with a volume of selected cases, and it is believed that this feature will be found peculiarly valuable by the careful student.

ST. PAUL, MINNESOTA.

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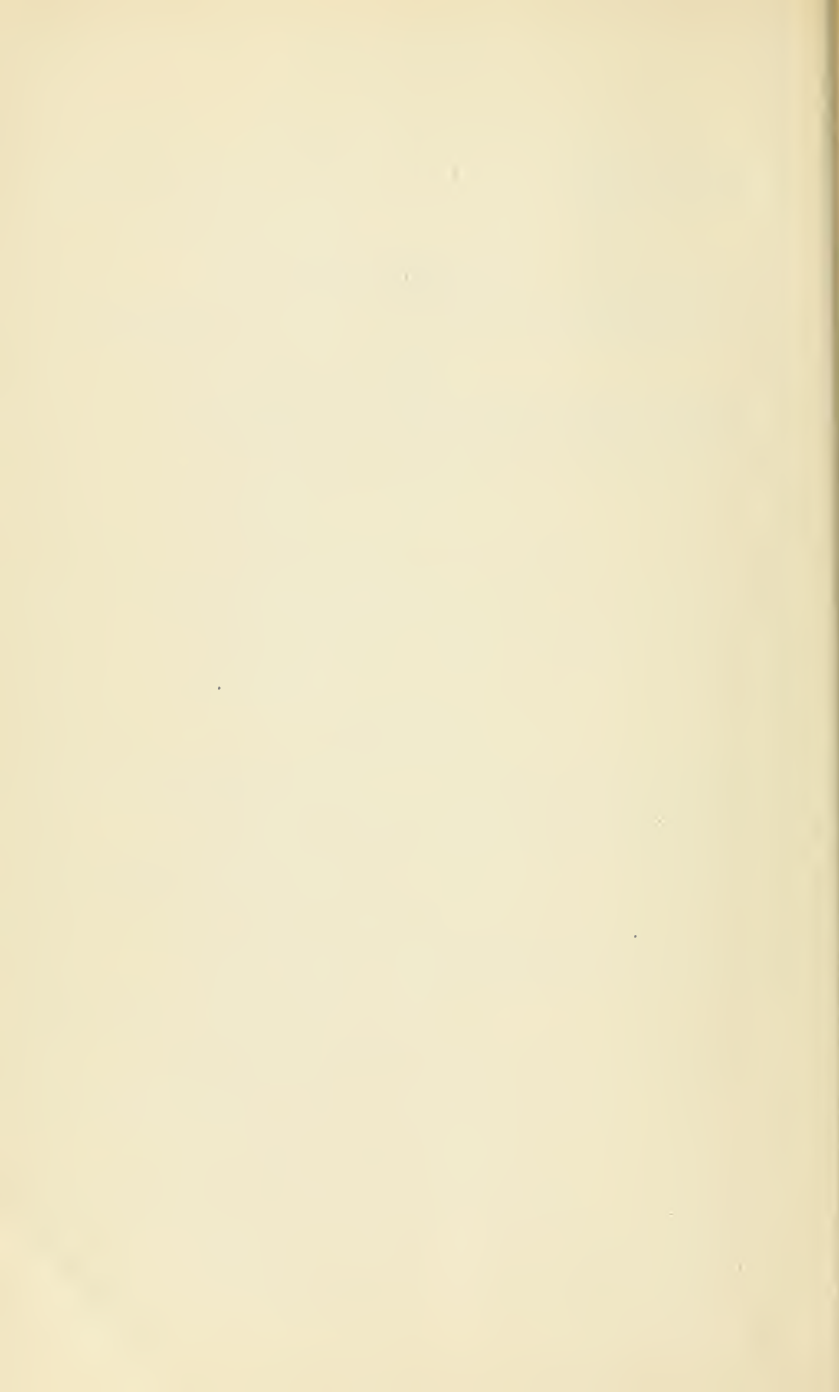
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ILLUSTRATIVE CASES

UPON

THE LAW OF SALES

(1)*



ALLARD v. GREASERT.

(61 N. Y. 1.)

Commission of Appeals of New York. Sept.
Term, 1874.

Action for goods sold and delivered. Defendant firm orally agreed with an agent of plaintiffs to buy by sample the following bill of hats and caps:

Of case No. 361, ½ doz. child's Leghorn sylvans, at \$11 per doz.	\$ 5 50
Of case No. 312, one doz. harvest hats, at.	4 50
Of case No. 371, half doz. Panama hats at.	28 50 a doz.
Of case No. 372, half doz. Panama hats at.	36 00 a doz.
Of case No. 326, one doz. palm leaf hats, at.	2 50 a doz.
Of case No. 324, one doz. palm leaf hats, at.	3 00 a doz.
Of case No. 329, one doz. white Glenwood, at.	15 00 a doz.
Of case No. 153, one doz. black Alpine, at.	24 00 a doz.
Of case No. 309, one doz. Leg. harvest, at.	3 25 a doz.

The samples were shown by the agent, and the prices of the different styles named, and a memorandum made by the agent of the number of each kind purchased. No memorandum was made in writing, and signed by either party. When the goods were sent, by express, as ordered, defendants refused to receive them because the one dozen harvest were in some slight particular different from the samples shown. Defendants moved for a nonsuit because (1) "that the agreement under which the plaintiffs seek to recover is within the statute of frauds, and void; (2) that the order for the goods constitutes one entire contract, and the plaintiffs have failed to fulfill, on their part, to deliver the harvest hats of the description ordered; that, by reason of said failure, the defendants had a right to refuse to receive any of the goods sent." The court nonsuited plaintiffs on the last ground.

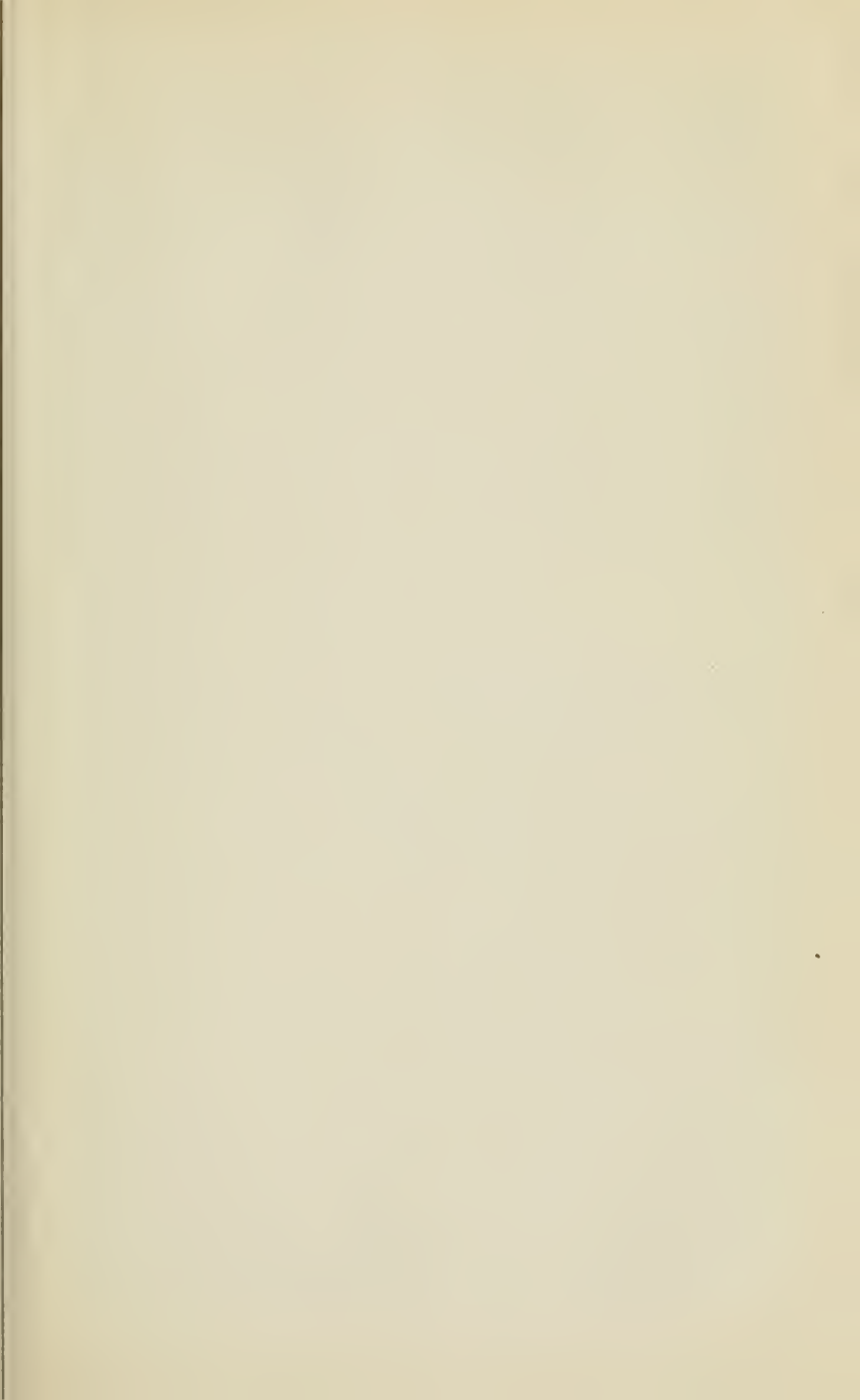
Daniel Wood, for appellants. Bowen & Pitts, for respondents.

EARL, C. The judge at the circuit regarded this as an entire contract of sale, and not severable; and if he was right in this, he properly nonsuited the plaintiffs upon that ground. If it was an entire contract, within the meaning of the law, the plaintiffs could recover only by showing entire performance, by a full delivery of all the articles purchased. But it is not necessary, in this case, to determine whether this was an entire or a severable contract, because the defendants also moved for a nonsuit upon the ground that the contract of sale was void under the statute of frauds. Although the judge did not place the nonsuit upon this ground, it may be considered here. He nonsuited the plaintiffs, and even if he gave a wrong reason for it, and placed it upon the wrong ground, the nonsuit may be upheld upon any ground appearing in the case. *Curtis v. Hubbard*, 1 Hill, 336; *Simar v.*

Canada, 53 N. Y. 298; 13 Am. Rep. 523; *Deland v. Richardson*, 4 Den. 95.

Even if this were a severable contract so far as relates to the performance of the same, within the meaning of the statute of frauds it is an entire contract. The reasons for holding it to be such are clearly set forth in *Baldecy v. Parker*, 2 B. & C. 41, and *Story Sales*, § 241. This, within the meaning of the statute of frauds, is a contract for the sale of goods for the price of \$50 or more, and as there was no note or memorandum or payment, the question to be determined is, whether the goods were accepted and received by the buyers so as to satisfy the statute. By the terms of the contract, the goods were to be delivered to the Merchants' Union Express, to be carried to the defendants, and they were so delivered. It is well settled that when there is a valid contract of sale, a delivery to a carrier, according to the terms of the contract, vests the title to the property in the buyer. It was decided in *Rodgers v. Phillips*, 40 N. Y. 519, that a delivery, according to the contract, to a general carrier, not designated or selected by the buyer, does not constitute such a delivery and acceptance as to answer the statute of frauds. But it has been held that when the goods have been accepted by the buyer, so as to answer that portion of the statute which requires acceptance, a delivery to a carrier selected by the buyer will answer that portion of the statute which requires the buyer to receive. *Cross v. O'Donnell*, 44 N. Y. 661; 4 Am. Rep. 721. So far as I can discover, it has never yet been decided in any case that is entitled to respect as authority, that a mere carrier designated by the buyer can both accept and receive the goods so as to answer the statute. *Benj. Sales*, 124. The cases upon this subject are cited and commented upon, and the principles applicable to the question are so fully set forth in the two recent cases above referred to that no further citation of authorities or extended discussions at this time is important. It will be found by an examination of the authorities, that in most of the cases where a delivery to a carrier has been held to satisfy the statute of frauds, there had been a prior acceptance of the goods by the buyer or his agent. A buyer may accept and receive through an agent expressly or impliedly appointed for that purpose. There is every reason for holding that a designated carrier may receive for the buyer, because he is expressly authorized to receive, and the act of receiving is a mere formal act requiring the exercise of no discretion. But there is no reason for holding that the buyer in such case intended to clothe the carrier, of whose agents he may know nothing, with authority to accept the goods, so as to conclude him as to their quality, and bind him to take them as a compliance with a contract of which such agents can know nothing. This case furnishes as good an illustration as any. The goods were boxed; the carrier could know nothing about them; and its agents had no right to unpack and handle them. Its sole duty and authority was to receive

and transport them. In such a case, it would be quite absurd to hold that the carrier had an implied authority from the buyer to accept the goods for him. If the buyer does not accept in person, he must do it through an authorized agent. Here it is not claimed that there was express authority conferred upon the carrier to accept, and the circumstances are not such that such authority can be implied. Upon this last ground therefore the non-suit was proper, and the judgment must be affirmed, with costs. All concur.



ARNOLD v. DELANO.

(4 Cush. 33.)

Supreme Judicial Court of Massachusetts.
Sept. Term, 1849.

This was an action of trover, brought by the plaintiff as the assignee of Arthur Sowerby, an insolvent debtor, and was submitted to the court of common pleas upon the following agreed statement of facts:

On the 30th of March, 1848, Sowerby and one Grant, who were partners as silk manufacturers, in Northampton, purchased of Delano, the defendant, sixty-five cords of wood, then piled with a much larger quantity on Delano's land. The wood sold was measured off at the time of the sale, but no otherwise separated from the residue, than by means of a stake put down to designate the extent of sixty-five cords. The contract was made with Sowerby, and a bill of the wood was given him by Delano, as follows:

"Messrs. Sowerby & Grant. Bo't of C. Delano. 1848, March 30th. 65 cords wood, \$97.00. Received payment by note at 6 mos. at Northampton Bank. C. Delano."

At the time of making the contract, there was no formal taking possession or delivery of the wood, except as above stated, but the purchasers were to remove the same before the 1st of April, 1849.

On the 23th of June, 1848, Sowerby applied personally for the benefit of the insolvent law, and a warrant was accordingly issued to Ansel Wright, as messenger, on the same day. Possession was taken of the property at the silk works by the messenger, on the 30th of June, and a schedule of assets was furnished him by Sowerby on the same day. On the schedule was the following entry, in the handwriting of the messenger: "65 cords of wood on C. Delano's land." No formal possession was taken of the wood by the messenger; nor was any entry made by him on the land where it was piled, which was distant, in fact, two miles or more from the silk works. On the 15th of July, Sowerby furnished a schedule of creditors, on which was this entry: "Cornelius Delano, Northampton. Note. Wood. No security. \$97."

On the evening of Saturday, the 1st of July, Delano, having heard of the insolvent proceedings, gave the messenger notice that the wood had not been paid for, and that he claimed to hold it, until the price should be paid. Delano also saw Sowerby the same evening, and requested him to give up the bill and take the note. Sowerby took until the next Monday morning for consideration, and being then applied to, gave up the bill to Delano, who thereupon canceled the note. The first publication of notice of the insolvency did not take place until Monday afternoon.

On the 17th of June, 1848, Sowerby and Grant advertised a dissolution of partnership, and gave public notice that Sowerby was duly authorized to settle all accounts of the late firm. As a part of the terms of dissolution, Sowerby undertook to pay all the partnership debts, and

Grant conveyed to him all his right and title in and to the partnership property but this conveyance was not known to Delano. At the time of the dissolution, the partners, severally, as well as the partnership, were, in fact, deeply insolvent.

The plaintiff was appointed assignee of Sowerby in October, 1848; the first meeting of creditors having been continued on account of certain legal objections; and the assignment was then first made by the commissioner.

To the demand made by the assignee on Delano for the wood, Delano answered that he could have it whenever he paid for it; and Delano has always been willing to give up the wood upon payment of the price. Subsequent to the 1st of April, 1849, Delano sold a portion of the wood measured off; but there has always remained in the same lot more than sixty-five cords of similar quality, of which he has offered to give up that amount, upon payment of the price agreed upon.

Upon the foregoing statement of facts, the court of common pleas gave judgment for the plaintiff, whereupon the defendant appealed to this court.

The case was argued in writing, as follows, on the points considered by the court.

C. P. Huntington, for plaintiff. C. Delano, for defendant.

SHAW, C. J. This is an action of trover, to recover the value of sixty-five cords of wood, brought by the plaintiff, as the assignee of Arthur Sowerby, an insolvent debtor. It is submitted to the court upon an agreed statement of facts, which being clearly stated, it is not necessary to recapitulate.

On these facts, the plaintiff contends, that there was a complete sale and purchase of the wood, by which the property became vested in Sowerby and Grant; that by the dissolution of partnership between them in June, 1848, and the transfer by Grant to Sowerby of all his right, title and interest in the partnership property, Sowerby stipulating to pay all the partnership debts, this property became vested in Sowerby; and that by his subsequent insolvency, the proceedings under it, and the assignment to the plaintiff, the same title to the property became vested in him.

On the other hand, the defendant insists, that though the wood was sold and measured off, with a license to the purchasers to come on to his land, and take it away as they wanted it, at any time within one year; and though a credit of six months was given for the purchase money, and a note was given to the plaintiff payable at the Northampton Bank in six months; yet as the wood remained as it originally lay on his premises, it was in his actual possession; and, as the purchasers became insolvent, and legal proceedings in insolvency were instituted against them, before the price of the wood had been paid, he had a right to detain the wood until payment or its equivalent.

The cause has been extremely well ar-

gued on both sides, and many authorities have been cited. But without going over the whole ground, it is proposed to state only what we understand to be the rules of law bearing upon the subject, and to apply them to the facts of the case as they appear in the agreed statement.

There is manifestly a marked distinction between those acts, which, as between the vendor and vendee upon a contract of sale, go to make a constructive delivery and to vest the property in the vendee, and that actual delivery by the vendor to the vendee, which puts an end to the right of the vendor to hold the goods as security for the price.

When goods are sold, and there is no stipulation for credit or time allowed for payment, the vendor has by the common law a lien for the price; in other words, he is not bound actually to part with the possession of the goods, without being paid for them. The term "lien" imports, that by the contract of sale, and a formal, symbolical or constructive delivery, the property has vested in the vendee; because no man can have a lien on his own goods. The very definition of a lien is, a right to hold goods, the property of another, in security for some debt, duty or other obligation. If the holder is the owner, the right to retain is a right incident to the right of property; if he have had a lien, it is merged in the general property.

A lien for the price is incident to the contract of sale, when there is no stipulation therein to the contrary; because a man is not required to part with his goods, until he is paid for them. But *conventio legem vincit*; and when a credit is given by agreement, the vendee has a right to the custody and actual possession, on a promise to pay at a future time. He may then take the goods away, and into his own actual possession; and if he does so, the lien of the vendor is gone, it being a right incident to the possession.

But the law, in holding that a vendor, who has thus given credit for goods, waives his lien for the price, does so on one implied condition, which is, that the vendee shall keep his credit good. If, therefore, before payment, the vendee become bankrupt or insolvent, and the vendor still retains the custody of the goods, or any part of them; or if the goods are in the hands of a carrier, or middle-man, on their way to the vendee, and have not yet got into his actual possession, and the vendor, before they do so, can regain his actual possession, by a stoppage in transitu; then his lien is restored, and he may hold the goods as security for the price.

The principle we take to be well settled, but the difficulty which arises in practice,—one which has given rise to so many cases,—lies in determining what is such an actual change of possession from the vendor to the vendee, as shall be deemed to put an end to the vendor's lien. Some cases seem to be clear, and to illustrate the rule. If the goods are delivered to the vendee's own servant, agent, wagoner, or shipmaster, that is in law a delivery to the vendee himself. So if goods are stored in a common warehouse, as the

dock warehouses at the London docks, and entered in the books as the property of A. B., and deliverable to him, and a dock warrant issued, and afterwards, upon the proper order of A. B. on the warrant, the whole or a part are transferred to C. D., and entered in like manner in his name, this is an actual change of custody, control and possession, though the goods are not moved from their position. So, if the seller sustain different characters, as if a person, who is a livery stable keeper, having a horse to sell, makes a sale to C. D., and then transfers the horse to his livery stable, to be kept for C. D. at a stipulated weekly hire, this may be regarded as an actual change of custody and possession.

But by far the most common case which occurs, is where goods are ordered by letter, on credit, to be sent from one country to another, or from one part of the same country to another, and are accordingly forwarded by a common carrier. There, as the carrier is not the servant of the vendee, the goods, though they have left the actual possession of the vendor, if they have not reached the actual custody of the vendee, or the ultimate place of destination ordered by him, may be stopped in transitu by the vendor; and if he can thus stop them, he regains his lien.

Now to apply these rules to the present case: it appears to us very clear, that there was a good sale and delivery of the wood to Grant and Sowerby. The wood was measured and marked off, so that the very sticks composing the sixty-five cords would be identified. And therefore, why marking, measuring, weighing, &c., is necessary, is, that the particular goods may be identified. If ten barrels of oil are sold, lying in a tank of thirty barrels, the buyer can identify no part of it as his, until it is measured. So, if fifty bales of cotton are sold out of one hundred, no particular bales are identified until separation. But, if they are capable of being identified, and by the contract of sale are identified, that is sufficient, and the property passes; as, if in the last case, there are one hundred bales of cotton, numbered from one to one hundred, and the contract is for the fifty odd numbers, or the fifty even numbers, or any other specified fifty numbers, the bales sold are identified though not separated. In the present case, the wood was marked off and identified, and the vendees had a license for one year to come on to the vendor's land and to take it away. This was a complete sale and a constructive delivery, so as to vest the property in Grant and Sowerby; and, on their dissolution and transfer, it vested in Sowerby, and by the assignment in his assignee. Then, the question is, whether the defendant had, under the circumstances, a lien for the price, and we think he had.

The purchasers had a license to go on to the defendant's land, and take the wood; whether this license was revocable or not, it is not necessary to consider, as it was not in fact revoked. But the vendees did not enter and take the wood; it remained on the vendor's land, and in his possession, in the same manner as before and at the

time of the sale. The vendor acted in no new capacity; he was to receive nothing for keeping; he was precisely in the condition of a vendor, who had not parted with the possession and custody of the goods sold. And this was the state of things, when Sowerby went into insolvency; upon which event, we think, the vendor was remitted to his right to keep possession of the wood as security for the price. Such a vendor in possession is regarded as having a higher equity to retain for the price, than the assignee of a debtor, who has not paid for the property, has to claim it for the general creditors.

Sometimes a question may arise as to what constitutes an insolvency, and whether a merestoppage of payment, and failure, in the popular sense, is sufficient. In this case, there is no doubt, because there was an insolvency declared by law, and a sequestration of all the vendee's property, under which this wood is claimed by the plaintiff.

If it might be supposed, that the giving of a note in this case was a payment, which would vary the case from that of a simple promise to pay for the wood, we think the answer is, that a promissory note, even if in form negotiable, whilst it remains in the hands of the vendor and not negotiated, but ready to be delivered up on the discharge of the lien, is regarded as the evidence in writing of a promise to pay for the goods purchased, and does not vary the rights of the par-

ties. *Thurston v. Blanchard*, 22 Pick. 18.

The fact, that after the proceedings in insolvency commenced, and became known to the defendant, he applied to Sowerby and got up the bill of sale, cannot of itself, we think, avail the defendant. The insolvent could not, in that state, vacate the sale, or reconvey the property; and if the wood was worth more than the lien of the defendant upon it, we think that the assignee, on paying the defendant the price, was entitled to the wood for the benefit of the general creditors; and this was a right which the insolvent could not defeat.

A fact was stated, on the part of the plaintiff, as of some weight, namely, that after the expiration of one year from the sale, the defendant sold a part of the wood. Whether, at that time, he had an absolute right to sell the wood or not, it seems to us, that such sale can have no effect on this claim. The plaintiff, if he can recover at all, must recover on the strength of his own title. He must prove a conversion. The action of trover admits that the defendant obtained the possession rightfully; then, if he had a lien and a right to hold until the price was paid, his refusal to deliver the wood on demand to the plaintiff, (such demand not being accompanied with a tender of the price,) was no evidence of conversion; and, until such tender made, the plaintiff has no ground of complaint.

Judgment for the defendant.



BABCOCK v. BONNELL.

(80 N. Y. 244.)

Court of Appeals of New York. Jan. Term.
1880.

Action by the administratrix of Babcock against Bonnell for an accounting for the proceeds of a policy of insurance taken out on the life of Babcock, and delivered to defendant as collateral security for two promissory notes of Babcock & Co. for \$4,678.48. Bonnell afterwards received from one Wheelright \$925 in full satisfaction of the notes which were delivered to Babcock & Co. and destroyed.

Wm. W. Niles, for appellant. Julien T. Davis, for respondent.

CHURCH, C. J. The finding of the trial judge that the policy was taken out and delivered to the defendant as collateral security for the payment of the indebtedness of Babcock & Co. to him was warranted by the evidence. No other conclusion could be arrived at, and the evidence is substantially undisputed.

Some years afterward Mr. Babcock expressed a desire not to be regarded as having an interest, and stated that the entire interest was in the defendant; but I do not think that this expression, under the circumstances, would have the effect of a release, or create an estoppel. There is no dispute that at the time the policy was taken out, there was an indebtedness in favor of the defendant against Babcock & Co., evidenced by two notes, amounting to \$4,678.48. The policy was issued in February, 1870, and it is claimed and found that in April, 1870, these notes were compromised and settled, and that the defendant received from one Wheelright, on behalf of Babcock & Co., \$925 in money, in full satisfaction and discharge of said indebtedness, and delivered and surrendered said notes to him, and that they were afterward delivered up to Babcock & Co., who destroyed and canceled them. Wheelright testified that he purchased the notes of the defendant, and paid his own money, and delivered them to Babcock & Co. upon being repaid that amount and his expenses. In either view we think the debt was discharged. It was an executed accord. Nothing remained executory, and it operated as a full satisfaction. A mere promise to accept less than the full amount of a debt although the sum promised has been paid has been held not sufficient; but when the security has been surrendered, or some act done of a like nature, there is no reason in law or morals, why the party should not be bound. *Kromer v. Heim*, 75 N. Y. 574; 31 Am. Rep. 491.

It may be that the defendant intended to hold the policy of insurance to indemnify him for the deficiency, but there was no agreement to that effect, and the defendant's letters indicate that he had regarded the debt fully released and canceled. The defendant claims also to hold the policy as security for the balance of an additional indebtedness of \$1,226.41 and interest, after applying the proceeds

of a cargo of coal, the finding in respect to which is here inserted. "Fourth. On the 15th day of November, 1869, the defendant sold a cargo of coal to said Charles A. Babcock & Co., and took a note in payment thereof of \$1,226.44, due March 15, 1870; the said last-mentioned cargo of coal was shipped to said Charles A. Babcock & Co. by the schooner *Hepzibah*, on or about the 21st day of February, 1870. The defendant through his agent, Edward Gullager, stopped the said last-mentioned cargo of coal in transitu, took possession thereof and disaffirmed the contract of sale thereof, and on the 4th day of May, 1870, sold the said last-mentioned cargo of coal to one E. S. Farrar." If this finding can be sustained as a finding of fact, it disposes of any claim for the debt. If the disaffirmance of the contract of sale of the coal depends as matter of law upon the stoppage of the coal in transitu, then a more difficult and doubtful question is presented. Every intendment is in favor of the findings of facts, and findings may be implied if warranted by the evidence to sustain a judgment. The evidence as to the stoppage of the coal, as to the possession of the defendant, and the sale thereof by him does not present the facts as clearly as would be desirable upon this question. If the defendant took possession of the coal in the exercise of the right of stoppage in transitu, and sold the same without notice to Babcock & Co., and without their consent, and especially before the debt was due, an inference of an intention to disaffirm the contract of sale might be drawn, because upon the theory that this right is to enforce a lien, as claimed by the defendant, he must hold the property until the expiration of the credit, and be able to deliver it upon payment of the price, and the vendee has the right to pay the price and take the property. According to that theory the credit is not abrogated, nor the sale, but the vendor is permitted to re-take the possession of the property, and hold it as security until the price is paid. If not paid at the time stipulated the vendor, in analogy to other cases of lien, may sell the property upon giving notice.

The general rule upon the theory of a lien must be that the vendor having exercised the right of stoppage in transitu, is restored to his position before he parted with the possession of the property. The property is vested in the vendee, and the vendor holds possession as security for the payment of the purchase-price. If therefore the defendant sold the coal without notice or consent, or if with consent of the vendee with the understanding that the sale was to be deemed rescinded the finding would be justified, and the defendant would have no claim upon this note.

The coal was sold to one Farrar, and a bill of sale thereof made by the defendant, and he received the purchase-money. The coal was sold and the bill of sale and payment were not made until April, after the note became due, and there is some conflict in the evidence whether it was made with the knowledge or consent of Babcock & Co., or not.

As to the legal question, although the

right of stoppage in transitu has been recognized in England for nearly two hundred years, there is great confusion in the books as to the origin of the right, and the principles upon which it is founded. As late as 1841 Lord Abinger said, that "although the question of stoppage in transitu had been as frequently raised as any other mercantile question within the last hundred years, it must be owned that the principle on which it depends has never been either settled or stated in a satisfactory manner."

"In courts of equity it has been a received opinion that it was founded on some principle of common law. In courts of law it is just as much the practice to call it a principle of equity which the common law has adopted."

Mr. Parsons, in his work on Admiralty, says, there are three ways, in either of which it might be supposed that the law of stoppage entered into the law of England. One that it is based upon the civil law by which, in case of a sale, the property does not pass to the buyer until he has possession of the goods. It would follow that the seller would continue the owner until they reach the buyer, and that by the insolvency of the latter the goods would remain the property of the former. By the common law a sale does of itself pass the property to the buyer, without delivery. Another way is by implying a right of rescinding the contract of sale in case of insolvency, and that the act of stoppage was an exercise of that right, and a third way is by implying constructive possession in the seller for the purpose of a lien, to be enforced by the act of stoppage, or, in other words, that this right is an enlargement of the common-law right of lien. Pars. Adm. 479.

The rule seems not to have been settled in 1842. Parke, B., said: "What the effect of stoppage in transitu is, whether entirely to rescind the contract, or only to replace the vendor in the same position as if he had not parted with the possession, and entitle him to hold the goods until the price be paid down, is a point not yet fully decided, and there are difficulties attending each construction."

Mr. Bell, in his Commentaries on the Law of Scotland, favors the doctrine of rescission. He says: "Although there are many difficulties either way, it appears, on the whole, most consistent with the great lines of this doctrine of stoppage in transitu, that the seller's security over the goods sold, though perhaps in a large sense of the nature of a lien, is given by equity originally on the condition that the seller shall take back the goods, as if the contract were ab initio recalled."

There are some other authorities favoring the same view, and there are others that favor the theory of a lien. *Felse v. Wray*, 3 East, 93; *Ex Parte Gwynne*, 12 Ves. Jr. 379; *Lickbarrow v. Mason*, 6 East, 21, note.

Mr. Parsons says that the earlier Eng-

lish cases sustain the doctrine of a lien, and intimates that later authorities changed the ground to that of rescission, but that the latest returned to the original doctrine. Pars. Adm. 481. Whatever uncertainty there may be as to the rule in England, the decisions in this country are quite preponderating in favor of the theory of a lien. *Rowley v. Bigelow*, 12 Pick. 307; 23 Am. Dec. 607; *Stanton v. Eager*, 16 Pick. 467-475; *Arnold v. Delano*, 4 Cush. 33, 39; 50 Am. Dec. 754; *Nehall v. Vargas*, 13 Me. 93; 29 Am. Dec. 489; *S. C.*, 15 Me. 314; 33 Am. Dec. 617, and cases cited; *Rogers v. Thomas*, 20 Conn. 53; *Jordan v. James*, 5 Ohio, 88-98; *Harris v. Pratt*, 17 N. Y. 263. The elementary writers favor the same view. 2 Kent Com. 541; Pars. Adm. 483; Pars. Cont. 598. The question has never been, that I am aware, definitely decided in this state. As an original question the doctrine of rescission commends itself to my judgment as being more simple, and in most cases, more just to both parties than the notion that the act of stoppage is the exercise of a right of lien, but in deference to the prevailing current of authority, I should hesitate in attempting to oppose it by any opinion of my own, and for that reason I do not deem it necessary to state the grounds which influence my judgment.

It is found as a fact that the policy was delivered to the defendant as collateral security for the payment of the first two notes referred to only, "and that the defendants never acquired or had any interest in said policy or in the moneys to accrue or become payable thereon, except as a creditor of the said firm, and to the extent of his claim upon the aforesaid two notes against the said firm." The evidence justified this finding. The letter of the defendant of March 1, 1876, shows that he did not then suppose that he had any legal indebtedness against Babcock & Co. At the time the policy was issued the cargo of coal for which the last note was given was in possession of the defendant as he claimed, and had not been disposed of, so that the balance, even if Babcock & Co. were liable for it, could not then be known, and in March after, in a letter to the defendant, introducing Mr. Wheelright, Babcock & Co. say: "We will avail ourselves of the opportunity to have him arrange for the settlement of your claim against us, leaving in abeyance the cargo of Hepzibah, and the note given in settlement of the same."

The testimony of the insurance agent is to the effect that the policy was delivered to secure a fixed indebtedness, which could only refer to the first two notes. We are of opinion therefore that the defendant has no lien upon this money to secure the balance of the note given for that cargo of coal, even if Babcock & Co. are liable for it.

It follows that the judgment must be affirmed.

All concur, except EARL, J., dissenting.



BAILEY v. HUDSON RIVER R. CO.

(49 N. Y. 70.)

Court of Appeals of New York. 1872.

Action by Bailey & Co. against defendant for the conversion of certain dry goods delivered to defendant and consigned to plaintiffs.

Theron R. Strong, for appellant.
Samuel Hand, for respondents.

CHURCH, C. J. It is undisputed that Alden, Frink & Weston delivered the goods in question to the defendant, to be transported by them to the plaintiffs; that they were consigned to the plaintiffs, and the packages properly marked with the name of the plaintiffs' firm, and the defendant gave a receipt for the same, agreeing to deliver the goods safely to the plaintiffs at the city of New York. It is also undisputed that the plaintiffs had made a specific advance upon a portion of the goods, and the remainder were shipped in pursuance of an agreement between the plaintiffs and Alden, Frink & Weston, to pay for money borrowed by the latter of the former a few days previous, and that invoices of all the goods, stating the consignment and shipment by the defendant's railroad, had been forwarded to the plaintiffs by mail. This was substantially the condition of things on the 17th of October, when one of the members of the firm of Alden, Frink & Weston, for his individual benefit, but in the name of his firm, changed the destination of the goods, and the defendant delivered them in pursuance of such changed destination to another person. The question is, whether the title had vested in the plaintiffs. I think it had. It is clear that the consignors delivered the goods to the carrier for the plaintiffs in compliance with their contract to do so. The parol contract was thereby executed, and the title vested in the plaintiffs. The plaintiffs occupied the legal position of vendees after having paid the purchase-money and received the delivery of the goods. But it is unnecessary, in order the uphold this judgment, to maintain that the plaintiffs occupied strictly the relation of vendees. The legal rights of a vendee attach when goods are shipped to a commission merchant, who has made advances upon them in pursuance of an agreement between the parties. Such an agreement may be either inferred from the circumstances or shown by express contract. *Holbrook v. Wight*, 24 Wend. 169, 35 Am. Dec. 607; *Haille v. Smith*, 1 Bos. & Pul. 563. In the latter case, *Eyre, J.*, said: "From the moment the goods were set apart for this particular purpose, why should we not hold the property in them to have changed, it being in perfect conformity to the agreement and such an execution thereof as the justice of the case requires." The same principle has been repeatedly adopted. *Grosvenor v. Phillips*, 2 Hill, 147.

It must appear that the delivery was made with intent to transfer the property. Until this is done the parol agreement is executory, the title remains in the

consignor, and he has the power to transfer the property to whomsoever he pleases, and render himself liable for the non-performance of the contract. It is urged by the counsel for the defendant that no bill of lading was forwarded or delivered to the plaintiffs, and that until this was done the title remained in the consignors. This is undoubtedly true in many cases; but it is mainly important in characterizing the act of the shipper, and showing with what purpose and intent the goods were delivered to the carrier. If A. has property, upon which he has received an advance from B. upon an agreement that he will ship it to B. to pay the advance or to pay any indebtedness, he may or may not comply with his contract. He may ship it to C. or he may ship it to B. upon conditions. As owner he can dispose of it as he pleases. But if he actually ships it to B. in pursuance of his contract, the title vests in B. upon the shipment. The highest evidence that he has done so is the consignment and unconditional delivery to B. of the bill of lading. If the consignor procures an advance upon the bill of lading from a third person, or delivers or indorses the bill of lading to a third person for a consideration, it furnishes equally satisfactory evidence that the property was not delivered to the consignee, for the simple reason that it was delivered to some one else. But I apprehend that if a consignor who made such an agreement retained in his own possession a duplicate of the bill of lading, and notified the consignee by letter that he had shipped the property for him in pursuance of the agreement, or in any other manner the intention thus to ship it was evinced, the title would pass as effectually, as between them, as if he had forwarded the bill of lading. The question whether a subsequent indorsee of the bill of lading for a valuable consideration could acquire any rights against the consignee is not involved. As against the consignor the delivery of the property to the carrier, with intent to comply with his contract, vests the title in the consignee. It is largely a question of intention. In *Mitchel v. Ede*, 11 Adol. & El. 903, cited by the defendants, Lord Denman said: "The intention of Mackenzie to transfer the property to the plaintiff is unquestionable, and we think that under the circumstances he has carried that intention into effect." And in *Bank of Rochester v. Jones*, 4 N. Y. 501, 55 Am. Dec. 290, this court said: "When the bill of lading has not been delivered to the consignee, and there is no other evidence of an intention on the part of the consignor to consign the specific property to him, no lien will attach." In that case the bill of lading was not only not sent to the consignee, but was transferred to the plaintiffs and money borrowed upon it, and there was no evidence of an intention to consign the flour to the defendant except upon the condition of paying the money so borrowed. It should be observed also that in that case there was no agreement to consign the property to the defendant as security, or in payment of the indebtedness due him from the consignor. Such

an agreement, either express or implied, is important, although not conclusive, in showing the intent with which the act was done. In this case there was no other bill of lading than the receipt produced in evidence, and no duplicate was taken; but the intention of Alden, Frink & Weston to transfer this specific property to the plaintiffs, to be applied upon their indebtedness, conclusively appears by the undisputed evidence. 1. By the agreement the day prior to the shipment. 2. By forwarding invoices of the shipment to the plaintiffs. 3. By making the shipment unconditionally. 4. By retaining the receipt given by the defendant, and neither making or attempting to make any use of it.

These acts were so unequivocal of an intention to transfer the property to the plaintiffs that there remains no room for doubt. The moment these acts were done, the title vested in the plaintiffs, and the consignors were powerless to interfere with the property.

The recent case of Cayuga County National Bank v. Daniels, 47 N. Y. 631, was decided against the consignees upon the distinction above referred to. It was held in that case that the consignors did not deliver the property to the carrier with the intention to vest the title in the defendants, except upon condition of paying a draft discounted by the plaintiffs, and that the bill of lading was delivered upon that condition, and that on the defendants' refusal to comply with the condition, they acquired no right or title to the property, and that the case therefore came within the principle of *Bank of Rochester v. Jones*, supra. Here the intention to vest the title is clear and plain. It is urged that the words "on our account" in the invoices evinced an intention not to vest the title in the plaintiffs. They can have no such effect in this case, even if, standing alone and unexplained, they might have. A bill of lading for which, as between the parties, the invoices were a substitute, can always be explained by parol. It may be shown by parol to have been intended as evidence of an absolute sale, a trust, a mortgage, a pledge, a lien, or a mere agency. 2 Hill, 151; 4 N. Y. 501, and cases cited. The ac-

tual agreement and transaction will prevail, and it was proved by two of the members of the firm, and uncontradicted, that the goods were in fact shipped in pursuance of the agreement. Besides, these words are not necessarily inconsistent with the agreement. The goods were not purchased absolutely by the plaintiffs at a specified price, but were to be sold and the avails applied. The relation of the plaintiffs was more nearly that of trustee, having the title, and bound to dispose of the property and apply the proceeds in a particular manner, and the consignors were the *custis que trust*, having the legal right to enforce the terms of the agreement for their benefit. In this sense the property was shipped on their account, and the agreement is consistent with the meaning of those words. The statute of frauds has no application. 1. There was no sale. 2. If there was the consideration was paid. 3. The property was specified when the agreement was made as being that which had been and was then being shipped, and the plaintiffs agreed to accept that particular property, and the subsequent delivery to the carrier agreed upon was in legal effect a delivery to the plaintiffs. *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721; *Stafford v. Webb*, *Lalor Supp.* 217.

The defendant is liable for a conversion of the property. It had receipted the property and agreed to transport safely and deliver it to the plaintiffs. Instead of complying with its contract, it delivered the property to another person by the direction of one who had no more legal authority over the property than a stranger, without the return even of its receipt. The plaintiffs had vested rights which the defendant was bound to respect, and with a knowledge of which it was legally chargeable. *Willets v. Sun Mut. Ins. Co.*, 45 N. Y. 49; *Hawkins v. Hoffman*, 6 Hill, 586; *Holbrook v. Wight*, 24 Wend. 169; *Story Bailm.* 414; *Boyce v. Brockway*, 31 N. Y. 490. It was its duty to deliver the property to the real owner. *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34.

Judgment affirmed, with costs.

All concur.

Judgment affirmed.



BALDEY et al. v. PARKER.

(2 Barn. & C. 37.)

King's Bench. June 5. 1823.

Assumpsit for goods sold and delivered. Plea, general issue. At the trial before Abbott, C. J., at the London sittings after Trinity term, 1822, the following appeared to be the facts of the case: The plaintiffs are linen-drappers, and the defendant came to their shop and bargained for various articles. A separate price was agreed upon for each, and no one article was of the value of £10. Some were measured in his presence; some he marked with a pencil; others he assisted in cutting from a larger bulk. He then desired an account of the whole to be sent to his house, and went away. A bill of parcels was accordingly made out and sent by a shopman. The amount of the goods was £70. The defendant looked at the account, and asked what discount would be allowed for ready money, and was told £5 per cent.; he replied that it was too little, and requested to see the person of whom he bought the goods (Baldey), as he could bargain with him respecting the discount, and said that he ought to be allowed £20 per cent. The goods were afterwards sent to the defendant's house, and he refused to accept them. The lord chief justice thought that this was a contract for goods of more than the value of £10 within the meaning of the 17th section of the statute of frauds, and not within any of the exceptions there mentioned, and directed a nonsuit; but gave the plaintiffs leave to move to enter a verdict in their favor for £70. A rule having accordingly been obtained for that purpose,

Scarlett and E. Lawes now shewed cause. Denman and Platt, contra.

ABBOTT, C. J. We have given our opinion upon more than one occasion that the 29 Car. 2, c. 3, is a highly beneficial and remedial statute. We are therefore bound so to construe it as to further the object and intention of the legislature, which was the prevention of fraud. It appeared from the facts of this case that the defendant went into the plaintiff's shop and bargained for various articles. Some were severed from a larger bulk, and some he marked in order to satisfy himself that the same were afterwards sent home to him. The first question is whether this was one entire contract for the sale of all the goods. By holding that it was not, we should entirely defeat the object of the statute. For then persons intending to buy many articles at one time, amounting in the whole to a large price, might withdraw the case from the operation of the statute by making a separate bargain for each article. Looking at the whole transaction, I am of opinion that the parties must be considered to have made one entire contract for the whole of the articles. The plaintiffs therefore cannot maintain this action unless they can shew that the case is within the exception of the 29 Car. 2, c. 3, § 17. Now the words of that exception are peculiar, "except the buyer shall

accept part of the goods so sold, and actually receive the same." It would be difficult to find words more distinctly denoting an actual transfer of the article from the seller, and an actual taking possession of it by the buyer. If we held that such a transfer and acceptance were complete in this case, it would seem to follow as a necessary consequence that the vendee might maintain trover without paying for the goods, and leave the vendor to this action for the price. Such a doctrine would be highly injurious to trade, and it is satisfactory to find that the law warrants us in saying that this transaction had no such effect.

BAYLEY, J. The buyer cannot be considered to have actually received the goods, when they have remained from first to last in the possession of the seller. The plaintiffs are not assisted by the exception in the 17th section of the statute of frauds. Then the question is, whether there was a separate contract for each article. The 29 Car. 2, c. 3, was passed to guard against frauds and perjuries; and it must be collected from the 17th section that the legislature thought that a contract to the extent of £10 might be sufficient to induce the parties to it to bring tainted evidence into court. Now it is conceded here that on the same day, and indeed at the same meeting, the defendant contracted with the plaintiffs for the purchase of goods to a much greater amount than £10. Had the entire value been set upon the whole goods together, there cannot be a doubt of its being a contract for a greater amount than £10 within the 17th section of the statute; and I think that the circumstance of a separate price being fixed upon each article makes no such difference as will take the case out of the operation of that law. It has been asked what interval of time must elapse between the purchase of different articles in order to make the contract separate; and the case has been put of a purchaser leaving a shop after making one purchase, and returning after an interval of five or ten minutes and making another. If the return to the shop were soon enough to warrant a supposition that the whole was intended to be one transaction, I should hold it one entire contract within the meaning of the statute. I am therefore of opinion that this rule must be discharged.

HOLROYD, J. I am of the same opinion. The intention of the statute was that certain requisites should be observed in all contracts for the sale of goods for the price of £10 and upwards. This was all one transaction though composed of different parts. At first it appears to have been a contract for goods of less value than £10, but in the course of the dealing it grew to a contract for a much larger amount. At last therefore it was one entire contract within the meaning and mischief of the statute of frauds, it being the intention of that statute that where the contract, either at the commencement or at the conclusion, amounted to or exceeded the value of £10, it should

not bind unless the requisites there mentioned were complied with. The danger of false testimony is quite as great where the bargain is ultimately of the value of £10, as if it had been originally of that amount. It must therefore be considered as one contract within the meaning of the act. With respect to the exception in the 17th section, it may perhaps have been the intention of the legislature to guard against mistake where the parties mean honestly as well as against wilful fraud; and the things required to be done will have the effect of answering both those ends. The words are, "except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." Each of those particulars either shews the bargain to be complete, or still further that it has been actually in part performed. The change of possession does not in ordinary cases take place until the completion of the bargain; part payment also shews the completion of it; and in like manner a note or memorandum in writing signed by the parties plainly proves that they understood the terms upon which they were dealing, and meant finally to bind themselves by the contract therein stated. In the present case there is nothing to shew that some further arrangement might not remain unsettled after the price for each article had been agreed upon. There was neither note nor

memorandum in writing; no part of the price was paid, nor was there any such change of possession as that contemplated by the statute. Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession; and therefore as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute.

BEST, J. It was formerly considered that a delivery of the goods by the seller was sufficient to take a case out of the 17th section of the statute of frauds; but it is now clearly settled that there must be an acceptance by the buyer as well as a delivery by the seller. The statute enacts that, where the bargain is for something to the value of £10, it shall not bind, unless something unequivocal has been done to shew that the contract is complete. Nothing of that kind having been done in this case, if the dealing is to be considered as one entire transaction it is clear that the plaintiffs cannot recover: whatever this might have been at the beginning, it was clearly at the close one bargain for the whole of the articles. The account was all made out together, and the conversation about discount was with reference to the whole account. It is therefore very distinguishable from *Emmerson v. Heelis*, 2 Taunt. 38, where a complete bargain was made as to each article as soon as the auctioneer had signed his name to it.

Rule discharged.

BALDWIN v. WILLIAMS.

(3 Metc. 365.)

Supreme Judicial Court of Massachusetts. Nov. Term, 1841.

This case was tried before Wilde, J., who made the following report of it:—

This was an action of assumpsit, and the declaration set forth an agreement of the plaintiff that he would bargain, sell, assign, transfer, and set over to the defendant, and indorse without recourse to him, the plaintiff, in any event, two notes of hand by him held, signed by S. J. Gardner; one dated April 24th, 1835, for the payment of \$1,500; the other dated May 5th, 1836, for the payment of \$500; and both payable to the plaintiff or order on the 3d of April, 1839, with interest from their dates. The declaration set forth an agreement by the defendant, in consideration of the plaintiff's agreement aforesaid, and in payment for said Gardner's said notes, to pay the plaintiff \$1,000 in cash, and to give the plaintiff a post note, made by the Lafayette Bank, for \$1,000, and also a note signed by J. B. Russell & Co. and indorsed by D. W. Williams for \$1,000.

The plaintiff at the trial proved an oral agreement with the defendant as set forth in the declaration, and an offer by the plaintiff to comply with his part of said agreement, and a tender of said Gardner's said notes, indorsed by the plaintiff without recourse to him in any event, and a demand upon the defendant to fulfil his part of said agreement, and the refusal of the defendant to do so. But the plaintiff introduced no evidence tending to show that any thing passed between the parties at the time of making the said agreement, or was given in earnest to bind the bargain.

The judge advised a nonsuit upon this evidence, because the contract was not in writing nor proved by any note or memorandum in writing signed by the defendant or his agent, and nothing was received by the purchaser, nor given in earnest to bind the bargain. A nonsuit was accordingly entered, which is to stand if in the opinion of the whole court the agreement set forth in the declaration falls within the statute of frauds (Rev. Sts., c. 74, § 4); otherwise, the nonsuit to be taken off, and a new trial granted.

Clarke, for plaintiff. S. D. Parker, for defendant.

WILDE, J. This action is founded on an oral contract, and the question is, whether it is a contract of sale within the statute of frauds.

The plaintiff's counsel contends in the first place that the contract is not a contract for the sale of the notes mentioned in the declaration, but a mere agreement for the exchange of them; and in the second place that if the agreement is to be considered as a contract of sale, yet it is not a contract within that statute.

As to the first point, the defendant's counsel contends that an agreement to exchange notes is a mutual contract of sale.

But it is not necessary to decide this question, for the agreement of the defendant, as alleged in the declaration, was to pay for the plaintiff's two notes \$2,000 in cash. In addition to two other notes; and that this was a contract of sale is, we think, very clear.

The other question is more doubtful. But the better opinion seems to us to be, that this is a contract within the true meaning of the statute of frauds. It is certainly within the mischief thereby intended to be prevented; and the words of the statute, "goods" and "merchandise," are sufficiently comprehensive to include promissory notes of hand. The word "goods" is a word of large signification; and so is the word "merchandise." "Merx est quicquid vendi potest."

In *Tisdale v. Harris*, 20 Pick. 9, it was decided that a contract for the sale of shares in a manufacturing corporation is a contract for the sale of goods or merchandise within the statute; and the reasons on which that decision was founded seem fully to authorize a similar decision as to promissory notes of hand. A different decision has recently been made in England in *Humble v. Mitchell*, 3 Perry & Davison, 141; s. c. 11 Adolph. & Ellis, 207. In that case it was decided that a contract for the sale of shares in a joint-stock banking company was not within the statute of frauds. But it seems to us that the reasoning in the case of *Tisdale v. Harris* is very cogent and satisfactory; and it is supported by several other cases. In *Mills v. Gore*, 20 Pick. 28, it was decided that a bill in equity might be maintained to compel the redelivery of a deed and a promissory note of hand, on the provision in the Rev. Sts. c. 81, § 8, which gives the court jurisdiction in all suits to compel the redelivery of any goods or chattels whatsoever, taken and detained from the owner thereof, and secreted or withheld, so that the same cannot be replevied. And the same point was decided in *Clapp v. Shephard*, 23 Pick. 228. In a former statute (St. 1823, c. 140), there was a similar provision which extended expressly to "any goods or chattels, deed, bond, note, bill, specialty, writing, or other personal property." And the learned commissioners, in a note on the Rev. Sts. c. 81, § 8, say that the words "goods or chattels" are supposed to comprehend the several particulars immediately following them in St. 1823, c. 140, as well as many others that are not mentioned.

The word "chattels" is not contained in the provision of the statute of frauds; but personal chattels are movable goods, and so far as these words may relate to the question under consideration they seem to have the same meaning. But however this may be, we think the present case cannot be distinguished in principle from *Tisdale v. Harris*; and upon the authority of that case, taking into consideration again the reasons and principles on which it was decided, we are of opinion that the contract in question is within the statute of frauds, and consequently that the motion to set aside the nonsuit must be overruled.

BALLENTINE et al. v. ROBINSON et al.

(46 Pa. St. 177.)

Supreme Court of Pennsylvania. Nov. 2, 1863.

Assumpsit by William C. Robinson and others, doing business as Robinson, Douglas & Millers, against Nathaniel Ballentine and George Hutchinson, partners trading as Hutchinson & Ballentine. Judgment for plaintiffs, and defendants bring error. Affirmed.

Robb & MacConnell, for plaintiffs in error. Hamilton & Acheson, for defendants in error.

STRONG, J.—The parties entered into a contract by which it was stipulated that the plaintiffs should furnish the materials and construct for the defendants a steam-engine of a described pattern, for which the defendants engaged to pay the sum of \$535 on its completion. The engine having been finished pursuant to the contract, and notice of its completion having been given to the defendants, they refused to pay the stipulated price. Hence this suit, in which the only question raised is, what is the correct measure of damages for such a breach of contract. That the plaintiffs had done all they were bound to do, that they had the engine ready for actual delivery, on payment of the sum agreed to be paid by the defendants, and that the defendants were under obligation to take it away and make payment, are established facts. It is now contended that the measure of damages recoverable is the difference between the price contracted to be paid for the engine and the market price at the time the contract was broken.

Where a sale of goods has been made and they have been delivered, it is plain the measure of damages for nonpayment is the stipulated price. About that there is no difficulty. Doubts, however, have been entertained, where goods have been sold and not delivered in consequence of the refusal of the buyer to complete the contract. It has sometimes been said the standard for measurement is the excess of the contract price over the market value. Yet where the subject of the sale is a specific article, where the contract has been so far completed as to pass the property in the article to the vendee, the possession being retained only because the price is not paid, there seems to be no good reason why the vendor should not be permitted to recover the agreed value. He has fully complied with all that he was under obligation to do. He has parted with his property, and given the full equivalent for the stipulated price. His right to the property having passed to the vendee, his right to the price would appear to be consummate. It is true, if the sale be for cash, the vendor may treat the goods as

his own and sell them, on failure of the vendee to pay, in which case he can claim only the difference between the price for which he has sold, and the price promised to be paid by the first vendee. That difference completes his compensation. But the resale is only a mode of giving effect to his lien. It is not a rescission of the contract, so as to re-vest the property in the article sold in him, for if it were, he could not sue for the deficiency. The law does not compel him to resume the ownership of the property, and, of course, it ought not to take away his right to the price.

The present is not strictly the case of a sale. The plaintiffs agreed to build the engine according to directions of the defendants, and to furnish the necessary materials for it. When it was completed the defendants had notice, and were bound to take it away and pay the contract price; but instead of taking it and paying the price, they requested the plaintiffs to sell it. In such a case the right of property was clearly in them on notice of the completion of the article. The materials of which it was composed may fairly be said to have been delivered when they were put into the engine. The defendants alone were in default. They ought not to be permitted to compel the plaintiffs to purchase from them. Retaining a lien on the engine for the price, the plaintiffs were at liberty to sell it anew, or, at their election, to obtain full compensation from the defendants for their breach of contract. There can be no just reason why they should be compelled to accept the engine as part payment, which they virtually must do if they can recover only the difference between its market value and the sum the defendants agreed to pay. And why should they, without any default of their own, be subjected to the risk and trouble of a resale, for the defendants' benefit? Besides, it may well be, that the article manufactured according to order may have no market value, and would be worthless on the manufacturers' hands. This engine was not made for sale in the market. It was built according to instructions given by the defendants, and, it may be presumed, for their peculiar use. The just rule, therefore, plainly is, in such a case, where the manufacturer of an article ordered, has completed it, and given notice of its completion, that he should be allowed to sue for the value, and recover, as its measure, the contract price. And such is the doctrine laid down in the better decisions. Thus it was decided in *Bement v. Smith*, 15 Wendell, 493, where the cases are reviewed, and the rule is thus stated in 2 *Parsons on Contracts* 483, and in *Sedgwick on Damages* 281.

The instruction given in the court below was therefore right.

The judgment is affirmed.

BARKER et al. v. DINSMORE.

(72 Pa. St. 427.)

Supreme Court of Pennsylvania. May 17, 1872.

Replevia by John Dinsmore against William Barker, Jr., and Jesse B. Kilgore, trading as William Barker & Co. for certain sacks of wool. Judgment for plaintiff, and defendants bring error. Affirmed.

A man, representing himself to be connected with defendant firm, bought from plaintiff, at the latter's farm, the wool in question, and gave him a memorandum to that effect on a business card of defendants, telling him to come to defendants' office in the city to procure his pay. The wool was shipped by plaintiff to defendants, but on its arrival in the city possession of it was procured by the person who had arranged the sale, and who in fact had no connection with defendants, and by him sold to defendants, they paying him what they considered the wool was worth.

Before THOMPSON, C. J., READ, AG-NEW, SHARSWOOD, and WILLIAMS, JJ.

A. M. Brown and T. M. Marshall, for plaintiffs in error. M. W. Acheson (with whom was W. B. Rodgers), for defendant in error.

WILLIAMS, J.—The verdict of the jury establishes the fact that the plaintiff below did not sell the wool to the defendants' vendor, as an individual, on his own responsibility, but as a member or agent of the defendants' firm, and upon their credit. Nor was the wool delivered to him by the plaintiff. It was delivered to the railroad company, to be carried to Pittsburg, and there delivered to defendants, to whom it was consigned by the plaintiff. Under the contract of shipment the company had no right to deliver the wool to any person except the consignees; and their delivery of it to the defendants'

vendor vested in him no property or right of possession as against the plaintiff. The principle which underlies this case, and by which the rights of the parties are to be determined, is this: The sale of goods by one who has tortiously obtained their possession without the owner's consent, vests in the purchaser no title to them as against the owner. As a general rule no man can be divested of his property without his own consent and voluntary act. It is true that there are exceptions to the rule, as clearly defined and as well settled as the rule itself, but this case does not come within any of them. Here the defendants' vendor, as we have seen, acquired no right or title to the wool under his contract with the plaintiff, and he did not obtain from him its actual possession. The railroad company had no authority, as the plaintiff's agent, to deliver the wool to him, and their delivery gave him no right or title to it whatever. Nor had he any apparent or implied authority from the plaintiff to sell or dispose of it. It is clear, then, that he could convey no title by its sale; and if so, the defendants could acquire no title by its purchase, though they purchased it for a fair and valuable consideration, in the usual course of trade, without notice of the plaintiff's ownership, or of any suspicious circumstances calculated to awaken inquiry or put them on their guard. The case is a hard one in any aspect of it. One of two innocent parties must suffer by the fraud and knavery of a swindler, who had no authority to act for either. But the law is well settled that the owner cannot be divested of his property without his own consent, unless he has placed it in the possession or custody of another and given him an apparent or implied right to dispose of it. The case was tried on this principle, and as there is no error apparent in the record, the judgment must be affirmed.

Judgment affirmed.

BARNARD v. CAMPBELL.

(55 N. Y. 456.)

Court of Appeals of New York. Jan. 20, 1874.

Appeal from order reversing a judgment in favor of plaintiffs and granting a new trial.

Replevin of 1,370 bags of linseed. Defendants, in New York, purchased of the broker of one Jeffries, of Boston, 1,800 bags of linseed on August 21, 1863, and sent him their notes in payment. Jeffries, by fraud, obtained 1,370 bags on an order from plaintiffs on August 24th. The linseed was delivered to him, and shipped to defendants. The bill of lading was mailed to them on the 25th. Defendants paid for the linseed by their notes on the 21st. Jeffries failed on the 27th.

James C. Carter, for appellants. Edwards Pierpont, for respondents.

ALLEN, J. The only question involved in the action is, whether the plaintiffs and original owners, or the defendants, the purchasers from Jeffries, the fraudulent vendee of the plaintiffs, have the better title to the merchandise in controversy. That as against Jeffries, the right of the plaintiffs to rescind the sale and reclaim the goods, by reason of the fraud of the latter, is perfect, is conceded, and was so held upon the trial. Such right continues as against any one acquiring title under Jeffries, unless under well-recognized principles of law, and under the circumstances of this case Jeffries could transfer a better title than he had, or the plaintiffs by their acts are estopped from asserting title as against a purchaser from him.

But two questions of fact were submitted to the jury: 1. Whether the sale to Jeffries was for cash or upon credit; and, 2. If for cash, whether payment was waived and the goods delivered so as, but for the fraud, to vest the property in Jeffries.

The jury found, either that the sale was upon credit, or that the payment of the purchase-price, as a condition precedent to the delivery of the property to and the vesting of the title in Jeffries was waived, and that the delivery to him was absolute and unconditional; and the defendants had a verdict, under the instructions of the judge, that the equitable rule applied, that when one of two innocent parties must suffer loss by reason of the fraud or deceit of another, the loss shall fall upon him by whose act or omission the wrong-doer has been enabled to commit the fraud; and that the plaintiffs were in the position of a party who lets another have property unconditionally, and thereby enables him to sell the same and receive the purchase-price from a third person; and that in such case the purchaser takes the title. In other words, the plaintiffs were held to be estopped from claiming the goods from the defendants in case the jury found that there had been an unconditional delivery by the plaintiffs to Jeffries, notwithstanding as the judge at the circuit expressly declared, and as the evidence showed, the defendants purchased

the goods from a broker of Jeffries in New York on the 21st of August, and paid for them the same day by transmitting their notes to Jeffries at Boston, who at once negotiated them; and Jeffries obtained neither the property nor any order for its delivery, or documentary evidence of title or of his purchase, until the 24th of the same month, three days after the transaction was consummated as between Jeffries and the defendants. That is, it was held at the circuit that the subsequently-acquired possession of Jeffries operated by relation to create an estoppel as of the 21st of August, in favor of the defendants and against the plaintiffs; and the jury were in terms instructed that the defendants were purchasers in good faith for value, and acquired a title paramount to that of the plaintiffs, and were entitled to a verdict; and they had a verdict and judgment upon this view of their rights.

That the defendants were purchasers in good faith, that is, without notice or knowledge of the fraud of Jeffries, or of the defects in his title, for a full consideration actually paid to Jeffries, is not disputed. Both plaintiffs and defendants are alike innocent of any dishonest or fraudulent intent, and one or the other must suffer loss by the frauds of one with whom they dealt in good faith, for legitimate purposes, and with honest intention. Both were alike the victims of the same fraudulent actor, and if one rather than the other of the parties has done any act enabling the fraud to be committed, and without which it could not have been perpetrated upon the other in the exercise of ordinary care and discretion, the loss should, within the rule before referred to, fall on that one of the parties aiding and abetting the fraud, or enabling it to be committed. But good faith, and a parting of value by the one, will not alone determine who should have the loss, or fix the ownership of the property fraudulently purchased from the one and sold to the other. The general rule is that a purchaser of property takes only such title as his seller has, and is authorized to transfer; that he acquires precisely the interest which the seller owns, and no other or greater. "*Nemo plus juris ad alium transferre potest quam ipse habet.*" Broom, Leg. Max. 452. The general rule of law is undoubted that no one can transfer a better title than he himself possesses. "*Nemo dat quod non habet.*" Per Willes, J., *Whistler v. Forster*, 14 C. B. (N. S.) 248. To this rule there are however some exceptions, and unless the defendants are within the exceptions they must abide by the title of Jeffries.

One of the recognized exceptions applies to negotiable instruments only, and depends for its existence upon the law-merchant and the reasons of public policy upon which that branch of the law rests. To make this exception available, the negotiable paper must be actually transferred by indorsement in the usual form and for value. *Whistler v. Forster*, supra; *Muller v. Pond*, 1r, (in this court, December 23, 1873,) 55 N. Y. 325; (a) *Story Prom. Notes*, § 120, note 1, *Calder v. Billington*, 15 Me. 398; *Southard v. Porter*, 43 N. H.

379. Another exception is in the case of a transfer by indorsement and delivery of a bill of lading, which is the symbol of the property itself, to a bona fide purchaser for value, by a consignee to whom the consignor and original owner of the goods has indorsed and delivered it. This exception is founded on the nature of the instrument, and the necessities of commerce. The bill of lading, for the convenience of trade, has been allowed to have effect at variance with the general rule of law. But this operation of a bill of lading is confined to a case where the person who transfers the right is himself in possession of the bill of lading so as to be in a situation to transfer the instrument itself, the symbol of the property transferred. *Jenkyns v. Osborne*, 7 M. & G. 678; *Akerman v. Humphrey*, 1 C. & P. 53.

Bills of lading differ essentially from bills of exchange and other commercial negotiable instruments; and even possession of a bill of lading, without the authority of the owner and vendor of the goods, or when obtained by fraud, will not authorize a transfer so as to defeat the title of the original owner, or affect his right to rescind the sale and stop the goods in transit. While possession of a bill of lading, or other document of a like nature may be evidence of title, and in some circumstances and for some purposes equivalent to actual possession of the goods, it does not constitute title, nor of itself affect the operation of the general rule that property in chattels cannot be transferred except by one having the title or an authority from the true owner. *Gurney v. Behrend*, 3 Ellis & Black, 622; *Dows v. Perrin*, 16 N. Y. 325; see also *Saltus v. Everett*, 20 Wend. 267; 32 Am. Dec. 541; *Brower v. Peabody*, 13 N. Y. 121. Jeffries had no bill of lading from the plaintiffs, the vendors of the goods, or any document of like character transferable in the usual course of business, and the transfer and delivery of which to a purchaser for value would have operated as a symbolical delivery of the goods, and been the equivalent of an actual delivery, so as to terminate the right of the plaintiffs to rescind the sale and reclaim the goods.

Another exception to the general rule exists in the case of a sale in market overt; but as we have no markets overt, and there are no sales, public or private, known to our law, which relieve the buyer of merchandise from the rule of caveat emptor, as applied to the title, this exception need not be further considered.

The defendants can only resist the claim of the plaintiffs to the merchandise by establishing an equitable estoppel, founded upon the acts of the plaintiffs, and in the application of the rule applied by the judge at the circuit, by which, as between two persons equally innocent, a loss resulting from the fraudulent acts of another shall rest upon him by whose act or omission the fraud has been made possible. This rule, general in its terms, only operates to protect those who, in dealing with others, exercise ordinary caution and prudence, and who deal in the ordinary way and in the usual course of business and upon the ordinary evidences of right and authority in those with whom they deal,

and as against those who have voluntarily conferred upon others the usual evidences or indicia of ownership of property, or an apparent authority to deal with and dispose of it. In such case, for obvious reasons, the law raises an equitable estoppel, and as against the real owner, declares that the apparent title and authority which exists by his act or omission shall quoad persons acting and parting with value upon the faith of it, stand for and be regarded as the real title and authority. It is not every parting with the possession of chattels or the documentary evidence of title that will enable the possessor to make a good title to one who may purchase from him. So far as such a parting with the possession is necessary in the business of life, or authorized by the custom of trade, the owner of the goods will not be affected by a sale by the one having the custody and manual possession. *Dyer v. Pearson*, 3 B. & C. 38; *Newsom v. Thornton*, 6 East, 17; *Taylor v. Kymer*, 3 Barn. & Adol. 320; *Ballard v. Burgett*, 40 N. Y. 314. But the owner must go farther, and do some act of a nature to mislead third persons as to the true position of the title. *Pickering v. Busk*, 15 East, 38.

Two things must concur to create an estoppel by which an owner may be deprived of his property, by the act of a third person, without his assent, under the rule now considered. 1. The owner must clothe the person assuming to dispose of the property with the apparent title to, or authority to dispose of it; and, 2. The person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real. In this respect it does not differ from other estoppels in pais. *Weaver v. Barden*, 49 N. Y. 286; *McGouldrick v. Willets*, 52 id. 612; *City Bank v. R., W. & O. R. Co.*, 44 id. 136; *Saltus v. Everett*, 20 Wend. 267; 32 Am. Dec. 541; *Wooster v. Sherwood*, 25 N. Y. 278; *Brower v. Peabody*, 13 id. 121.

In the case before us every element of an estoppel is wanting, and no case was made for the application of the rule by which, under some circumstances, one, rather than the other two innocent persons, is made to bear the loss occasioned by the fraud of a third person.

The defendants consummated their purchase from Jeffries, acting through his broker in New York, and paid for the merchandise by remitting, at his request, directly to Jeffries on the 21st of August, at which time Jeffries had neither the possession nor right of possession of the property, nor any documentary evidence of title or any indicia of ownership, or of dominion over the property of any kind. The plaintiffs had done nothing to induce the defendants to put faith in or give credit to the claim of Jeffries of the right to sell the property. The defendants then parted with the consideration for the purchase of the seed, not upon the apparent ownership of Jeffries, but upon his assertion of right of which the plaintiffs had no knowledge, and for which they are not

responsible. Neither did the defendants at any time do or forbear to do any act in reliance upon the apparent ownership of the property by Jeffries, or induced by any act or declaration of the plaintiffs. In *Knights v. Wiffen*, L. R., 5 Q. B. 660, the plaintiff was induced to rest satisfied under the belief that he had acquired title to the property purchased, and so to alter his position, by abstaining from proceedings to recover back the money which he had paid to his vendor, by the declaration of the defendant that it was all right, and his promise that when the forwarding note should be received he would put the barley on the line. The defendants here at no time had any declaration or statement of the plaintiffs upon which to rely, and were not led to act or forbear to act by any documentary evidence of title in Jeffries emanating from them. There is a manifest equity in holding the owner of property estopped from asserting title as against one who, for value actually paid, has purchased it from one having, by the voluntary act or negligence of the owner, the apparent title with right of disposal, but with this limitation there is no hard-

ship in holding to the rule that the right of property in chattels cannot be transferred unless on the ground of authority or title. Public policy requires that purchasers of property should be vigilant and cautious, at least to the extent of seeing that their vendors have some and the usual evidence of title, and if they are content to rest upon their declarations they may not impose the loss, which is the result of their own incautiousness or credulity, on another. The payment for or parting with value for the goods by the purchaser from the fraudulent vendee lays at the foundation of the estoppel, for if he has parted with nothing, he can lose nothing by the retaking of the goods by the original owner, and that payment must be occasioned by the acts or omissions of such owner. It is the payment that creates the estoppel, and if that is not made in reliance on the acts of the owner, the latter is not and cannot, in the nature of things, be estopped.

The order granting a new trial must be affirmed, and judgment absolute for the plaintiffs.

All concur.

BARNARD v. CAMPBELL.

(58 N. Y. 73.)

Court of Appeals of New York. June Term, 1874.

Motion for re-argument.

James C. Carter, for motion. Edwards Pierrepont, opposed.

ALLEN, J. The question considered by this court, and discussed in the opinion delivered on giving judgment upon this appeal was that distinctly presented by the exceptions to the ruling and decisions of the judge upon the trial, and as that was decisive and led to an affirmance of the order granting a new trial and a final judgment for the plaintiffs, it was not deemed necessary, in assigning the reasons for the judgment, to canvass particularly the argument, or review in detail the authorities cited by counsel upon a somewhat different view of the case. The entire brief, and all the authorities cited, were nevertheless, carefully examined and considered; and had the court adopted the views of the learned counsel for the appellants, it is possible a way might have been found to sustain the defendants' claim to the property, notwithstanding the pointed exceptions to propositions in the instructions to the jury, which were deemed erroneous. The case has been again carefully examined, and upon the theory of the counsel for the appellants, and with the aid of his very able brief, submitted upon the present motion, and the court sees no reason to interfere with the judgment already given. It is proper to say that the unusual delay in passing upon the present application has not been because of any intrinsic difficulties in the question presented, or any serious doubt as to the correctness of the former decision.

Isolated expressions may be found in elementary treatises, as well as in judicial opinions, which give color to the claim of the defendants, to hold the property in dispute as against the plaintiffs, but these were not intended to and do not give the rule by which this and like cases are controlled. They are all proper in the connection in which they are found and for the purposes for which they were used, and ought not to receive any other interpretation than such as was designed by the authors. It must be conceded that upon the delivery of the goods to Jeffries by the plaintiffs, under the circumstances, the property passed to Jeffries, and the fact that the delivery was induced by fraud did not render the contract void. It was merely voidable at the instance of the plaintiffs, who might elect to disaffirm the contract and reclaim the property. That is, the contract of sale was defensible at the election of the plaintiffs, the vendors, if the election was seasonably made, and the goods reclaimed in proper time after the discovery of the fraud. The plaintiffs could lose the right by delay as against the wrong-doer, if in consequence of such delay his position should be changed, and they would have lost it absolutely if during the interval between the delivery of the goods, the vesting of this

defensible title in the purchaser, Jeffries, and the disaffirmance of the sale by the plaintiffs, the goods had been sold to an innocent third party for a valuable consideration. The superior equity of a purchaser of property from one who has acquired a title defensible at the election of the former owner and vendor, by reason of fraud, to that of such owner seeking to reclaim his property, is based upon the fact that acting upon the evidence of title which the owner has permitted the wrong-doer to assume and possess, he has been induced to part with value, and will be the loser because of the credit given to the apparent ownership if he is compelled to surrender the property. The mere possession by the party claiming to hold will not sustain his claim, but the circumstances under and consideration upon which he has acquired the possession are also material. Were it otherwise, an assignee for the benefit of creditors, or one who should take as collateral security for the payment of a precedent debt, would hold as against the original owner, which is not claimed and is contrary to the whole current of authority. Several things must concur to bar the claim of the defrauded vendor. 1. He must have parted with possession of his property with intent to pass the title to the wrong-doer, thus giving him the apparent right of disposal. If property is taken feloniously or without the consent of the owner the taker can make no title to it, even to an innocent purchaser with value. 2. A third party must have acquired title from the wrong-doer without notice of the defects in his title or knowledge of circumstances to put him to an inquiry as to the source of his title. And, 3. Such third party must have parted with value upon the faith of the apparent title of the wrong-doer, and his right to dispose of the property. If any of these elements are wanting the vendor seasonably pursuing his legal right may have his property. That this formula very closely resembles that by which an estoppel in pais is defined and limited is true, and this must necessarily be so, so long as the rights based upon each have the same equitable foundation. The defendants parted with no value, incurred no liability, and in no respect changed their situation in the interval between the delivery of the merchandise by the plaintiffs to Jeffries, and their disaffirmance of the contract, and reclaiming the goods. In other words, they did nothing in consequence of such delivery to Jeffries or based upon his title and possession, and are in precisely the same situation as if the goods had never left the possession of the plaintiffs. They parted with their notes and incurred obligations upon the faith of the promise and agreement of Jeffries and upon his credit alone.

It is possible that the claim of the defendants to hold as bona fide purchasers for value is sustained by *Fenby v. Pritchard*, 2 Sandf. 151, but this case is so at war with principles recognized as well settled by this court in analogous cases, that it cannot be regarded as well decided. The cases cited from Maine and Illinois (*Lee v.*

Kimball, 45 Me. 172; *Butters v. Haughwout*, 42 Ill. 18; 89 Am. Dec. 401), treat the case as analogous to a transfer of negotiable paper, and hold that a precedent debt is a valuable consideration for the transfer, and gives the transferee a good title as against the former owner. This is in direct conflict with the uniform decisions in this State, from *Bay v. Coddington*, 5 Johns. Ch. 54; 9 Am. Dec. 268; affirmed, 20 Johns. 637, to *Weaver v. Barden*, 49 N. Y. 286; affirmed, *Turner v. Treadway*, 53 id. 650. One other case from Maine cited by the counsel for the appellants (*Titecomb v. Wood*, 38 Me. 561) recognizes the necessity of a valuable consideration, as that term is understood and used by the courts of this state as necessary to give the purchaser of property from a fraudulent vendor a superior equity and title to that of the former owner, and find such a consideration in the transfer of property before then stolen from the defendant. The courts say: "Here the defendant being the owner of stolen property, with his right and title unimpaired by the felony, transferred it to McClure for the property in question, in part payment at least. This constituted a valuable consideration for his purchase, given at the time. Thus it appears that he was a purchaser of the gold watch, bona fide, for a valuable consideration, and without notice of the fraud by which his vendor acquired it. This gives him a superior equity and a better right, and enables him to hold the property against the defrauded vendor." *Hutton v. Cruttwell*, 1 El. & Bl. 15; and *Mercer v. Peterson*, L. R., 2 Exch. 304, relied upon in support of this application, presented questions under the English Bankrupt Acts, and merely decided that a transfer of effects, by the bankrupt, in performance of a prior executory agreement, for which a full consideration had been paid at the time of the agreement, was not within the condemnation of the act or affected by the proceedings in bankruptcy. They do not bear upon the question before us. In *Clough v. London, etc., R. Co.*, L. R., 7 Exch. 26; 1 Eng. Rep. 148, the question was whether the claim to disaffirm the sale of the goods was seasonably made by the defrauded vendor. The vendor had first sought to stop the goods in transitu, which was an act in affirmance of the sale; but the transit was ended before notice reached the carrier. There was no act avoiding the contract on the ground of fraud done by the vendor, until the plea in the action by Clough, who was found by the jury to be cognizant of, and a party to the fraud in the purchase. No question of consideration or the validity of any sale of the goods by the fraud-

ulent purchaser was in the case, or considered by the court. *Durbrow v. McDonald*, 5 Bosw. 130; s. c., sub nom. *Winne v. McDonald*, 39 N. Y. 233, was clearly within the rule upon the interpretation given to the transaction by the courts. It was said by the superior court that *Perry & Co.*, the purchasers of the wheat, had the full possession of it in the precise manner that the contract between them and the plaintiffs contemplated, and that the purchase and possession of *Perry* were such as to enable him to confer upon a bona fide purchaser, a pledgee for value, a title valid as against the plaintiffs; and that the advance was made by the defendants after the delivery to *Perry & Co.* of the documentary evidence of title, and the wheat pledged as security at the time of the advance. The evidence upon the record in this court, it would seem, left the precise time when some of the occurrences took place in doubt, but that the specific wheat was pledged, at the time of the advance, was established, although possibly the muniments of title were not then delivered. The title and possession had vested in *Perry & Co.* at the time of the pledge; and that fact clearly distinguished that from the present case.

Judge Bosworth, in *Caldwell v. Bartlett*, 3 Duer, 341, and *Keyser v. Harbeck*, id. 373, recognizes the doctrine that the advance must be made or consideration parted with upon the faith of the title of one in actual possession of the property, or the written evidence of title, to give an indefeasible title as against the true owner. All the authorities are direct and to the effect that no one but a bona fide purchaser, or pledgee for value—that is, one who gives value for or makes advances upon goods obtained from the owner by fraud or fraudulent representation—and that he who has paid value, or made advances, or incurred responsibilities upon the credit of them, can alone claim to hold them as against such owner. *Root v. French*, 13 Wend. 573; 28 Am. Dec. 482; *Mowrey v. Walsh*, 8 Cow. 238; *Hoffman v. Noble*, 6 Mete. 68; 39 Am. Dec. 711. There is no good reason or equity in placing the burden of a fraudulent sale upon a bona fide vendor rather than upon a bona fide purchaser from the fraudulent vendee, unless the purchaser has parted with his money, or some value, upon the credit of possession or some evidence of title in the vendee, received from the original owner, and by means of which he has induced the purchaser to treat with him as owner.

The motion for a re-argument must be denied.

All concur, except JOHNSON, J., not sitting.



Appeal of BEACH.

(20 Atl. Rep. 475, 58 Conn. 464.)

Supreme Court of Errors of Connecticut. Feb. 7, 1890.

Appeal from superior court, Hartford county.

The contract and note referred to in the opinion are as follows: "This memorandum of an agreement made this 3d day of March, 1886, between George Crompton, of the first part, and the Home Woolen Co., Charles M. Beach, treasurer, of the second part. Whereas, the said Crompton of the first part agrees to deliver to the said party of the second part certain articles of machinery, to-wit, thirty broad Crompton '1883' fancy looms (twenty-eight of which are single-beam looms, and two are double-beam looms,) and fixtures thereto belonging, amounting to \$12,456.69, and the party of the second part agrees to give the party of the first part its promissory note dated the average shipping date of the looms, and payable eight months from its date, for \$12,456.69. It is hereby agreed by the said parties that the party of the second part shall be permitted to take the said property into their possession, and the same to take to and set up in the mill occupied by them in Beacon Falls, agreeing to keep the same in good order, and also to keep the same insured for the full cost of the same for the benefit of the party of the first part, and to hold the said machinery as the property of the party of the first part until the above note or renewals thereof have been fully paid, according to the tenor thereof, when the machinery above named shall be sold to and become the property of the party of the second part. And the party of the first part is hereby bound to sell and relinquish his claim to said property upon payment of the said note or renewals thereof, and does agree to consider the same as sold and delivered when said note or renewals thereof are paid. And it is further agreed that upon default of the payment of the said note or renewals thereof when the same shall become due, as also in default of said machinery being kept in good order and insured as above provided, the party of the first part shall have the right at any time to resume possession of the machinery, and to enter the premises and remove the same as his own property. And, if any portion of said note or renewals thereof shall remain unpaid when possession shall be so taken by the party of the first part or his authorized agent, then the amount which may have been paid shall be for the use of said machinery while in possession of the party of the second part, and said notes shall then be canceled and given up. Witness the hands and seals of the parties aforesaid. GEORGE CROMPTON. [L. s.] CHAS. M. BEACH, Treasurer. [L. s.]

H. C. Robinson and L. F. Robinson, for appellant. F. Chamberlin and E. S. White, for appellee.

LOOMIS, J. The sole question for our determination is whether the promissory note described in the finding, dated January 15, 1887, given by the Home Woolen

Mills Company, payable six months after date, to Mary Crompton, administratrix of George Crompton, deceased, is a good and collectible note. The commissioners on the assigned estate of the maker, now an insolvent, allowed the claim in full, and their doings were affirmed by the superior court upon an appeal by a creditor. Although numerous errors are assigned as reasons for the appeal to this court, yet the controlling question as it seems to us relates wholly to the consideration of the note, and the remedy of the plaintiff for default of payment. The note in suit is a renewal of the one mentioned in the contract dated March 3, 1886, given to George Crompton by the Home Woolen Company, pursuant to the provisions of the contract, and a determination of the questions relative to the consideration and collectibility of the note will involve also the construction of the contract.

No question is made as to the validity of the transaction. It belongs to the class of exoneratory conditional sales so often sustained by the courts of this and other jurisdictions, even against attaching creditors. But the question here is between the parties, and those who immediately represent them. If then, as HOLT, C. J., so forcibly said in *Thorpe v. Thorpe*, 1 Salk. 171, "every man's bargain ought to be performed as he intended it," we cannot refrain from asking at the outset why should not the absolute promise contained in this note be performed? Was it in its inception a mere *nudum pactum*, lacking the requisites of a legal obligation to perform, or has there since been a failure of the consideration? Unless it is all a mere waste of words, paper, and ink, a good consideration is found in the mutual obligations which the contract imposed upon the parties. Under it the Home Woolen Company had the possession, the right of possession, the right to use the property, until default, and the right to acquire the legal title by the payment of the note. This was a vested interest of which the vendee could not be deprived except after default. Moreover, it was an attachable interest under section 920 of the General Statutes. The vendee or any of its attaching creditors could compel the vendor to give a good title. In other jurisdictions the doctrine is well established that such contracts vest an interest in the vendee which is capable of sale or mortgage by him to a third person, so that the moment the vendee's title is perfected it passes to such third person. *Fosdick v. Schall*, 99 U. S. 235; *Carpenter v. Scott*, 13 R. I. 477; *Day v. Bassett*, 102 Mass. 445; *Crompton v. Pratt*, 105 Mass. 255; *Currier v. Knapp*, 117 Mass. 324; *Chase v. Ingalls*, 122 Mass. 383; note to *Miller v. Sten*, 89 Amer. Dec. 128. The case at bar is most remarkable in the fact that, while the appellant claims a want or failure of consideration for the note, he at the same time concedes that there has been no default in any of the vendor's obligations mentioned in the contract, nor has possession of the looms been taken by the vendor or his representative, nor has there been any interruption or disturbance of the vendee's possession. But strangely enough the failure of considera-

tion is predicated solely upon the default of the vendee to perform his own promise—the same party who sets up the defense! That such may be the consequence of a party's own default, we concede as a possibility, but only where it is so written in the contract, and such intent is manifest. And here counsel for the appellant say, in effect, that the decisions of this court in *Hine v. Roberts*, 48 Conn. 267, and *Loomis v. Bragg*, 50 Conn. 228, where contracts said to be essentially the same as in the case at bar were construed so as to give the precise effect to the vendee's own default, coupled with his act of returning the property, which we now characterize as so anomalous. But the appellant's argument as based on the cases cited overlooks several most important and controlling distinctions. In the first place, the court there was not called upon to give effect to the sole default, and the sole act of the vendees in returning the property after default, for in both cases these acts of the vendees were coupled with the corresponding acts of the vendors in accepting and taking back the property which they had conditionally sold. This of itself constituted a failure of the consideration, and had the looms in this case when tendered been accepted and appropriated by the vendor, the vendee would be no longer liable for the purchase price. The gist of the decision in *Hine v. Roberts* appears in the closing paragraph of the opinion: "The purchase failed; the title did not pass. The plaintiff received the melodeon and the return of the organ in good condition, which is all he contracted for in that contingency, and the defendant forfeits all previous payments (in this case the melodeon) which is all he agreed to forfeit. There was therefore an entire failure of the consideration for the note." But it is said that the reasoning of the court in this, and in the other case referred to, supports the right of the vendees to return the property upon their own default, irrespective of any assent on the part of the vendors arising from their acceptance of the property when returned. This is true, and naturally occasions some hesitation as to the proper decision of this case. But the reasoning referred to was based upon a construction of those contracts whereby it was expressly provided that the vendees' default of payment should work a forfeiture of their entire interest in the property. In *Hine v. Roberts* the very words which the vendee used in his contract were: "If I fail to pay any of said rent when due, * * * all my rights herein shall thereupon expire and terminate;" which seems to justify the reasoning and conclusion of the court. In *Loomis v. Bragg* the same construction was given to the contract, although the language was less explicit. In the opinion of the court, on page 231, it is said that the agreement provided for the contingency of a default of payment by the vendee "by a forfeiture of all the defendant's rights under the contract." In the case at bar, as it seems to us, no such construction can reasonably be given, for there is no express provision as in *Hine v. Roberts*, and none can be implied from the language used, as in *Loomis v. Bragg*, that the vendee can determine his interest

in the property and revest it in the vendor by his own default merely. The option to give such an effect to a default rests wholly in the vendor, and the vendee's rights continue until the option is exercised. The mere absence of any provision in the contract as to a return of the property by the vendee, while expressly conferring on the vendor the right to reclaim it, of itself affords ground for an implication against the existence of any such right, but in this case it is expressly stated to be the duty of the vendee "to hold the said machinery as the property of the party of the first part, until the above note or renewals thereof have been fully paid according to the tenor thereof."

This case belongs to the class of which *Appleton v. Library Corp.*, 53 Conn. 8, is the type rather than to that of *Hine v. Roberts* and *Loomis v. Bragg*, and the language of the court in that case, in reference to the claim of a right in the defendant to return books similarly bought, is equally applicable to this case. The court there say: "It is said that the plaintiffs had the right, at their option, to retake the property at any time if the defendants should fail to pay any installment for a period of thirty days after it became due; but this is a right which the plaintiffs had in case the defendants should break the contract by non-payment. It gives the defendants no right to return the books." But it is suggested that the present case is like *Hine v. Roberts* and *Loomis v. Bragg* in that no remedy except the right to resume possession is given to the vendor, and that it is unlike *Appleton v. Library Corp.*, in that there is no absolute promise to pay for the looms, as there was to pay for the books in that case. While we concede that there is some plausible ground for these distinctions, upon further reflection we find them unsatisfactory. In the first two cases the payments stipulated to be made at frequent intervals were called "rent," and the agreements were called "leases," and although this court, taking into view the features of the entire transactions, called them "conditional sales" and not "leases," yet the use of these words by the parties certainly has a legitimate bearing upon the construction of the agreements as to the point now under consideration, namely, whether the parties intended to give the vendors a remedy to recover the entire sum stipulated to be paid as a condition for vesting the title in the vendees. In both cases also we find most ample provisions for the protection of the vendors. In *Hine v. Roberts* a large advance payment was made by delivery to the vendor of a melodeon, worth nearly one-third the price of the organ. In *Loomis v. Bragg* the payment of a monthly rent was required, many times larger than the interest upon the full price of the piano which was the subject of the sale. But in the case at bar the contract requires no advance payment and no rent or installments are to be paid either at long or short intervals. The word "rent" does not occur in the writing, and its equivalent in idea only appears where it speaks of the consequences of a retaking of possession by the vendor, and provides for the

cancellation of the notes, in which case any payments that may have been made it is said "shall be for the use of the machinery while the vendee was in possession." Even interest is not mentioned in the agreement, yet the finding shows that it was in fact paid in advance upon giving the present renewal note; and, upon the supposition that the entire note could be collected when due, the vendor had it in his power always to secure the prepayment of interest or any other security as a condition for granting a renewal of the note. But the first note that was given pursuant to the contract had the interest included with the principal, which was due at the end of eight months, so that, had the question under discussion then arisen, the appellant could have claimed, consistently with his present position, that not even the interest was recoverable, for its payment was only obligatory as part and parcel of the principal, which could not, he says, have been recovered by suit; but, if the interest could have been or could be recovered apart from the principal, it would be a very inadequate protection to the vendor for the risk and deterioration incident to the use of such machinery by another. As matter of common knowledge, we may safely assume that the property in question, if subjected to only ordinary wear, would, if taken back by the vendor, necessarily be greatly depreciated in its market value, for it would have to be sold again, if at all, as second-hand machinery, and the vendor must inevitably lose the whole difference between the value of new and of second-hand machinery, which in an investment of over \$12,000, as in this case, would be too serious a matter to be lost sight of in the contemplation of the parties. The appellant's construction of the agreement would put upon the vendor all the risks and losses, (of which there are many besides those mentioned,) incident to the agreement and its subject-matter, and at the same time give to the vendee all possible benefits, while exempting him from all obligations except such as he might be well pleased to fulfill. It is incredible that a contract so one-sided, and a remedy so inadequate for the vendor, should have been intended by the parties. Any construction leading to such results ought not to be accepted unless plainly required or necessarily to be inferred from the language of the contract. We think the contract in this case admits of a different and more reasonable construction. We have already seen that no option to return the property is given to the vendee merely upon his own default, which has an important bearing upon the questions whether the parties have restricted the remedy of the vendor solely to a retaking of the property, and whether there was any promise by the vendee to pay the purchase price. We have also adverted to the provision that the vendee shall hold the property as that of the vendor until the note and its renewals have been fully paid, which indicates that actual payment was contemplated; and we have in addition the note itself, which contains a direct promise, without condition or contingency, to pay the purchase price of the looms; and this

note being provided for in the contract, and made part and parcel of it, ought to be read as if inserted in the body of the contract. All these considerations make it reasonable to construe the agreement as containing an absolute promise to pay for the property at the expiration of the eight-months credit agreed upon. And this brings the case within the principle of *Appleton v. Library Corp.*, where this court said: "This contract is an absolute one. The plaintiffs agreed to sell the books to the defendants for the sum of ninety dollars, to be paid in installments at certain specified times. The defendants agreed to pay that sum according to the terms of the contract. There is no conditional agreement here. It is true that the title to the goods did not pass, and could not pass, until the full sum of ninety dollars had been paid, but the promise to pay that sum was absolute. Whence, then, comes the defendants' right to return the books in full satisfaction and discharge of the contract, and thus leave a great part of the installments unpaid?" And, speaking of the plaintiffs' right to recover possession of the books, the court further says: "But this is not their only remedy. The contract expressly further provides that in case of such breach all the remaining unpaid installments shall immediately become due and payable. If they become due and payable in consequence of non-payment, of course a suit could be maintained for their recovery."

Another question involved in the reasons for the appeal, and very briefly referred to in the argument for the appellant, is whether the appellee, by bringing a suit on the note, and attaching the property of the vendee thereon, and by refusing to accept the property when tendered back, and by presenting the note to the commissioners as a claim against the estate of the vendee, thereby affirmed the sale, and waived her right to recover back the property. The counsel for the appellee insisted that this question was not properly before this court, and declined to argue it. It is true this suit is not for the recovery of the machinery, but only for the recovery of the amount of the note. The vendee has not been disturbed in his possession of the property, and it is not certain that he will be. But the facts referred to as to the conduct of the appellee all appear on the record, and so far as they affect the right to recover the note now in question the matter is legitimately before the court. And, although our present decision must be confined to the claim on the note, yet the note and the property may have such relations as that the principle established as to the former may virtually determine the question as to the property, should it hereafter arise. The controlling question in the present case, as we have seen, relates simply to the consideration of the note. If, then, the action of the plaintiff, as found in this case, had the effect to affirm the sale, and pass the title of the property to the vendee, at the same time it must have prevented a failure of the consideration of the note; and if the title did pass it follows also that the plaintiff cannot recover the property in any suit founded upon the contract. For these reasons we

regret that the question was not fully argued. The case of *Bailey v. Hervey*, 135 Mass. 172, was cited, and, as it was based on a contract similar in effect to the one under consideration, it seems to be directly in point. The action was brought by the conditional vendee against the vendors for taking the property away, and the defendants attempted to justify under their contract after default of payment was made by the vendee. ALLEN, J., in delivering the opinion of the court, said: "When the plaintiff discontinued his payments on account, what was the legal position of the defendants? If it be assumed that they might at their option either reclaim the goods as their own property, without any obligation to account for the proceeds or value to the plaintiff, or that they might collect the price in full, it is plain that they were not entitled to do both. They could not treat the transaction as a valid sale and an invalid one at the same time. If they reclaim their property, it must be on the ground that they elected to treat the transaction as no sale. If they brought an action for the price, they would thereby affirm it as a sale. Two inconsistent courses being open to them, they must elect which they would pursue; and electing one they are debarred from the other. Reclaiming the goods

would show an election to forego the right to recover the price; but, instead of reclaiming the goods in the first instance, they brought an action against Bailey for the price, made an attachment of his property by trustee process, entered their action in court, and he was defaulted." To accept this as good law would be to establish a principle which would, upon the facts found, preclude the appellee from hereafter reclaiming the machinery in question. And while we feel impressed with the clear and cogent reasoning contained in the opinion cited, and are aware that it may receive further support from other decisions to the same effect, yet inasmuch as the point was not argued at all by the appellee, and only briefly for the appellant, and as its adoption would only furnish one independent additional reason for a conclusion already reached by a majority of the court, it is deemed best on the whole to leave the question open for further consideration and decision after full argument. There was no error in the judgment complained of.

ANDREWS, C. J., and PARDEE and FENN, J.J., concurred.

CARPENTER, J., delivered a dissenting opinion.



BECKER v. HALLGARTEN.

(86 N. Y. 167.)

Court of Appeals of New York. 1881.

Action for conversion. Wilhelm & Boemer, merchants in Berlin, Germany, sold to Boas & Stern, of the same place, certain goods on credit, giving them invoices of the same. The goods were shipped by direction of the purchasers to one Becker, the plaintiff, in Bremen. Boas & Stern borrowed 3,000 marks of one Goldstein, a banker in Berlin, on the security of the goods and the bills of lading, directing Becker to hold them subject to Goldstein's order, who directed Becker to ship them to defendants, Hallgarten & Co., of New York. Goldstein wrote defendants informing them of the shipment, and directed them to deliver the goods to one L. Stern, of New York, on payment by him of the Goldstein loan and expenses. Becker shipped the goods on August 4th to defendants, with bills of lading made out in his name as shipper, directing delivery of the goods to defendants. One bill of lading he mailed to defendants, directing delivery of the goods to L. Stern, as instructed by Goldstein. The duplicate bill of lading was forwarded to Boas & Stern, who sent it to Goldstein, who forwarded it to defendants, directing the same disposition of the goods by them. Becker cabled defendants on August 19th, on behalf of the vendors, stopping the goods in transit, and they agreed to hold them for plaintiff's account. The vendors afterwards assigned to plaintiff their claims against the purchasers for an accepted draft and balance of account. Under the laws of Germany, goods covered by bills of lading can be transferred only by written indorsement on the bills by the consignee. Those sent to defendant were not indorsed. Plaintiff tendered defendants their charges, and demanded the goods.

Samuel Hand, for appellants. Lewis Sanders, for respondent.

DANFORTH, J. Becker was at no time in the course of these transactions the agent or representative of the vendors. Until and including the shipment of the goods he was the agent of Boas & Stern, the vendees, or of Goldstein. He obeyed, as was proper, at the different stages of the affair, first one and then the other of these parties. If his special character ceased with the shipment, he neither entered the employ of the vendors, nor did he act under any instruction received from them. The finding therefore that in behalf of the vendors he stopped the goods is without evidence to support it. Assuming, in the next place (for the purpose only of this discussion,) that by the assignment above set out he became vested with a vendor's right to stop goods while on their way to an insolvent purchaser, it is one which we think cannot be exercised in this case, for the reasons: First, that the transit was over before the goods left Germany. They were sent by the vendors to Becker, as the vendees' agent at Bremen.

The shipment was preceded by and was in consequence of a request by B. & S. to the vendors "to send the boxes" to Becker "at our disposition." Therefore, on the 28th of July, informing Becker of the shipment to him, "at the request of and for account of Messrs. B. & S. of Berlin," they write, we have sent you part of the goods in question and "request you to carry out the further instruction of said parties concerning the same;" and in the next letter, communicating the shipment of the balance, they say, "and request you hereby to let Messrs. B. & S. have the further disposal thereof." It is obvious then that the impulse impressed upon the goods by the vendors carried them only to Bremen. Some other action was necessary on the part of the vendees before they moved again. They at that point transferred the goods to Goldstein, and made them, in the hands of Becker, subject to his order. The trial court finds not only a "taking of the goods by him as security," but that Boas & Stern "directed Becker to hold and ship the goods according to Goldstein's directions." This was done. The bills of lading were issued in favor of strangers to the vendees, and who represent a party having actual custody and the right of disposition. The shipment and the consignment by the vendors ended at Bremen. At that place new interests attached, in promotion of which the goods were sent forward. The only consignment by W. & B. was to Becker at Bremen.

It has been held that the delivery to the vendee, which puts an end to the state of passage, may be at a place where he means the goods to remain until a fresh destination is communicated to them by orders from himself. *Valpy v. Gibson*, 4 C. B. 837; *Biggs v. Barry*, 2 Curt. 259; *Bolton v. L. & Y. R. W. Co.*, L. R. 1 C. P. 439. Also *Dixon v. Baldwin*, 5 East, 175; and this case is approved in *Covell v. Hitchcock*, 23 Wend. 611. In the case before us it is plain that they had reached the place for which they were intended, under the direction given by the vendors, and had come under the actual control of the vendees. *Dixon v. Baldwin*, supra, is commented upon in *Harris v. Pratt*, 17 N. Y. 249, and distinguished from the rule thought applicable to the facts of that case. There the suspense in transportation was temporary, and to be resumed at a future time in the direction already given by the vendors. But in the case before us not only is the actual fact like that in *Dixon v. Baldwin*, but if the destination at Bremen was originally intended only to give the vendees an opportunity to determine by which of several routes or at what time, as in *Harris v. Pratt*, the goods should go on, we have the additional vital circumstances before adverted to of a complete possession and control by the vendees and its transfer to a third party, who also took the actual possession and control of the goods, and has since retained them. Neither *Harris v. Pratt* nor any of the other cases cited by the appellant go to the extent of upholding the vendor's lien in such a case.

Second. The transaction between Gold-

stein and the vendees was effectual to pass the property to him and so deprive the vendors of the right of stoppage if it otherwise existed. That right may always be defeated by indorsing and delivering a bill of lading of the goods to a bona fide indorsee for a valuable consideration, without notice of the facts on which the right of stoppage would otherwise exist. This was held in *Lickbarrow v. Mason*, 2 T. R. 63, and has since been deemed established. It does not impair the force of this position that the money was in fact advanced before the delivery of the bill of lading. The goods were in the possession of Goldstein when he paid over the money. The bill of lading was promised and was part of the consideration on which the money was paid, but more than all he had theright, under the authority given to him by B. & S., to take the bill of lading in any form, and it was made out for his benefit. *City Bk. v. R. Co.*, 44 N. Y. 136. Nor is it material, unless made so by the German law (*infra*), that the bill of lading was not indorsed. It was not necessary that it should be. *Hallgarten & Co.* were Goldstein's agents, subject to his control, and in making the bill of lading in their names as consignees all was effected which the indorsement of a bill taken in the name of B. & S. would have accomplished. The cases cited by the respondent (*Meyerstein v. Barber*, L. R., 2 C. P. 45; *Short v. Simpson*, 1 id. 255), show that a bill so indorsed has the same effect, even if the ship containing the goods was at sea, as delivery of the goods themselves. Here there was a delivery of the goods to Goldstein, and the bill of lading followed the possession.

Third. The German law, as set out in evidence, has no application to the case in hand. It applies when the bill of lad-

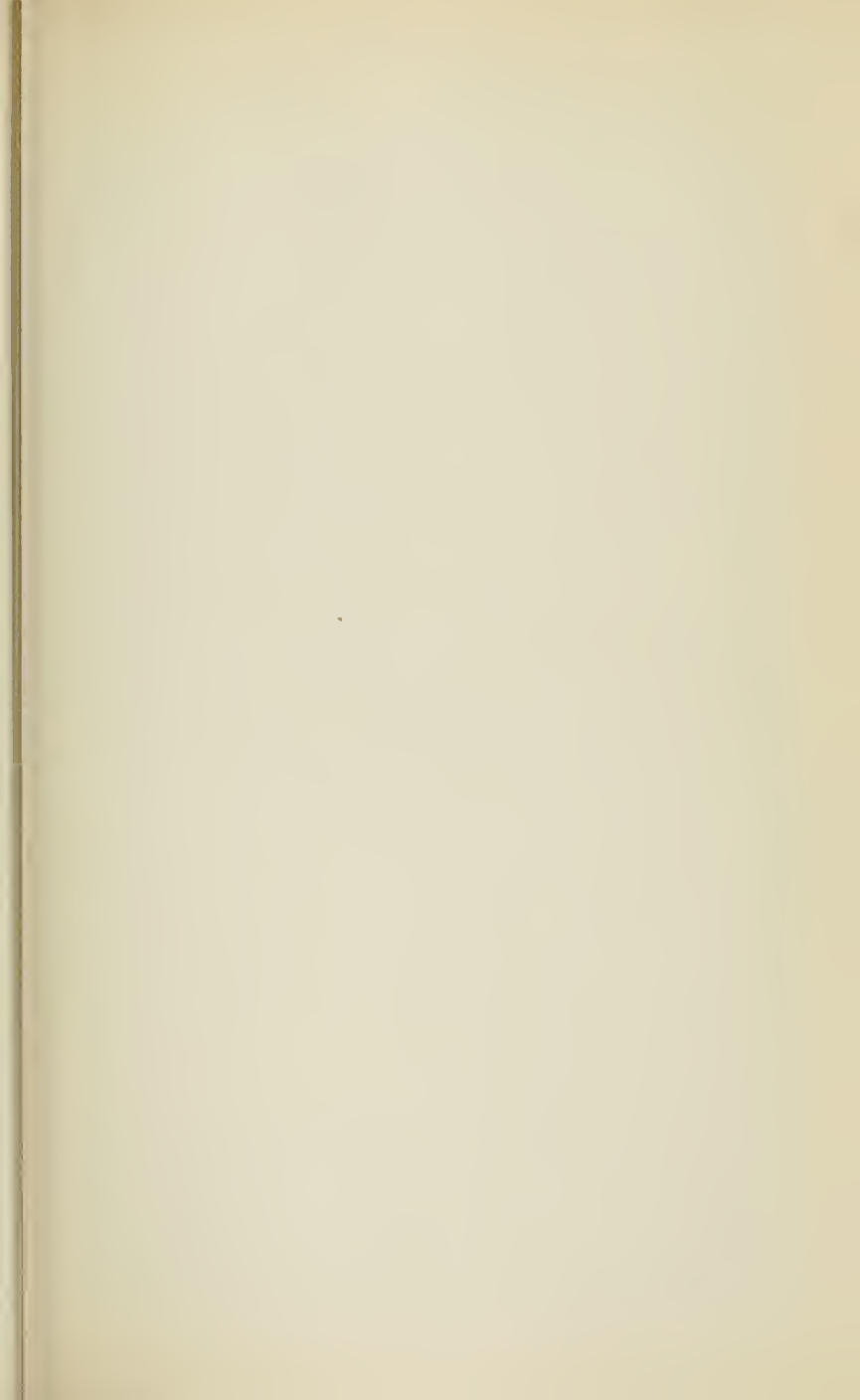
ing is taken in the name of the vendee or of some person through whom the party claiming its benefit must make title. The observations already made show that in our opinion this is not the plaintiff's position. Nor are the defendants estopped from disputing the plaintiff's title. There is no finding of any fact upon which such doctrine can rest; no change of position by the plaintiff; a promise at most by the defendants without consideration, in violation of duty to their principals and in fraud of their rights. If it forms the foundation of any action, it cannot be one the effect of which is to deprive a third party of his property, or subject the defendant to a second action by the real owner of the goods. The right of stoppage, when it exists, depends upon equity, and that of the defendants, by virtue of their representative character, is superior in any view to the plaintiff's. Liable at all, it would be upon their assumpsit to keep the goods on his account. But what damages could the plaintiff show from the breach of an agreement to keep for him, or subject to his order, goods to which another person was entitled, and whose claim was as to him exclusive?

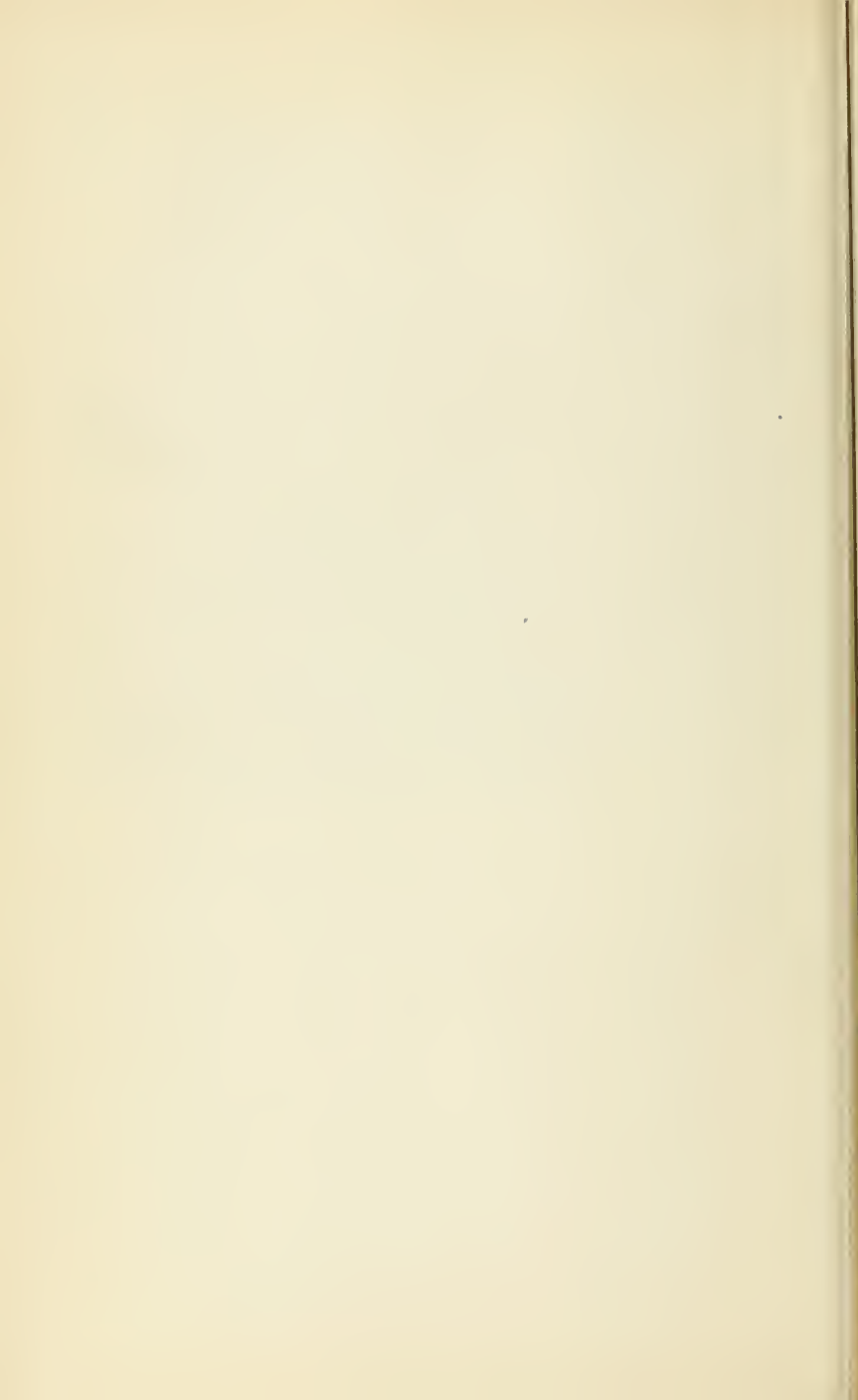
Some other grounds are urged by the respondent on which he claims the judgment may be sustained. They have been examined, and are deemed untenable. The reasons for this conclusion need not be stated, since however decided, they would be insufficient to overcome the appellants' objections which have been already declared well taken.

The judgment appealed from should be reversed and a new trial granted, with costs to abide the event.

All concur except FOLGER, C. J., absent from argument.

Judgment reversed.





BEMENT v. SMITH.

(15 Wend. 493.)

Supreme Court of New York. July Term, 1836.

This was an action of assumpsit, tried at the Seneca circuit in November, 1834, before the Hon. Daniel Moseley, one of the circuit judges.

In March, 1834, the defendant employed the plaintiff, a carriage maker, to build a sulky for him, to be worth ten dollars more than a sulky made for a Mr. Putnam; for which he promised to pay \$80, part in a note against one Joseph Bement, a brother of the plaintiff, for the sum of ten or eleven dollars, and the residue in his own note, at six or twelve months, or in the notes of other persons as good as his own. In June, 1834, the plaintiff took the sulky to the residence of the defendant, and told him that he delivered it to him, and demanded payment, in pursuance of the terms of the contract. The defendant denied having agreed to receive the carriage. Whereupon the plaintiff told him he would leave it with a Mr. De Wolf, residing in the neighborhood; which he accordingly did, and in July, 1834, commenced this suit. It was proved that the value of the sulky was \$80, and that it was worth \$10 more than Putnam's. The declaration contained three special counts, substantially alike, setting forth the contract, alleging performance on the part of the plaintiff, by a delivery of the sulky, and stating a refusal to perform, on the part of the defendant. The declaration also contained a general count, for work and labor, and goods sold. The judge, after denying a motion for a nonsuit, made on the assumed grounds of variance between the declaration and proof, charged the jury that the tender of the carriage was substantially a fulfillment of the contract on the part of the plaintiff, and that he was entitled to sustain his action for the price agreed upon between the parties. The defendant's counsel requested the judge to charge the jury that the measure of damages was not the value of the sulky, but only the expense of taking it to the residence of the defendant, delay, loss of sale, &c. The judge declined so to charge, and reiterated the instruction that the value of the article was the measure of damages. The jury found for the plaintiff, with \$3.26 damages. The defendant moved for a new trial. The cause was submitted on written arguments.

O. H. Platt and J. F. Stevens, for plaintiff. W. R. Smith, for defendant.

By the court, SAVAGE, Ch. J. The defendant presents no defence upon the merits. His defence is entirely technical, and raises two questions: 1. Whether the tender of the sulky was equivalent to a delivery, and sustained the averment in the declaration that the sulky was delivered; and 2. Whether the rule of damages should be the value of the sulky, or the particular damages to be proved, resulting from the breach of the contract. There is no question raised here upon the

statute of frauds. The contract is therefore admitted to be a valid one; and relating to something not in solido at the time of the contract, there is no question of its validity.

The plaintiff agreed to make and deliver the article in question at a particular time and place, and the defendant agreed to pay for it, on delivery, in a particular manner. The plaintiff made, and, as far as was in his power, delivered the sulky. He offered it to the defendant at the place and within the time agreed upon. It was not the plaintiff's fault that the delivery was not complete, that was the fault of the defendant. There are many cases in which an offer to perform an executory contract is tantamount to a performance. This, I apprehend, is one of them. The case of *Towers v. Osborne*, 1 Strange, 506, was like this. The question here presented was not raised, but the defendant there sought to screen himself under the statute of frauds. The defendant bespoke a chariot, and when it was made, refused to take it; so far the cases are parallel. In an action for the value, it was objected that the contract was not binding, there being no note in writing, nor earnest, nor delivery. The objection was overruled. In that case the action was brought for the value, not for damages for the breach of contract. This case is like it in that particular; this action is brought for the value, that is, for the price agreed on; and it is shown that the sulky was of that value. The case of *Crookshank v. Burrell*, 18 Johns. R. 58, was an action in which the plaintiff declared against the defendant on a contract whereby the plaintiff was to make the woodwork of a wagon, for which the defendant was to pay in lambs. The defendant was to come for the wagon. The question was upon the statute of frauds. *Spencer, Ch. J.*, states what had been held in some of the English cases, *Clayton v. Andrews*, 4 Burr. 2101, and *Cooper v. Elston*, 7 T. R. 14, that a distinction existed between a contract to sell goods then in existence, and an agreement for a thing not yet made. The latter is not a contract for the sale and purchase of goods, but a contract for work and labor merely. The case of *Crookshank v. Burrell* is much like this, with this exception; there the purchaser was to send for the wagon; here the manufacturer was to take it to him. There it was held that the manufacturer was entitled to recover, on proving that he had made the wagon according to the contract; here it is proved that the sulky was made, and taken to the place of delivery according to contract. The merits of the two cases are the same. It seems to be conceded that an averment of a tender of the sulky by the plaintiff, and a refusal of the defendant to receive it, would have been sufficient; and if so, it seems rather technical to turn the plaintiff out of court, when he has proved all that would have been required of him to sustain his action. The plaintiff, in his special counts, does not declare for the sale and delivery, but upon the special contract; and herein this case is distinguishable from several cases cited on the part of

the defendant, and shows that it was not necessary to have declared for goods bargained and sold. It seems to me, therefore, that the judge was right in refusing the nonsuit, and in holding that the evidence showed substantially a fulfilment of the contract. The variance as to the amount of Joseph Bement's note, I think, is immaterial; but if otherwise, it may be amended. The alleged variance as to the price of the sulky is not sustained by the facts of the case.

The only remaining question, therefore, is as to damages which the plaintiff was entitled to recover. It is true that the plaintiff does not recover directly as for goods sold; but in the case of *Towers v. Osborn* the plaintiff recovered the value of the chariot, and in *Crookshank v. Burrell* the recovery was for the value of the wagon. The amount of damages which ought to be recovered was not the question before the court in either of those cases; but if the value of the article was not the true measure, we may infer that the point would have been raised. Upon principle, I may ask, what should be the rule? A mechanic makes an article to order, and the customer refuses to receive it: is it not right and just that the mechanic should be paid the price agreed upon, and the customer left to dispose of the article as he may? A contrary rule might be found a great embarrassment to trade. The mechanic or merchant, upon a valid contract of sale, may, after refusal to receive, sell the article to another, and sue for the difference between the contract price and the actual sale. *Sands and Crump v. Taylor and Lovett*, 5 Johns. R. 395, 410, 411; *Langfort v. Tiler*, 1 Salkeld, 113, 6 Modern, 162. In the first of these cases, the plaintiffs sold the defendants a cargo of wheat. The defendants received part, but refused to receive the remainder. The plaintiffs tendered the remainder, and gave notice that unless it was re-

ceived and paid for, it would be sold at auction, and the defendants held responsible for any deficiency in the amount of sales. It was held, upon this part of the case, that the subsequent sale of the residue was not a waiver of the contract, the vendor being at liberty to dispose of it bona fide, in consequence of the refusal of the purchaser to accept the wheat. This case shows that where there has been a valid contract of sale, the vendor is entitled to the full price, whether the vendee receive the goods or not. I cannot see why the same principle is not applicable in this case. Here was a valid contract to make and deliver the sulky. The plaintiff performed the contract on his part. The defendant refused to receive the sulky. The plaintiff might, upon notice, have sold the sulky at auction, and if it sold for less than \$80, the defendant must have paid the balance. The reason given by Kent, Ch. J., 5 Johns. R. 411, is that it would be unreasonable to oblige him to let the article perish on his hands, and run the risk of the insolvency of the buyer. But if after tender or notice, which ever may be necessary, the vendor chooses to run that risk and permit the article to perish, or, as in this case, if he deposit it with a third person for the use of the vendee, he certainly must have a right to do so, and prosecute for the whole price. Suppose a tailor makes a garment, or a shoemaker a pair of shoes, to order, and performs his part of the contract, is he not entitled to the price of the article furnished? I think he is, and that the plaintiff in this case was entitled to his verdict.

The question upon the action being prematurely brought before the expiration of the credit which was to have been given, cannot properly arise in this case, as the plaintiff recovers upon the special contract, and not upon a count for goods sold and delivered.

New trial denied.

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BENEDICT v. SCHAETTLER.

(12 Ohio St. 515.)

Supreme Court of Ohio. Dec. Term, 1861.

Error to the superior court of Cincinnati.

Stallo & McCook, for plaintiff in error.
Kebler & Force, for defendant in error.

GHOLSON, J. According to the decision in *House v. Elliott*, 6 Ohio St. Rep. 497, which applies in this case, we can not inquire as to the weight of evidence on which any finding of fact was made in the court below. The finding must be against law. Assuming every fact which the evidence may tend to prove, in support of the finding and judgment of the court below, do those facts fail to establish the right of the plaintiff in the action to recover? We need not, therefore, say whether there was sufficient evidence to show that Johnson, to whom the goods were sold, was insolvent. There was, we think, evidence tending to show the insolvency of the vendee at the time of the sale of the goods, and that such insolvency was not known to the vendor. The question then arises, whether the vendor, on afterward hearing of the insolvency, may exercise the right of stoppage in transitu, or, whether, as claimed by counsel for the plaintiff in error, the insolvency, to authorize a stoppage in transitu, must be evidenced by some positive overt act, the existence of which is not inferable from any testimony in the bill of exceptions, and that such overt act must occur after the sale, and before the delivery of the goods?

It is the rule of the mercantile law, that where goods have been consigned, and are on transit to the vendee, the consignor can not vary the consignment, except in the case of insolvency. It has been said, that "the mischief and inconvenience that would ensue on a contrary supposition, are extreme. The goods might be put on board, and might lie at the risk of the consignee for two or three months; and if the consignor could come and resume them at pleasure, it would place the consignee in a situation of great disadvantage, that he should be exposed to the risk during such a length of time, for an object which might be eventually defeated, at any moment, by the capricious or interested change of intention in the breast of the consignor. It would be to expose the consignee altogether to the mercy of the seller." *The Constantin*, 6 C. Rob. 321-327. In that case, the vendor had stopped and diverted the delivery of goods, and it was said, if the vendee "had been an insolvent person, it would have amounted to a complete and effective revindication of the goods. But if the person to whom they are consigned is not insolvent; if from misinformation or excess of caution, the vendor has exercised this privilege prematurely, he has assumed a right that did not belong to him, and the consignee will be entitled to the delivery of the goods, with an indemnification for the expenses that have been incurred. * * * It is not an unlimited power that is vested in the consignor, to vary the consignment

at his pleasure in all cases whatever. It is a privilege allowed to the seller, for the particular purpose of protecting him from the insolvency of the consignee. Certainly it is not necessary that the person should be actually insolvent at the time. If the insolvency happen before the arrival, it would be sufficient to justify what has been done, and to entitle the shipper to the benefit of his own provisional caution. But if the person is not insolvent, the ground is not laid on which alone such a privilege is founded." 6 C. Rob. 326. In the case of *Wilmshurst v. Bowker*, 2 M. & G. 792, 812, it was said by Tindal, C. J.: "The ordinary right of countermanding the actual delivery of goods shipped to a consignee, is limited to the cases in which the bankruptcy or insolvency of the consignee has taken place. The law as to this point is very clearly laid down by Lord Stowell, in the case of *The Constantin*."

This statement of the doctrine of stoppage in transitu, which is supported by such high authorities, does not sustain the proposition, that a vendee, insolvent at the time of the sale of goods, and still remaining insolvent, can object to their stoppage in transitu. He could only complain when his insolvency was known to the vendor at the time of sale, and the contract was made in view of such, his condition. The object in allowing the privilege to the vendor being his protection against the insolvency of the vendee, such privilege, unless waived by the vendor, ought properly to extend to cases of insolvency, whether existing at the time of sale, or occurring at any time before the actual delivery of the goods. A vendee who disputes the right of stoppage in transitu, must be prepared to aver, as in the case of *Wilmshurst v. Bowker*, 2 M. & G. 792, which was an action by a vendee against a vendor for improperly stopping the delivery of goods, that he was neither bankrupt nor insolvent. Independently of any circumstances to the contrary, the vendee might have the benefit of a presumption of ability to comply with his contract, and the burden of showing insolvency might be cast on the vendor. It may be that this would be sufficiently shown by the proof of an overt act of insolvency, such as a stoppage of payment, though, in fact, an actual insolvency, in the sense of not having means adequate to the payment of debts, might not exist. If the vendee, before the stoppage in transitu, had, by his conduct in business, afforded the ordinary apparent evidences of insolvency, he ought not to complain of the precautionary measure taken by the vendor, though it should turn out that he was ultimately unable to pay. But, though no such evidences of insolvency should precede the stoppage in transitu, still, if the fact of insolvency existed the vendee ought not to complain. This, at least, is clearly to be inferred from the language of the authority which has been cited, and appears entirely reasonable and proper. Fair dealing will be better insured by leaving to the vendor his privilege of stoppage in transitu, in all cases of insolvency, whether evidenced by the ordinary accompanying acts, or shown actually to exist. The

rights of a fair vendee will be sufficiently protected by giving him an indemnity when the right of stoppage in transitu is exercised upon rumor or suspicion without any foundation in fact, and by depriving the vendor, in all cases, of any chance of speculating upon the goods, by requiring them to be delivered or accounted for to the vendee, or his assignee, on the payment or tender of the agreed price.

These views are sustained by the origin and nature of the doctrine of stoppage in transitu. It appears to have been derived from, or to be analogous to, the revindication of the civil law. This has been thus defined: "Revindication is the right of an unpaid vendor, upon the insolvency of the vendee, to reclaim, in specie, such part of the goods as remains in the hands of the vendee entire, and without having changed its quality." (In re Westzynthus, 2 Nev. & Man. 650, note.) In Bell's Commentaries on the Laws of Scotland, cited in the same case, it is said: "The privilege to stop goods in transitu, is a qualified extension in equity of that rule of mutual contract, by which, either party may withhold performance, on the other becoming unable to perform his part." It is stated, as a rule introduced into the common law, in modern times, founded on principles of equity, and borrowed from the foreign or continental law, that in case of the vendee's bankruptcy or insolvency, the vendor might stop and take back the goods in transitu, or before they come into the hands of the vendee. Bell's Comm. bk. 2, pt. 2, c. 1, art. 3, cited, 2 Nev. & Man. 651, 652, note; Mackreth v. Symmons, 15 Ves. 343. It is "nothing more than an extension of the right of lien, which, by the common law, the vendor has upon the goods for the price, originally allowed in equity, and subsequently adopted as a rule of law." Rowley v. Bigelow, 12 Pick. 307, 313; Atkins v. Colby, 20 N. H. 154; Grout v. Hill, 4 Gray, 361. "A kind of equitable lien adopted by the law for the purposes of substantial justice." Hodgson v. Loy, 7 T. R. 445. In the case of McEwan v. Smith, 2 Ho. L. Cas. 309, 328, it was said, by Lord Campbell, that "the doctrine of stoppage in transitu is a most just and equitable one, and I would by no means strive to limit its operation."

If the true principle of the right of stoppage in transitu be found in that certainly just rule of mutual contract, by which either party may withhold performance, on the other becoming unable to perform, on his part; if the foundation of the rule be a just lien on the goods for the price, until delivered, an equitable lien adopted for the purposes of substantial justice, then, it is the ability to perform the contract—to pay the price—which is the material consideration. If there be a want of ability, it can make no difference in justice or good sense, whether it was produced by causes, or shown by acts, at a period before or after the contract of sale. Substantially, to the vendor who is about to complete delivery, and abandon or lose his proprietary lien, the question is, can the vendee perform the contract on his part; has he, from insolvency, become unable to pay the price? If such be his con-

dition, and the vendor has not precluded himself by some act of waiver, the general principles on the subject and justice require that he should be allowed to exercise the right of stoppage in transitu.

To sustain the contrary view and limit the right of stoppage in transitu, the case of Rogers v. Thomas, 20 Conn. 53, is relied on, in which it was decided, that to authorize the exercise of the right of stoppage in transitu, there must be some overt act of insolvency, and that it must intervene between the sale and the exercise of the right. The decision in the case of Rogers v. Thomas, was not made on the authority of previous cases, but, in the absence of such cases, upon the ground that the general definitions or statements of the doctrine of stoppage in transitu required such a limit to the exercise of the right; and particular reference is made to the general statement of the doctrine in Smith's Mercantile Law, 547 (Am. Ed. 677). The very first authority cited by Mr. Smith to sustain his statement of the doctrine, is the case of Wilmshurst v. Bowker, and he quotes the remarks of Tindal, C. J., as to the clearness with which the law on the point had been laid down by Lord Stowell in the case of The Constantia. Interpreting the statement of the doctrine, by Mr. Smith, in the light of the authorities he cites, and it is manifest that he never intended any such limit to the exercise of the right of stoppage in transitu. Nor do we think the terms in which the doctrine of stoppage in transitu is stated in many of the authorities, would justify the limit supposed to exist.

It was said by Lord Kenyon, in Ellis v. Hunt, 3 T. R. 467, that "the doctrine of stopping goods in transitu is bottomed on the case of Snee v. Prescott, 1 Atk. 245, where Lord Hardwicke established a very wise rule, that the vendor might resume the possession of goods, consigned to the vendee, before delivery, in case of the bankruptcy of the vendee."

The doctrine is thus stated by Lord Hardwicke. After referring to the rule, that an action against a carrier for loss of goods should be brought in the name of the consignee, he proceeds: "But suppose such goods are actually delivered to a carrier, to be delivered to A., and while the carrier is upon the road, and before actual delivery to A., by the carrier, the consignor hears A., his consignee, is likely to become bankrupt, or is actually one, and countermands the delivery, and gets them back in his own possession again, I am of opinion that no action of trover would lie for the assignees of A., because the goods, while they were in transitu, might be so countermanded." Snee v. Prescott, 1 Atk. 248.

In a case before cited it is said by Lord Campbell: "What is stoppage in transitu? It is this, that where a vendor of goods has to send them to a vendee, and has, for that purpose, parted from them to a carrier, he may, upon hearing of the insolvency of the vendee, while they remain in the hands of the carrier, and, before delivery to the purchaser, stop their delivery." McEwan v. Smith, 2 Ho. L. Cas. 328.

In the case of Donath v. Broomhead, 7

Barr, 301, 303, it is said: "The right of a vendor, on the discovery of the bankruptcy or insolvency of the party to whom he has sold goods on credit, to retake them before actual or complete delivery, is the well-settled doctrine of both courts of law and equity."

In the case of *Hays v. Mouille*, 14 Pa. St. 48, the judge, in his charge to the jury (and his views were expressly adopted by the court of error,) after stating that the insolvency of the vendee was the groundwork of the plaintiff's claim, thus put the question—Was the vendee "insolvent when these goods were replevied by the plaintiffs? It is not necessary, to prove insolvency, that he should have been declared a bankrupt or insolvent by a judicial tribunal, nor that he should have made an assignment of his property. If the fact exist, no matter how proved, if sufficiently and satisfactorily proved, the law requires no more." In that case the evidence tended to show that the vendee was insolvent when the goods were bought, and the judge further said: "You have the testimony of Baker that Rhodes was indebted some \$60,000, and that his assets were but \$25,000, and that his creditors were watching for these goods on the line of transportation, and actually attached them before they reached Ohio, for debts which he was not able to pay."

In the case of *Stevens v. Wheeler*, 27 Barb. 658, 663, there is this statement of the rules on the subject of stoppage in transitu: "that the vendor has a right to stop goods sold by him, when he discovers the vendee to be insolvent, at any time while the goods are in transitu. That the transitu continues until the goods reach the place of destination, unless sooner terminated by the act of the vendee. That a delivery to the vendee of the goods, or a part of them, or a delivery to his agent or to a bona fide purchaser from him, terminates the right of the vendor of the goods to stop them."

Not only do the general statements of the doctrine fall short of sustaining the decision in *Rogers v. Thomas*, but, in several cases, where the question was involved, it was differently decided. Such, we think, was the case of *Hays v. Mouille*, 14 Pa. St. 48, before noticed. There it is evident, the insolvency existed at the time of the sale of the goods, and it was proved, not by any overt act, but by a comparison of the amount of liabilities with the amount of assets.

The decision in the case of *Buckley v. Furniss*, 15 Wend. 137, appears to be directly opposed to that in *Rogers v. Thomas*. In *Buckley v. Furniss*, the point was made that the vendor, at the time of the sale, knew the circumstances of the vendee, who was then insolvent. It was said by Bronson, J.: "The sale was no doubt absolute, whether the plaintiff knew that Titus was insolvent or not; and so are most sales, where the vendor afterward exercises the right of stoppage in transitu. The right of the vendor to resume possession of goods sold on credit, in case of the insolvency of the consignee, before they come to his hands, does not depend upon any condition, or other pec-

uliarity in the contract of sale, but proceeds on the ground of an equitable lien. Still, it may be, and probably is true, that if the plaintiff sold the iron, with a full knowledge of the situation of the vendee, he could not afterward exercise the right of stoppage in transitu; but the argument is not borne out by the facts." The judge then proceeds to show by a reference to the facts, that although the vendee was insolvent at the time of the sale, it was not known to the vendor, who, therefore, had the right to retake the goods. This case was cited by counsel, in *Rogers v. Thomas*, but was not noticed in the opinion of the court.

There are other cases in which the decision did not turn on the question of insolvency, the contest in this class of cases having generally been as to the termination of the transitu; but where it appears either directly or by strong inference, that the insolvency existed at the time of sale. Such a case is *Biggs v. Barry*, 2 Curtis, 259, in which it clearly appears that the insolvency existed at the time of sale; but the case was given to the jury on the question, simply, whether the transitu had ended, without any reference to the time of insolvency.

In the cases of *Stubbs v. Lund*, 7 Mass. 453, and *Isley v. Stubbs*, 9 Mass. 65, what was regarded by the court as the sale of the goods, their shipment on order, was after the insolvency of the vendee, and yet the exercise of the right of stoppage in transitu was sustained.

The point might have been made, and if sustained would have changed the decision in the case of *Litt v. Cowley*, 1 Holt, 338, 3 Eng. Com. L., 138, as is shown by Waite, J., in his dissenting opinion in the case of *Rogers v. Thomas*. It may not be conclusive against the correctness of a legal proposition, that it was not presented, when from the facts involved it might have been. But when this has occurred in a number of cases, where it is to be supposed that both counsel and court are well informed as to the rules of law, it is a reasonable inference that the point was not made because it was deemed untenable.

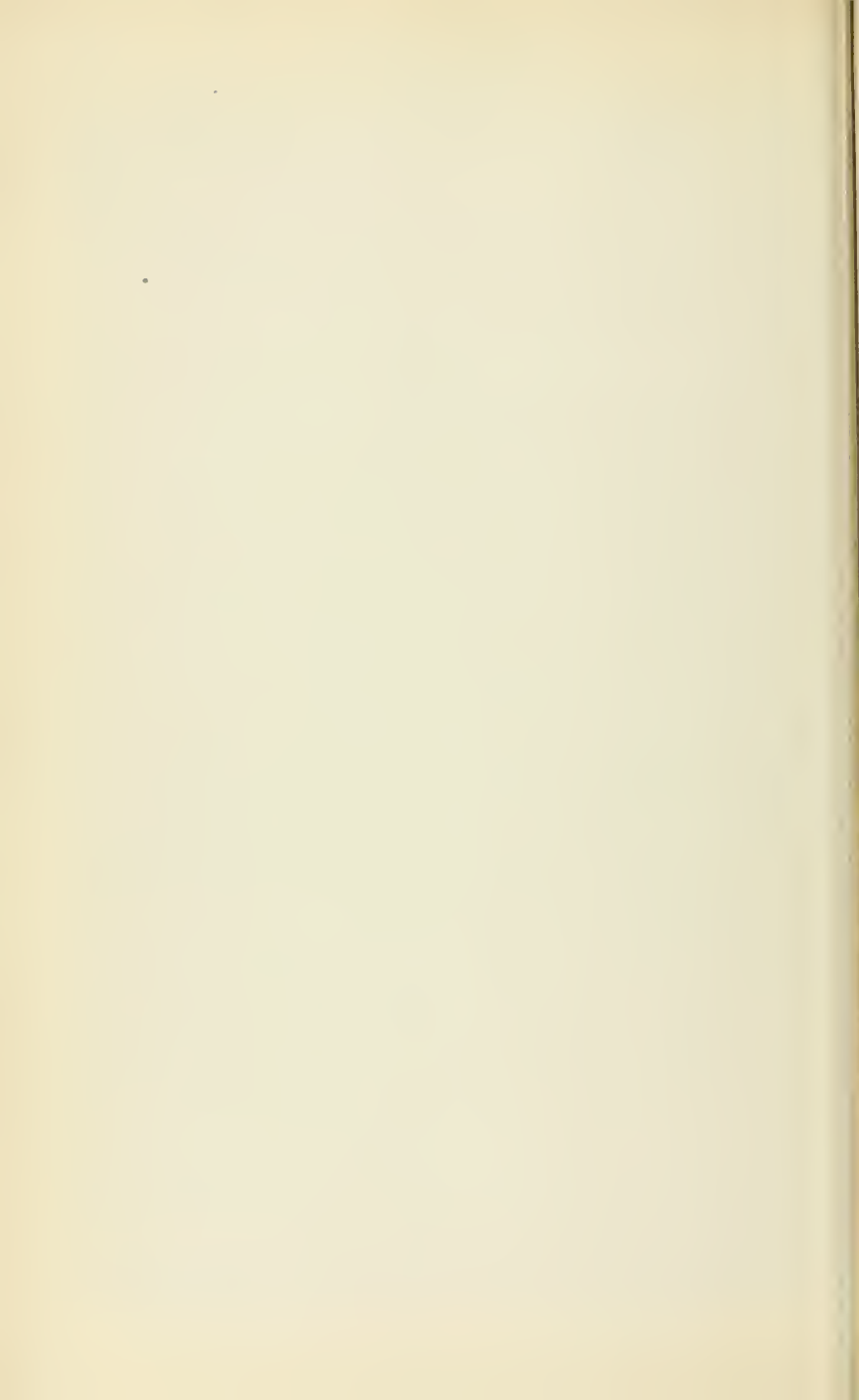
We have not been able to find, and our attention has not been called by counsel to any decision which sustains the restriction on the right of stoppage in transitu laid down in *Rogers v. Thomas*; but it has been adopted as a rule of law in several elementary works. It appears to be approved in 1 *Parsons on Contracts*, 476, 478, but that approbation is omitted in the work of the same author on *Mercantile Law*, and withdrawn, and a grave doubt substituted, in his more recent work on *Maritime Law*, 1 Vol. 363.

We are satisfied that the restriction can not be maintained either on principle or authority.

In accordance with the views which have been expressed, the judgment of the superior court of Cincinnati will be affirmed.

Judgment affirmed.

SUTLIFF, C. J., and PECK, BRINKERHOFF, and SCOTT, JJ., concurred.



BENNETT v. COOK.

(6 S. E. Rep. 28, 28 S. C. 353.)

Supreme Court of South Carolina. April 3, 1888.

Appeal from common pleas circuit court of Hampton county; Hudson, Judge.

Action by William Bennett, administrator, against Joe Cook, to obtain possession of certain property claimed by defendant as a gift from the intestate in his lifetime. Judgment was rendered in favor of defendant, and plaintiff appeals.

W. S. Tillinghast and James W. Moore, for appellant. Scarson & Warren, for respondent.

McGOWAN, J. James Hughey, becoming old and infirm, and finding himself alone, and without any one of his immediate family to take care of him, sold his little tract of land, and went to live with the defendant, who had married his adopted daughter, to whom he was attached. Upon the occasion of his removal he seems to have carried with him a horse, about 60 bushels of corn, a gun, a few pieces of old furniture, and some notes, amounting in value, as alleged, to about \$800. He was received and treated kindly by the defendant and his wife. They nursed him in his last illness, employed and paid for what medical attention he wanted; and in about six months thereafter he died intestate, leaving his property in their possession. Soon after the death of the intestate, the plaintiff, who had married a daughter of the deceased, applied for letters of administration upon the estate, and, before the time had elapsed for obtaining full letters, he received some authority in the nature of letters ad colligendum bona to gather up the goods of the deceased, and sued the defendant for the aforesaid property. The defendant answered, claiming title to the property which remained by parcel gift from the intestate in his lifetime, the inducing cause or consideration being the love and affection to his wife, the adopted daughter of the deceased, and the services rendered the intestate in his old age and helpless condition by the defendant and his wife. It was referred to a referee to take the testimony, much of which consisted of the "declarations" of the intestate that he "had given," or "intended to give," the property to Cook and wife, and was taken subject to exception. It is all printed in the brief. The cause came on to be heard by Judge Hudson, who ruled that all the testimony of both the plaintiff and defendant touching transactions and communications of the witnesses with the deceased must be stricken out, under section 400 of the Code; and that all the testimony of other witnesses in behalf of the plaintiff as to declarations of the deceased in support of his title, and against the gift, must also be stricken out. The judge in his decree says, "after eliminating from the case all this incompetent and irrelevant testimony, and after considering the other testimony, I find that the great weight of the evidence is in favor

of the title of the defendant and wife, and is against the claim of the plaintiff. * * * I find as matter of fact that the intestate at the time of his death did not own the property in dispute, having given the same to the defendant and his wife, and hence the plaintiff cannot recover,"—and dismissed the complaint. From this decree the plaintiff appeals upon exceptions: "(1) Because it is respectfully submitted that his honor erred in ruling that all the testimony of witnesses in behalf of the plaintiff as to declarations of deceased in support of his title, and against the gift, must be stricken out, testimony of like nature in support of the gift having been previously introduced by defendant. (2) Because his honor erred in finding that the great weight of the evidence is in favor of the title of the defendant and wife, and is against the claim of the plaintiff. (3) Because his honor erred in finding that this case is similar, in the character of the proof of the gift, to the case of *Blake v. Jones*, Bailey, Eq. 142, it being respectfully submitted that there is no parallel between the two cases. (4) Because his honor erred in finding that the delivery was made as in as usual under like circumstances, and that the defendant and wife had possession of the property sufficient to amount to a delivery. (5) Because his honor erred in finding that the plaintiff gave the horse to defendant and wife for immediate use as their horse. (6) Because his honor erred in finding that the plaintiff had no right to any of the property traced to defendant's possession, and named in the complaint. (7) Because his honor erred in finding that defendant had only one dollar and fifty cents in his possession of the money of the intestate, and that he had offered to turn over the same to plaintiff. (8) Because his honor erred in deciding that the intestate did not at the time of his death own the property in dispute; that he had given the same to defendant and wife, and adjudging that the complaint should be dismissed." There are no rights of creditors in the case. The intestate seems to have been punctual in paying his debts, and the only contest is between the heirs at law and the defendant.

The general rule of evidence certainly is that declarations are admissible against the interest of the party, but not in his favor. "There is, perhaps, no principle better settled than that when one has entered into a contract, made a gift, or done any other act by which he is bound, he cannot by any subsequent act or declaration of his own avoid or discharge himself from it. If, then, the gift by the testatrix to the defendant's wife was proved, her subsequent declarations were, upon general principles, inadmissible, for the obvious reason that they were irrelevant. They were therefore properly rejected. Cases do sometimes arise in which proof of the gift is made up of repeated declarations of the donor, running through several years; where such declarations are brought in, by the party claiming under it, in support of doubtful evidence of the gift. In these and such like cases, such declarations are admis-

sible in reply to such evidence. The case of *Sims v. Saunders*, Harp. 374, is an illustration of this." *M'Kane v. Bonner*, 1 Bailey, 116. It seems that in respect to alleged parol gifts proof of declarations of the donor is only allowable in doubtful cases upon the question of gift or no gift, and the evidence on both sides consists of declarations of the alleged donor. The doctrine is clearly exceptional in character, and, as it trenches closely on forbidden ground, it should not be allowed to go beyond the necessity of the case, and then be received with great caution. "Where there has been plenary proof of the gift, subsequent declaration of the donor that a gift was not intended is inadmissible." *M'Kane v. Bonner*, *supra*. It seems that the circuit judge was entirely satisfied, "from the great weight of the evidence," that "plenary proof of the gift" had been made. And according to the well-established rule of this court that finding of fact will not be disturbed unless it is against the weight of the evidence which we have read and considered, we cannot say there was error of law in excluding the subsequent declarations of the intestate tending to controvert the gift previously made.

But it is strongly urged upon us that there was no sufficient proof of gift perfected by a delivery; that the whole evidence taken together showed, at the most, an intention to give at the death of the donor, which was testamentary in character and void, as being in conflict with the law as to wills. The question whether there was a delivery was also a question of fact which the circuit judge has decided. It is said, however, that his view of what, under such circumstances, would constitute a legal delivery was error of law. There is no doubt that a parol gift of chattels cannot be made to take effect in futuro. To constitute a legal gift there must be an actual or constructive delivery of possession so as to confer the right of enjoyment in present. The rule seems very plain, but there are so many kinds of personal property, and circumstances are so various, there is often no little difficulty in applying it properly. It has been settled that it is not necessary that there should be in all cases an actual manual delivery. The principle is stated thus: "Property in a chattel cannot be transferred by a parol gift without delivery; but by delivery is not meant an actual manual delivery in all cases, but any circumstances amounting to a clear demonstration of the intention of the one to transfer, and of the other to accept, and which puts it into his power,

or gives him authority to take possession, is all that is necessary, and is a fact that is left to the jury." *Reid v. Colcock*, 1 Nott & McC. 592; *Banks v. Hatton*, id. 221; *Blake v. Jones*, Bailey, Eq. 141. The latter case, as remarked by the circuit judge, "is very similar in the character of the proof" to this. In that case it was held that, "when a donor has repeatedly declared his intention to give, his subsequent admissions that 'he had given,' are sufficient evidence of an actual delivery to complete the title of the donee when it does not appear that the declarations were loose and playful, and particularly when the donor was under a moral obligation to make the gift." Indeed, upon the point of delivery, this case is stronger than that of *Blake v. Jones*, for there the slaves recovered by a daughter from the administrator of her father were never in the actual possession of the donee. The father had said, "When you get a plantation, I will send them to you, and in the mean time I might as well pay you hire as any one else." While here the property, at the time of the death of the alleged donor, was already in the possession of the person claiming as donee. It may be said that this arose from the accidental circumstance that the intestate at the time of his death was living with the defendant; but it seems to us it is a circumstance entitled to some consideration, at least, in this, that at the time of the alleged gift there was no occasion to make a visible transfer of the possession. (the usual evidence of such a gift,) for the defendant was already in possession in a general sense.

We see no reason to except the "cream horse" from the other property. It appeared from the testimony of Weekly, Searson, Shaffer, and others, that the intestate, three or four weeks before his death, said: "I have moved to Joe Cook's for some time. I don't intend to live by myself any more. All I've got I have carried to Joe Cook's, and there is where I expect to stay until I die. And this horse I have given to Joe Cook on condition that, when I want to ride, he is my horse, and when I have no use for the horse, it's Joe Cook's, and all that I have." "Where the gift of a slave was absolute in its terms, and accompanied with delivery of possession, held that the reservation of a right 'to borrow' under certain circumstances, or to receive 'something like hire' if the donor should stand in need, was a condition subsequent, and did not invalidate the gift although made by parol," etc. *M'Kane v. Bonner*, *supra*.

The judgment of this court is that the judgment of the circuit court be affirmed.





BENTALL et al. v. BURN.

(3 Barn. & C. 423.)

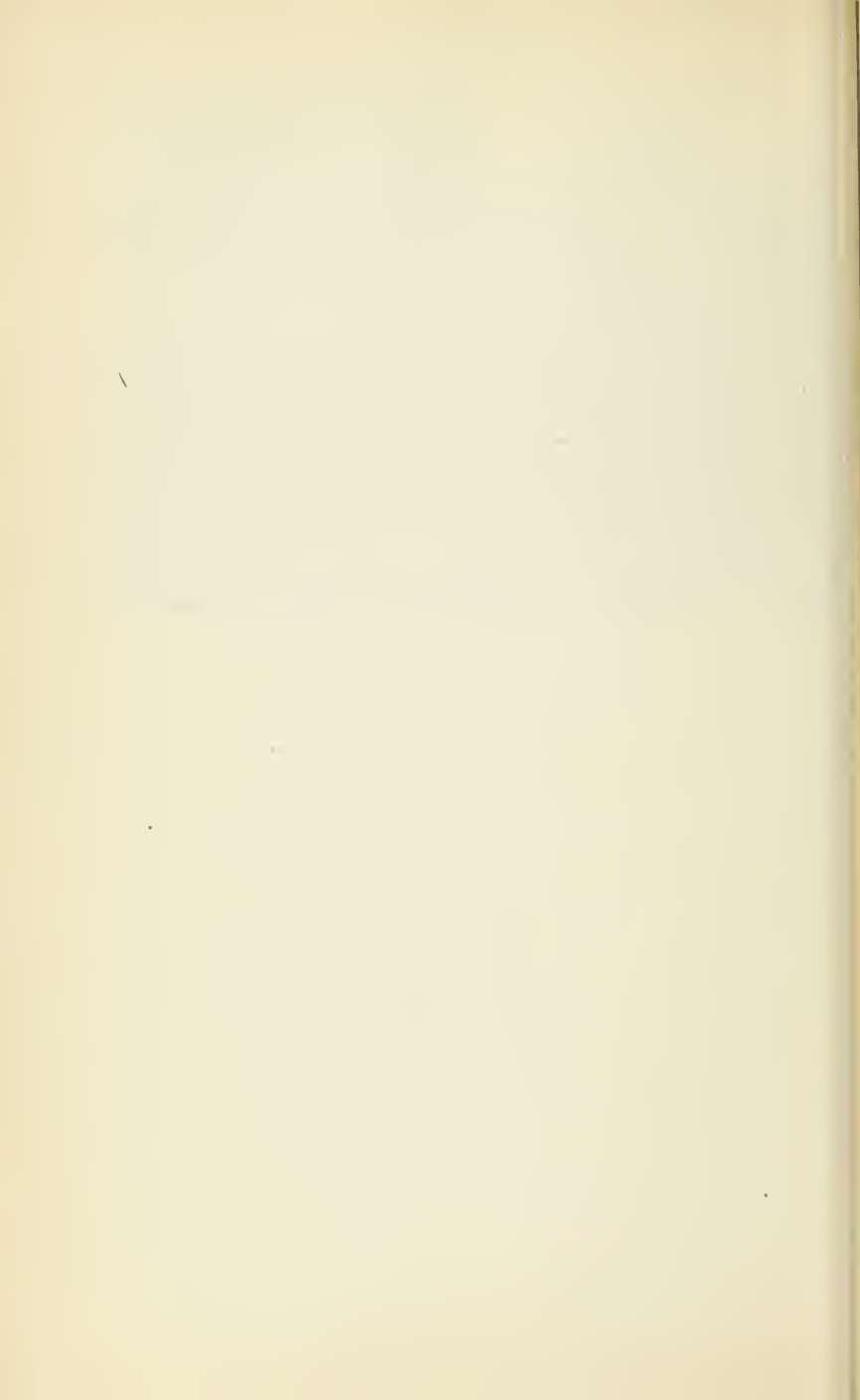
King's Bench, Michaelmas Term. Nov. 9,
1824.

Assumpsit for goods bargained and sold and goods sold and delivered by Dyer and the bankrupts before their bankruptcy. This was an action brought to recover £13 14s., the price of a hogshead of Sicilian wine sold to the defendant by the bankrupts, they being copartners with the other plaintiff, Dyer, who resided in Sicily. At the trial before Abbott, C. J., at the London sittings after last Trinity term, it appeared that the bankrupts had, on the 15th of February, 1822, sold, in the name of and on account of the firm, to the defendant a hogshead of Sicilian wine, then lying in the London docks, at the price of £13 14s., and at the same time a delivery order and invoice were made out and sent to the defendant, signed by the firm. But there was no contract in writing. On the 5th of June the defendant, on being applied to for payment, said that the former order had been lost, and that the wine had not been transferred to him in proper time, and he had consequently lost the sale of it; that he had not been allowed to taste it. It was proved that a delivery order is given where the wine is intended to be speedily removed, and that

the party receiving it may get the goods mentioned in the order upon producing it at the London docks and paying the charges, which are always deducted from the price. Upon this evidence the lord chief justice was of opinion that the acceptance of the delivery order by the vendee was not equivalent to an actual acceptance of the goods within the meaning of the statute of frauds; and he directed a nonsuit to be entered, with liberty to the plaintiffs to move to enter a verdict for them for the price of the wine.

Barnwall now moved accordingly.

PER CURIAM. There could not have been any actual acceptance of the wine by the vendee until the dock company accepted the order for delivery, and thereby assented to hold the wine as the agents of the vendee. They held it originally as the agents of the vendors, and as long as they continued so to hold it the property was unchanged. It has been said that the London Dock Company were bound by law, when required, to hold the goods on account of the vendee. That may be true, and they might render themselves liable to an action for refusing so to do; but if they did wrongfully refuse to transfer the goods to the vendee, it is clear that there could not then be any actual acceptance of them by him until he actually took possession of them. Rule refused.



BIANCHI v. NASII.

(1 Mees. & W. 545.)

Exchequer of Pleas, Trinity Term, 1836.

Debt for goods sold and delivered. *Plen, nunquam indebitatus*. At the trial, before the under-sheriff of Middlesex, it appeared that the plaintiff was a dealer in musical snuff-boxes; that the defendant applied to him to let (or lend) him a musical snuff-box, and the plaintiff agreed to do so, on the understanding that the defendant was to have it and pay for it if it were damaged; and the sum of £3 10s. was to be taken as its value. The defendant received the snuff-box on this understanding; it was damaged while in his possession; and the plaintiff, in consequence, refused to receive it back, and brought this action for the price. The under-sheriff left it to the jury to say whether the agreement was, that, in the event of the box being damaged, it was to be a sale; and they found that that was the agreement, and gave a verdict for the plaintiff, damages £3 10s.

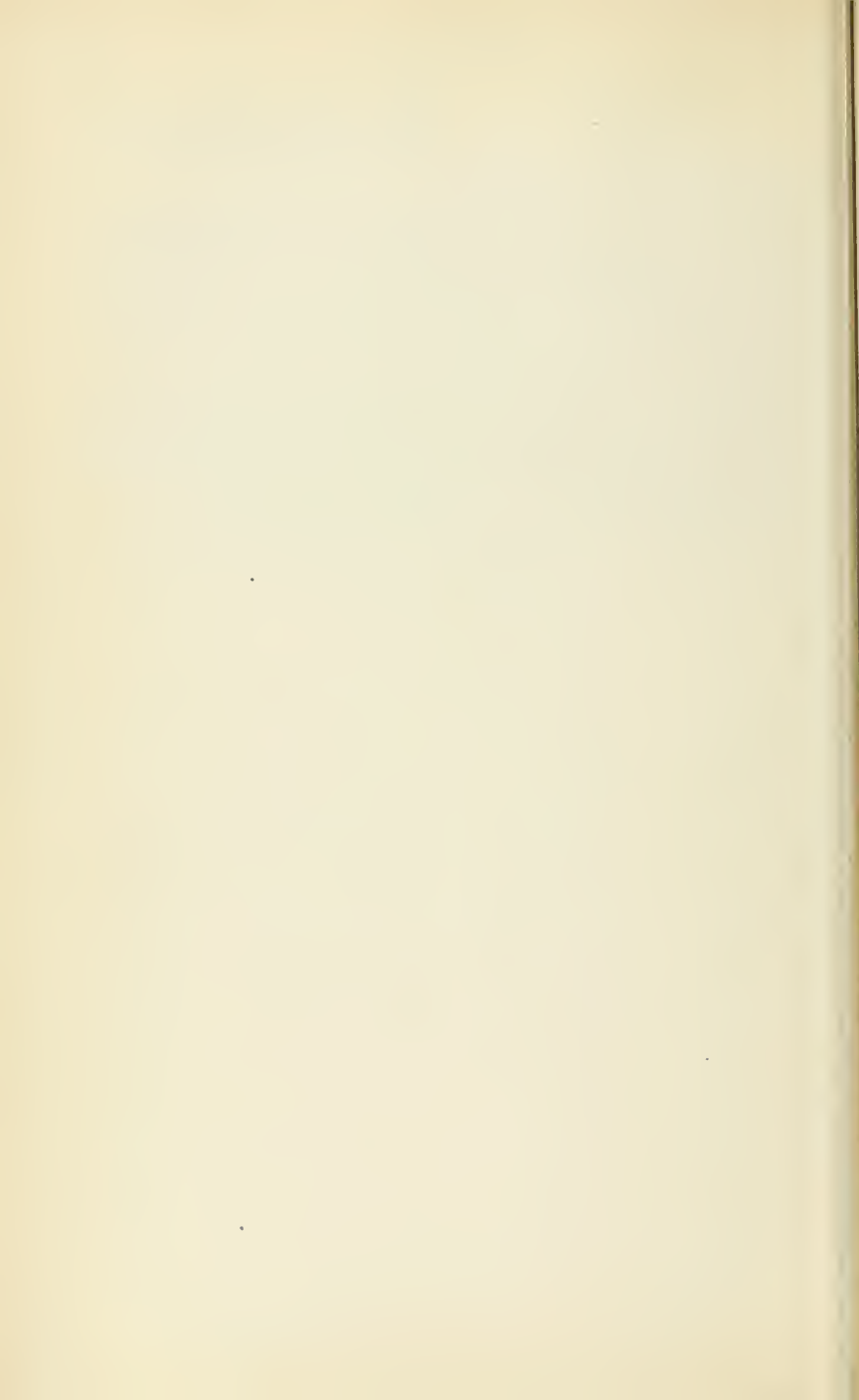
F. V. Lee obtained a rule nisi for a new trial, on the ground that this was a mere

ballment, which ought to have been declared on specially, and that there was no evidence to support the count for goods sold and delivered. Chaudless showed cause. F. V. Lee, contra.

LORD ABINGER, C. B. I think there is no question at all on the general principle applicable to this case; when goods are sold on condition, and the condition is performed, the sale becomes absolute. And there is no little doubt on the evidence, that this was a conditional sale, and that the condition was performed. The defendant agrees to pay the price of the box for it, in case he damages it.

PARKE, B. There was clearly evidence for the jury that this was a contract for a conditional sale; and it was a very reasonable contract. Then there is no doubt that the value was recoverable under the count for goods sold and delivered. As soon as the condition is performed, it is an absolute sale. The other barons concurred. Rule discharged.¹

¹ See *Studdy v. Sanders*, 5 B. & C. 628.



BILL v. BAMENT.

(9 Mees. & W. 36.)

Exchequer of Pleas, Michaelmas Term. Nov. 11, 1841.

Assumpsit for goods sold and delivered, and on an account stated. Plea, non assumpsit. At the trial before Lord Abinger, C. B., at the London sittings after Trinity term, the following facts appeared:—The defendant ordered of one Harvey, who was an agent of the plaintiff under a *credere* commission, a quantity of goods, including twenty dozen hair-brushes and twelve dozen clothes-brushes, to be paid for on delivery at a stipulated price, but no memorandum in writing of the bargain was made at the time. On receiving notice from Harvey that the brushes had arrived at his warehouse, the defendant on the 22d of March last went there, and directed a boy whom he saw there to alter the mark "No. 1" upon one of the packages to "No. 12," and to send the whole of the goods to the St. Catharine's Docks. The next day an invoice was delivered to the defendant, charging the brushes respectively at the rate of 8s. and 12s. each. The defendant objected to this price, alleging that by the contract, as he had understood it, the above were to be the prices of the brushes per dozen, and refused to pay for them. On the 24th of March the plaintiff commenced the present action for the price. On the 27th the defendant at Harvey's request wrote in Harvey's ledger, at the bottom of the page which contained the statement of the articles ordered by the defendant, and which page was headed "Bill & Co.," the following words: "Received the above, John Bament." The rest of the goods were sent to and received by the defendant. It was objected for the defendant that there was no evidence of any contract in writing, or of any acceptance of the brushes, sufficient to satisfy the 17th section of the statute of frauds. The lord chief baron reserved the point, and the plaintiff had a verdict for the amount claimed, leave being reserved to the defendant to move to enter a nonsuit.

Erle having obtained a rule nisi accordingly, Thesiger and Martin now shewed cause. Erle (with whom was Whateley), contra.

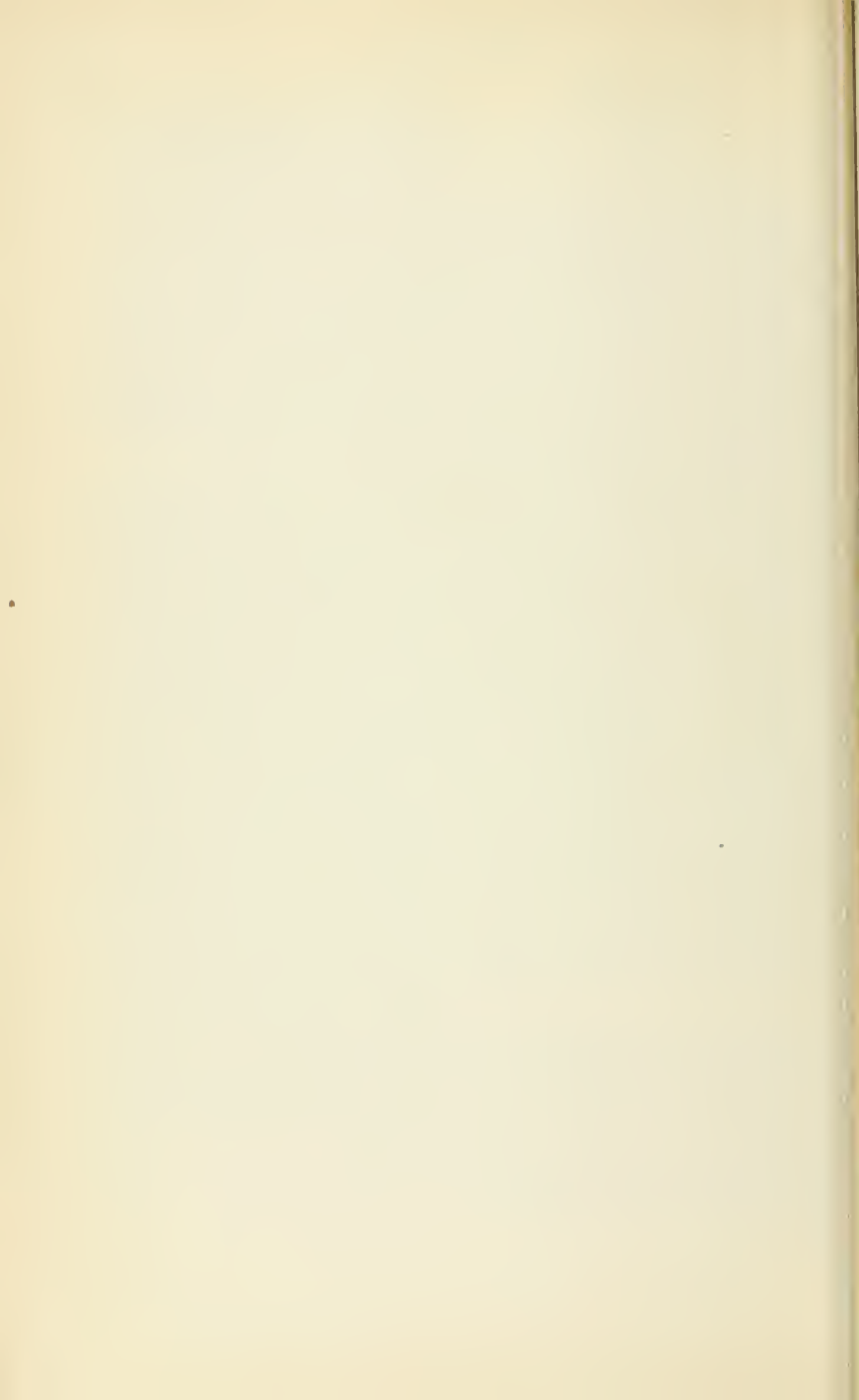
Lord ABINGER, C. B. If the question at the trial had turned altogether upon the acceptance, I should then have formed the same opinion as I do now. In order to make it such an acceptance as to satisfy the statute, it should appear that there was a delivery. Here Harvey was the plaintiff's agent, and sold for ready money; and he was not bound to deliver the goods until payment of the price. Now all that takes place is a direction by the defendant to alter the mark on the goods, and to send them to the docks;

but the question is, whether this was done under such circumstances, and Harvey stood in such a situation, as that he was bound to send them to the docks. The acceptance, to be effectual under the statute, should be such as to devert the property in the goods out of the seller. Here the defendant probably meant to accept them, and to make Harvey his agent for shipping them. But could it be said that he was his agent to deliver at all events? I think clearly not. He was at liberty to say that he would not deliver to or ship for the defendant until the goods were paid for. There is nothing to shew that he contracted to hold them as the defendant's agent, or by implication to make him his agent. Therefore, for want of a delivery, there was no sufficient acceptance of these goods. The rule will be absolute, but not for a nonsuit, as it appears that some goods were received by the defendant, but for a new trial on payment of costs by the plaintiff.

PARKE, B. I concur in thinking that there was no evidence to go to the jury to satisfy the statute of frauds. With regard to the point which has been made by Mr. Martin, that a memorandum in writing after action brought is sufficient, it is certainly quite a new point; but I am clearly of opinion that it is untenable. There must, in order to sustain the action, be a good contract in existence at the time of action brought; and to make it a good contract under the statute there must be one of the three requisites therein mentioned. I think therefore that a written memorandum, or part payment after action brought, is not sufficient to satisfy the statute. Then, to take the case out of the 17th section, there must be both delivery and acceptance; and the question is, whether they have been proved in the present case. I think they have not. I agree that there was evidence for the jury of acceptance, or rather of intended acceptance. The direction to mark the goods was evidence to go to the jury *quo animo* the defendant took possession of them: so also the receipt was some evidence of an acceptance. But there must also be a delivery; and to constitute that the possession must have been parted with by the owner so as to deprive him of the right of lien. Harvey might have agreed to hold the goods as the warehouseman of the defendant, so as to deprive himself of the right to refuse to deliver them without payment of the price; but of that there was no proof. There was no evidence of actual marking of the goods, or that the order to mark was assented to by Harvey. I am of opinion therefore that there was no sufficient proof of acceptance to satisfy the statute, and that the case falls within the 17th section.

GURNEY, B., and ROLFE, B., concurred.

Rule absolute accordingly.



BIRD et al. v. MUNROE.

(66 Me. 237.)

Supreme Judicial Court of Maine. May 29, 1877.

A. S. Rice and O. G. Hall, for plaintiffs.
A. P. Gould and J. E. Moore, for defendant.

PETERS, J. On March 2, 1874, at Rockland, in this state, the defendant contracted verbally with the plaintiffs for the purchase of a quantity of ice, to be delivered, (by immediate shipments,) to the defendant in New York. On March 10, 1874, or thereabouts, the defendant, by his want of readiness to receive a portion of the ice as he had agreed to, temporarily prevented the plaintiffs from performing the contract on their part according to the preparations made by them for the purpose. On March 24, 1874, the parties, then in New York, put their previous verbal contract into writing, ante dating it as an original contract made at Rockland on March 2, 1874. On the same day, (March 24,) by consent of the defendant, the plaintiffs sold the same ice to another party, reserving their claim against the defendant for the damages sustained by them by the breach of the contract by the defendant on March 10th or about that time. This action was commenced on April 11, 1874, counting on the contract as made on March 2, and declaring for damages sustained by the breach of contract on March 10, or thereabouts and prior to March 24, 1874. Several objections are set up against the plaintiffs' right to recover.

The first objection is, that in some respects the allegations in the writ and the written proof do not concur. But we pass this point, as an imperfection in the writ may, either with or without terms, be corrected by amendment hereafter.

Then it is claimed for the defendant that, as matter of fact, the parties intended to make a new and original contract as of March 24, by their writing made on that day and ante-dated March 2, and that it was not their purpose thereby to give expression and efficacy to any unwritten contract made by them before that time. But we think a jury would be well warranted in coming to a different conclusion. Undoubtedly there are circumstances tending to throw some doubt upon the idea that both parties understood that a contract was fully entered into on March 2, 1874, but that doubt is much more than overcome when all the written and oral evidence is considered together. We think the writing made on the 24th March, with the explanations as to its origin, is to be considered precisely as if the parties on that day had signed a paper dated of that date, certifying and admitting that they had on the 2d day of March made a verbal contract and stating in exact written terms just what such verbal contract was. Parol evidence is proper to show the situation of the parties and the circumstances under which the contract was made. It explains but does not alter the terms of the contract. The defend-

ant himself invokes it to show that, according to his view, the paper bears an erroneous date. Such evidence merely discloses in this case such facts as are part of the res gestæ. *Benjamin on Sales*, § 213. *Stoops v. Smith*, 101 Mass. 63, 66; and cases there cited.

Then, the defendant next contends that, even if the writing signed by the parties was intended by them to operate retroactively as of the first named date as a matter of law, it cannot be permitted to have that effect and meet the requirements of the statute of frauds. The position of the defendant is, that all which took place between the parties before the 24th of March was of the nature of negotiation and proposition only; and that there was no valid contract, such as is called for by the statute of frauds, before that day; and that the action is not maintainable, because the breach of contract is alleged to have occurred before that time. The plaintiffs, on the other hand, contend that the real contract was made verbally on the 2d of March, and that the written instrument is sufficient proof to make the verbal contract a valid one as of that date, (March 2,) although the written proof was not made out until twenty-two days after that time. Was the valid contract, therefore, made on March 2d or March the 24th? The point raised is, whether, in view of the statute of frauds, the writing in this case shall be considered as constituting the contract itself or at any rate any substantial portion of it, or whether it may be regarded as merely the necessary legal evidence by means of which the prior unwritten contract may be proved. In other words, is the writing the contract, or only evidence of it; we incline to the latter view.

The peculiar wording of the statute presents a strong argument for such a determination. The section reads: "No contract for the sale of any goods, wares, or merchandise, for thirty dollars or more, shall be valid, unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or his agent." In the first place, the statute does not go to all contracts of sale, but only to those where the price is over a certain sum. Then, the requirement of the statute is in the alternative. The contract need not be evidenced by writing at all, provided "the purchaser accepts and receives a part of the goods, or gives something in earnest to bind the bargain or in part payment thereof." If any one of these circumstances will as effectually perfect the sale as a writing would, it is not easily seen how the writing can actually constitute the contract, merely because a writing happens to exist. It could not with any correctness be said, that anything given in earnest to bind a bargain was a substantial part of the bargain itself, or anything more than a particular mode of proof. Then, it is not the contract that is required to be in writing, but only "some note or

memorandum thereof." This language supposes that the verbal bargain may be first made, and a memorandum of it given afterwards. It also implies that no set and formal agreement is called for. Chancellor Kent says "the instrument is liberally construed without regard to forms." The briefest possible forms of a bargain have been deemed sufficient in many cases. Certain important elements of a completed contract may be omitted altogether. For instance, in this state, the consideration for the promise is not required to be expressed in writing. *Gilgiban v. Boardman*, 29 Maine, 79. Again, it is provided that the note or memorandum is sufficient, if signed only by the person sought to be charged. One party may be held thereby and the other not be. There may be a mutuality of contract but not of evidence or of remedy. Still, if the writing is to be regarded in all cases as constituting the contract, in many cases there would be but one contracting party.

Another idea gives weight to the argument for the position advocated by the plaintiffs; and that is, that such a construction of the statute upholds contracts according to the intention of parties thereto, while it, at the same time, fully subserves all the purposes for which the statute was created. It must be borne in mind that verbal bargains for the sale of personal property are good at common law. Nor are they made illegal by the statute. Parties can execute them if they mutually please to do so. The object of the statute is, to prevent perjury and fraud. Of course, perjury and fraud cannot be wholly prevented; but, as said by Bigelow, J., (*Marsh v. Hyde*, 3 Gray, 331,) "a memorandum in writing will be as effectual against perjury, although signed subsequently to the making of a verbal contract, as if it had been executed at the moment when the parties consummated their agreement by word of mouth." We think it would be more so. A person would be likely to commit himself in writing with more care and caution after time to take a second thought. The locus penitentiae remains to him.

By no means are we to be understood as saying that all written instruments will satisfy the statute, by having the effect to make the contracts described in them valid from their first verbal inception. That must depend upon circumstances. In many, and perhaps, most instances such a version of the transaction would not agree with the actual understanding of the parties. In many cases, undoubtedly, the written instrument is per se the contract of the parties. In many cases, as for instance, like the antedating of the deed in *Egery v. Woodard*, 56 Maine, 45, cited by the defendant, the contract, (by deed,) could not take effect before delivery; the law forbids it. So a will made by parol is absolutely void. But all these classes of cases differ from the case before us.

A distinction is attempted to be set up between the meaning to be given to R. S. c. 111, § 4, where it is provided that no

unwritten contract for the sale of goods "shall be valid," and that to be given to the several preceding sections where it is provided that upon certain other kinds of unwritten contracts "no action shall be maintained;" the position taken being that in the former case the contract is void, and in the other cases only voidable perhaps, or not enforceable by suit at law. But the distinction is without any essential difference, and is now so regarded by authors generally and in most of the decided cases. All the sections referred to rest upon precisely the same policy. Exactly the same object is aimed at in all. The difference of phraseology in the different sections of the original English statute, of which ours is a substantial copy, may perhaps be accounted for by the fact, as is generally conceded, that the authorship of the statute was the work of different hands. Although our statute (R. S. 1871, § 4,) uses the words "no contract shall be valid," our previous statutes used the phrase "shall be allowed to be good;" and the change was made when the statutes were revised in 1857, without any legislative intent to make an alteration in the sense of the section. (R. S. 1841, c. 136, § 4.) The two sets of phrases were undoubtedly deemed to be equivalent expressions. The words of the original English section are, "shall not be allowed to be good," meaning, it is said, not good for the purpose of sustaining an action thereon without written proof. *Browne, St. Frauds*, §§ 115, 136, and notes to the sections; *Benjamin's Sales*, § 114; *Townsend v. Hargraves*, 118 Mass. 325; and cases there cited.

There are few decisions that bear directly upon the precise point which this case presents to us. From the nature of things, a state of facts involving the question would seldom exist. But we regard the case of *Townsend v. Hargraves*, above cited, as representing the principle very pointedly. It was there held that the statute of frauds affects the remedy only and not the validity of the contract; and that where there has been a completed oral contract of sale of goods, the acceptance and receipt of part of the goods by the purchaser takes the case out of the statute, although such acceptance and receipt are after the rest of the goods are destroyed by fire while in the hands of the seller or his agent. The date of the agreement rather than the date of the part acceptance was treated as the time when the contract was made; and the risk of the loss of the goods was cast upon the buyer. *Vincent v. Germond*, 11 Johns. 283, is to the same effect. We are not aware of any case where the question has been directly adjudicated adversely to these cases. *Webster v. Zielly*, 52 Barb. (N. Y.) 482, in the argument of the court, directly admits the same principle. The case of *Leather Cloth Co. v. Hieronimus*, L. R., 10 Q. B. 140, seems also to be an authority directly in point. *Thompson v. Alger*, 12 Met. 428, 435 and *Marsh v. Hyde*, 3 Gray, 331, relied on by defendant, do not, in their results, oppose the idea of the above cases, although there

may be some expression in them inconsistent therewith. Altogether another question was before the court in the latter cases.

But there are a great many cases where, in construing the statute of frauds, the force and effect of the decisions go to sustain the view we take of this question, by the very strongest implication: Such as; that the statute does not apply where the contract has been executed on both sides; *Bucknam v. Nash*, 12 Maine, 474;—that no person can take advantage of the statute but the parties to the contract, and their privies; *Cowan v. Adams*, 10 Maine, 374;—that the memorandum may be made by a broker; *Hinckley v. Arey*, 27 Maine, 362; or by an auctioneer; *Cleaves v. Foss*, 4 Maine, 1;—that a sale of personal property is valid when there has been a delivery and acceptance of part, although the part be accepted several hours after the sale; *Davis v. Moore*, 13 Maine, 424; or several days after; *Bush v. Holmes*, 53 Maine, 417; or ever so long after; *Browne St. Frauds*, § 337, and cases there noted;—that a creditor, receiving payments from his debtor without any direction as to their application, may apply them to a debt on which the statute of frauds does not allow an action to be maintained; *Waynes v. Nee*, 100 Mass. 327;—that a contract made in France, and valid there without a writing, could not be enforced in England without one, upon the ground that the statute related to the mode of procedure and not to the validity of the contract; *Leroux v. Brown*, 12 C. B. 801; but this case has been questioned somewhat;—that a witness may be guilty of perjury who falsely swears to a fact which may not be competent evidence by the statute of frauds, but which becomes material because not objected to by the party against whom it was offered and received; *Howard v. Sexton*, 4 Comstock, 157;—that an agent who signs a memorandum need not have his authority at the time the contract is entered into, if his act is orally ratified afterwards; *Maclean v. Dunn*, 4 Bing. 722;—that the identical agreement need not be signed, and that it is sufficient if it is acknowledged by any other instrument duly signed; *Gale v. Nixon*, 6 Cow. 445;—that the recognition of the contract may be contained in a letter; or in several letters, if so connected by "written links" as to form sufficient evidence of the contract;—that the letters may be addressed to a third person; *Browne St. Frauds*, § 346; *Pyson v. Kitton*, 30 E. L. & Eq. 374; *Gibson v. Holland*, L. R. 1 C. P. 1;—that an agent may write his own name instead of that of his principal if intending to bind his principal by it; *Williams v. Bacon*, 2 Gray, 387, 393, and citations there;—that a proposal in writing, if accepted by the other party by parol, is a sufficient memorandum; *Reuss v. Pickersley*, L. R. 1 Exc. 342;—that where one party is bound by a note or memorandum the other party may be bound if he admits the writing by another writing by him subsequently signed; *Dobell v. Hutchinson*, 3 A. & E. 355;—that the written contract may be

rescinded by parol, although many decisions are opposed to this proposition; *Richardson v. Cooper*, 25 Maine, 450;—that equity will interfere to prevent a party making the statute an instrument of fraud; *Ryan v. Dox*, 34 N. Y. 307; *Hessam v. Barrett*, 115 Mass. 256, 258;—that a contract verbally made may be maintained for certain purposes, notwithstanding the statute;—that a person who pays his money under it cannot recover it back if the other side is willing to perform; and he can recover if performance is refused; *Chapman v. Kieh*, 63 Maine, 588, and cases cited;—that a respondent in equity waives the statute as a defense unless set up in plea or answer; *Adams v. Patrick*, 30 Vt. 516;—that it must be specially pleaded in an action at law; *Middlesex Co. v. Osgood*, 4 Gray, 447; *Lawrence v. Chase*, 54 Maine, 136;—that the defendant may waive the protection of the statute and admit verbal evidence and become bound by it; *Browne St. Frauds*, § 135.

It may be remarked, however, that in most courts a defendant may avail himself of a defense of the statute under the general issue. The different rule in Massachusetts and Maine, grew out of the practice act in the one state and in the statute requiring the filing of specifications in the other.

It is clear from the foregoing cases, as well as from many more that might be cited, that the statute does not forbid parol contracts, but only precludes the bringing of actions to enforce them. As said in *Thornton v. Kempster*, 5 Taunt. 786, 788, "the statute of frauds throws a difficulty in the way of the evidence." In a case already cited, *Jervis, C. J.*, said, "the effect of the section is not to avoid the contract, but to bar the remedy upon it, unless there be writing." See analogous case of *McClellan v. McClellan*, 65 Maine, 500.

But the defendant contends that this course of reasoning would make a memorandum sufficient if made after action brought, and that the authorities do not agree to that proposition. There has been some judicial inclination to favor the doctrine to that extent even, and there may be some logic in it. Still the current of decision requires that the writing must exist before action brought. And the reason for the requirement does not militate against the idea that a memorandum is only evidence of the contract. There is no actionable contract before memorandum obtained. The contract cannot be sued until it has been legally verified by writing; until then there is no cause of action, although there is a contract. The writing is a condition precedent to the right to sue. *Willes, J.*, perhaps correctly describes it in *Gibson v. Holland*, supra, when he says, "the memorandum is in some way to stand in the place of a contract." He adds: "The courts have considered the intention of the legislature to be of a mixed character: to prevent persons from having actions brought against them so long as no written evidence was existing when the action was instituted."

Browne, St. Frauds, § 338. Benjamin's Sales, § 159. Fricker v. Thomlinson, 1 Man. & Gr. 772. Bradford v. Spyker, 32 Ala. 134. Bill v. Bament, 9 M. & W. 36. Philbrook v. Belknap, 6 Vt. 383. In the last case it is said, "strictly speaking, the statute does not make the contract void, except for the purpose of sustaining an action upon it, to enforce it." Action to stand for trial.

APPLETON, C. J., WALTON, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.



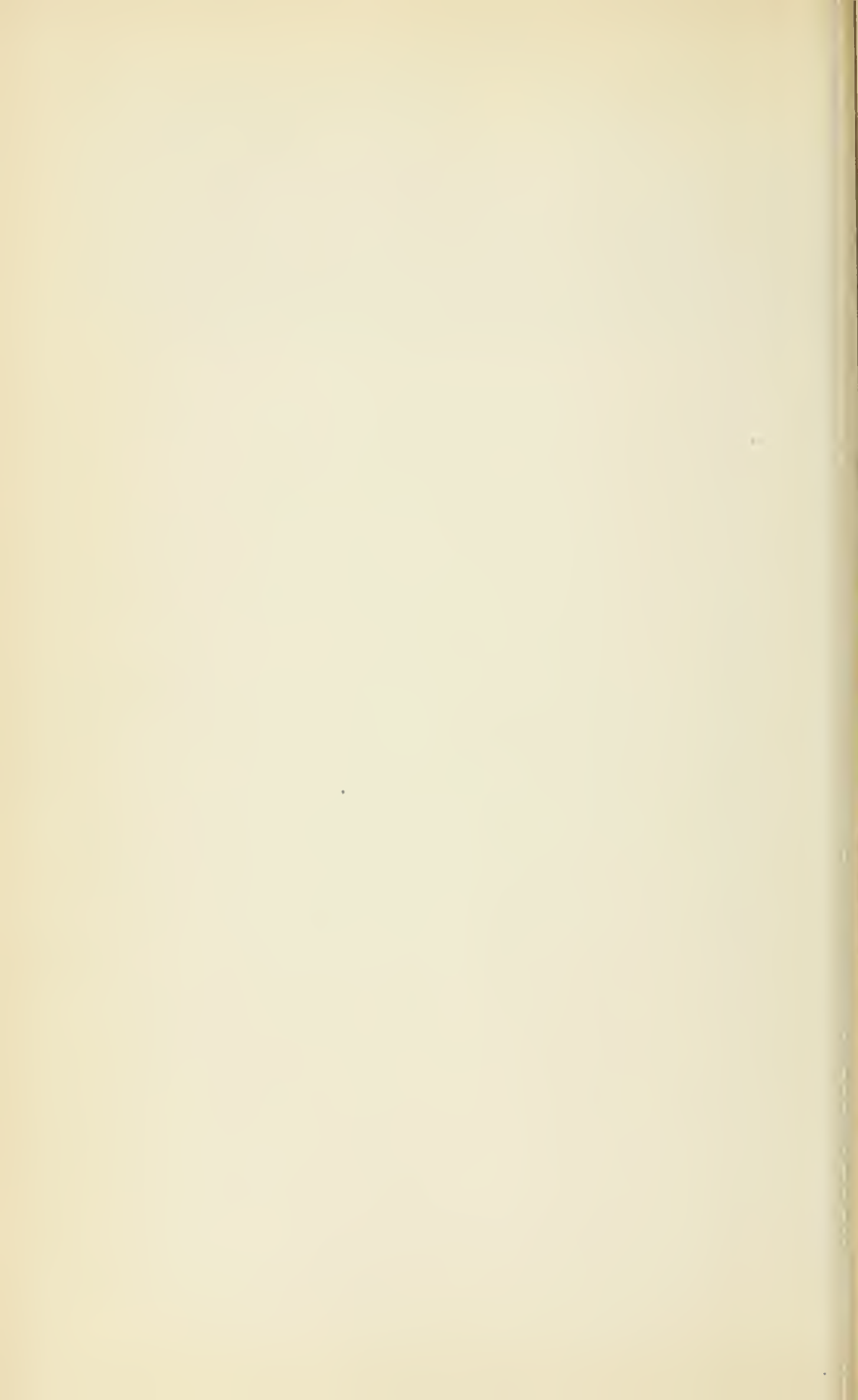
BISHOP v. SHILLITO.

(2 Barn. & Ald. 329, n. (a).)

King's Bench, Hilary Term. 1819.

Trover for iron. The iron was to be delivered under a contract that certain bills outstanding against the plaintiff should be taken out of circulation. After a part of the iron had been delivered, and no bills had been taken out of circulation, the plaintiff stopped the farther delivery, and brought trover for what had been delivered. Scarlett, for defendant, contended that trover would not lie, and that the only remedy for the plaintiff was to

bring an action for the breach of the contract by the defendant. But the COURT held that this was only if conditional delivery, and the condition being broken, the plaintiff might bring trover. ALBOTT, C. J., said he had left it to the jury to say, whether the delivery of the iron and the redelivery of the bills, were to be contemporary, and that the jury found that fact in the affirmative; and BAYLEY, J., added, that if a tradesman sold goods to be paid for on delivery, and his servant by mistake delivers them without receiving the money, he may, after demand and refusal to deliver or pay, bring trover for his goods against the purchaser.



BLOXAM et al. v. SANDERS et al.

(4 Barn. & C. 941.)

King's Bench, Michaelmas Term, 1825.

Trover to recover the value of a quantity of hops from the defendants. At the trial before Abbott C. J. at the London sittings, after last Trinity term, the jury found a verdict for the plaintiffs, damages £300, subject to the opinion of this court upon the following case: The plaintiffs were assignees of J. R. Saxby, a bankrupt under a commission of bankruptcy duly issued against him on the 5th January 1824. The act of bankruptcy was committed on the 1st November 1823, the bankrupt having on that day surrendered himself to prison, where he lay more than two months. The defendants were hop factors and merchants in the borough of Southwark. Previous to his bankruptcy the bankrupt had been a dealer in hops, and on the 7th, 16th, and 23d August purchased from the defendants the hops (among others) for which this action was brought. Bought notes were delivered in the following form: "Mr. John Robert Saxby, of Sanders, Parkes, and Co. T. M. Simmonds, eight pockets at 15s., 8th August 1823." Part of the hops were weighed, and an account of the weights was delivered to Saxby by the defendants. The samples were given to the bankrupt, and bills of parcels were also delivered to him in which he was made debtor for six different parcels of hops, the amount of which was £739. The usual time of payment in the trade was the second Saturday subsequent to a purchase. Part of the hops belonged to the defendants, and part they sold as factors, but they sold all in their own names, it being the custom in the hop trade to do so. It was proved that the bankrupt had said more than once that the hops were to remain in the defendants' hands till paid for, and that he said so when he was about buying one of the parcels of hops for which the action was brought. The bankrupt did not pay for the hops, and on the 6th September 1823 the defendants wrote to the bankrupt, and desired him to "take notice, that unless he paid for the hops they had sold him, on or before Tuesday then next, the defendants would proceed to resell them, holding him accountable for any loss which might arise in consequence thereof." Before the bankruptcy the defendants did not sell any parcel of hops without the bankrupt's express assent. After the notice already stated the defendants sold some parcels of the hops, but in one instance the bankrupt refused to allow the defendants to sell a parcel of hops to a person named by them at the price offered, and that parcel was accordingly sold by the defendants, before Saxby's bankruptcy, to another person by Saxby's authority. On another occasion in the month of September the bankrupt had employed a broker to sell another parcel of the hops, but the defendants refused to deliver them without being paid for them. After the act of bankruptcy the defendants sold hops of the bankrupt's to the amount of £380 19s. 5d. The defendants

delivered account sales of the hops so sold by them after the bankruptcy. The hops were stated to be sold for Saxby, and he was charged warehouse rent from the 30th of August, and also commission on the sales. Besides the hops purchased from the defendants, the bankrupt placed in their warehouse nineteen pockets of hops for sale by them (as factors), of which fifteen pockets were sold on and after the 13th of January 1824 of the value of £77 19s. 5d., and of which four remained in their warehouse at the time of the trial, which four were of the value of £14, and there were also unsold of the hops purchased from defendants seven bags, fifty-six pockets, of the value of £251 13s. 6d. There was a demand by plaintiffs of these hops, and a tender of warehouse rent and charges, and a refusal on the part of the defendants to deliver them, before action brought. The jury found that the defendants did not rescind the sales made by them to the bankrupt. This case was argued at the sittings before last term, by

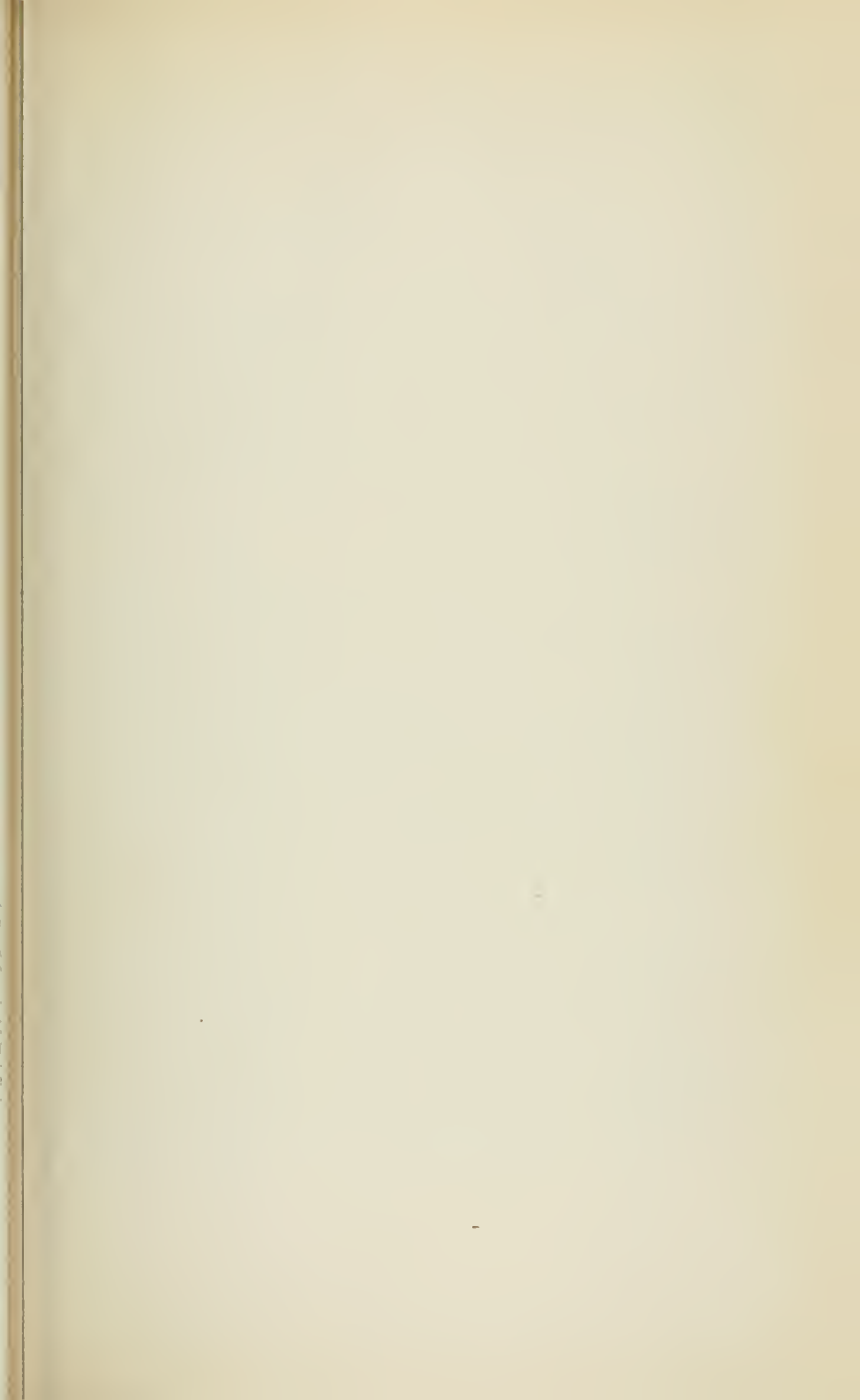
Evans, for the plaintiffs. Abraham, contra.

BAYLEY, J. now delivered the judgment of the court. This was an action of trover for certain quantities of hops sold by the defendants to Saxby before his bankruptcy, and for certain other hops which Saxby had placed in defendants' warehouses that defendants in their character of factors might sell them for misuse, and the question as to this latter parcel stands upon perfectly distinct grounds from the question as to the others. This parcel consisted of nineteen pockets; defendants sold none of them until after Saxby's bankruptcy, and then they sold fifteen pockets, not for the use of the assignees, but to apply the proceeds, not for any debt due to them in their character of factors, but to discharge a claim they considered themselves as having upon Saxby in regard to the other hops; and the other four pockets they refused to deliver to the assignees. It was candidly admitted upon the argument, and was clear beyond all doubt, that the defendants were not warranted in applying the proceeds of the fifteen pockets to the purpose to which they attempted to apply them, and that they had no legal ground for withholding the four pockets; and, therefore, to the extent of these nineteen pockets, the value of which is £91 19s. 5d., we think it clear that the plaintiffs are entitled to recover. The other quantities were hops Saxby had bargained to buy of the defendants on different days in August 1823, and for which defendants had delivered bought notes to Saxby. The bought notes were in this form: "Mr. J. R. Saxby, of Sanders, Parkes, and Co. T. M. Simmonds, eight pockets at 15s., 8th August 1823." Part of the hops were weighed, and an account delivered to Saxby of the weights, and samples were given to Saxby and invoices delivered. The bought notes were silent as to the time for delivering the hops, and also as to the time for paying for them, but the usual time for paying for hops was proved

to be the second Saturday after the purchase. It was also proved that Saxby had said that the hops were to remain with the defendants till they were paid for; but as the admissibility of such evidence was questioned, and in our view of the case it is unnecessary to decide that point, I only mention it to dismiss it. (The learned judge then stated the other facts set out in the special case, and then proceeded as follows.) Under these circumstances the question is, whether in respect of these hops the plaintiffs are entitled to recover. It was urged, on the part of the plaintiffs, that the sale of these hops vested the property in them in Saxby; that the hops were to be considered as sold upon credit, and that defendants had no lien therefore upon any of them for the price; that if they ever had any lien, it was destroyed as to those they sold by the act of sale, and that the plaintiffs were entitled to recover the full value of what were sold, without making any deduction for the price which was unpaid. It is, therefore, material to consider whether the property vested in Saxby to any and to what extent; and what were the respective rights of Saxby and of the defendants. Where goods are sold and nothing is said as to the time of the delivery, or the time of payment, and every thing the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded upon payment of the price; but the buyer has no right to have possession of the goods till he pays the price. The buyer's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, and payment or a tender of the price is a condition precedent on the buyer's part, and until he makes such payment or tender he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute, it is liable to be defeated if he becomes insolvent before he obtains possession, *Tooke v. Hollingworth*, 5 T. R. 215.—Whether default in payment when the credit expires will destroy his right of possession, if he has not before that time obtained actual possession, and put him in the same situation as if there had been no bargain for credit, it is not now necessary to inquire, because this is a case of insolvency, and in case of insolvency the point seems to be perfectly

clear, *Hanson v. Meyer*, 6 East, 614. If the seller has dispatched the goods to the buyer, and insolvency occurs, he has a right in virtue of his original ownership to stop them in transitu, *Mason v. Lickbarrow*, 1 H. Bl. 357.—*Ellis v. Hunt*, 3 T. R. 464.—*Hodgson v. Loy*, 7 T. R. 440.—*Inglis v. Usherwood*, 1 East, 515.—*Bohtlingk v. Inglis*, 3 East, 381. Why? Because the property is vested in the buyer, so as to subject him to the risk of any accident; but he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats that right. And if this be the case after he has dispatched the goods, and whilst they are in transitu, a fortiori, is it when he has never parted with the goods, and when no transitus has begun. The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price, or they may still act upon their right of property if any thing unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which right of property and right of possession are both requisite, unless they have both those rights, *Gordon v. Harper*, 7 T. R. 9. Trover is an action of that description, it requires right of property and right of possession to support it. And this is an answer to the argument upon the charge of warehouse rent, and the non-rescinding of the sale. If the defendants were forced to keep the hops in their warehouse longer than Saxby had a right to require them, they were entitled to charge him with that expense, but that charge gave him no better right of possession than he would have had if that charge had not been made. Indeed that charge was not made until after the bankruptcy, and until the defendants insisted that the right of possession was transferred to their second vendee. Then as to the non-rescinding of the sale, what can be its effect? It is nothing more than insisting that the defendants will not release Saxby from the obligation of his purchase, but it will give him no right beyond the right his purchase gave, and that is a right to have the possession on payment of the price. As that price has not been paid or tendered, we are of opinion that this action, which is not an action for special damage by a wrongful sale, but an action of trover, cannot, as to those hops, be maintained. The verdict must, therefore, be for the plaintiffs for the sum of £91.19s.5d. only.

Judgment for the plaintiffs.



BOOTHBY et al. v. PLAISTED.

(51 N. H. 436.)

Supreme Judicial Court of New Hampshire.
 Rockingham. Dec., 1871.

Assumpsit by James L. Boothby and another against Sidney G. Plaisted for goods sold and delivered. The court ordered a verdict for plaintiffs, which defendant moved to set aside. Judgment on verdict.

A traveling agent for plaintiffs, who were liquor dealers in New York, called at defendant's place of business in New Hampshire, and showed him samples of various liquors. Defendant gave the salesman an order for some of these liquors, it being agreed that the purchaser need not accept them if they were not like the samples shown him. The liquors were forwarded to defendant from New York, and received and used by him; plaintiffs charging defendant for cartage in New York, and he paying the freight from New York to his place of business in New Hampshire.

Frink and Butler, for plaintiffs. Hatch and Page, for defendant.

SARGENT, J. In all respects save one, this sale of liquor stands upon the same foundation as the numerous cases reported in our state. That exception is the fact that the defendant, "after the liquors arrived at his store, might examine them, and if not according to sample he need not accept the same." But waiving that part of the contract for the present, this case, aside from that, presents the same features of numerous other cases where there was a contract for the sale of liquors made in New Hampshire, but the completed sale (completed by separating the liquors from a larger mass and setting them apart for the defendant, marking and directing them, and then by delivery at the place agreed on) was in another state. The charge for cartage is waived by the plaintiff; and the case finds that the defendant paid the freight from New York. *Bancher v. Warren*, 33 N. H. 183; *Smith & Lougee v. Smith*, 27 N. H. 244; *Woolsey v. Bailey*, 27 N. H. 219; *Gassett v. Godfrey*, 26 N. H. 415; *Garland v. Lane*, 46 N. H. 248; *Butler v. Northumberland*, 50 N. H. 33.

But we cannot see that the additional provision as to acceptance is anything more than the law implies in every contract where a sale is made by sample or with warranty, except that in this case it was agreed that the defendant should decide for himself whether or not the goods were according to the sample; and he certainly cannot be heard to object that he himself was made the umpire, and has by his own acts decided the case in favor of the plaintiffs.

His accepting and using the goods is

sufficient proof that they were considered to be according to sample; and if they were according to the sample, then he had no right or power under the contract to refuse to receive them.

What questions might have arisen had the defendant in fact refused to receive them, it is not important here to determine. Here was a contract for a sale and delivery in New York of a certain description of goods as per sample. If the plaintiffs performed their part of the contract fully by delivering at the time and place agreed the article which they agreed to furnish, then it became at once the property of the defendant, and he would ordinarily have no right to refuse to accept it. Ordinarily it would be a question for the jury to settle, whether the goods delivered were according to contract or like the sample. But in this case the parties agreed that that fact should be referred to the defendant, and he has decided the case in favor of the plaintiff.

The defendant might refuse to accept if the article was not such as the plaintiffs had sold him. He was at liberty to refuse to receive an article which he had not bought or agreed to take. But the article in this case which was sold was delivered and was accepted, and we think the contract binds the defendant from the time the goods were delivered.

A case in point is *Gibson v. Stevens*, 8 How. (U. S.) 40, where there was a guarantee that certain goods sold should bear inspection. In that case the price had been paid and a bill of sale of the goods taken, but no delivery of the goods had been made. They were left in the hands of the vendor. Taney, C. J., in the opinion, says,—"The guarantee that the articles should pass inspection does not affect the character of the transaction, or convert it into an executory contract. It is nothing more than the usual warranty of the soundness and quality of the thing sold, which is taken in every sale of personal property where the purchaser does not choose to take the risk upon himself." 2 Kent's Com. 480; 1 Parsons on Con. 593; 1 Smith's Lead. Cases 308; *Vincent v. Germond*, 11 Johns. 283.

As to the questions and answers in the plaintiff's deposition, they are clearly competent as they stand. The witness states the matter as something within his own knowledge, and if so, the facts stated are all competent and proper. But it is urged that it must be inferred from the facts stated in the case that the witness did not know the facts contained in the answers except by hearsay. But we think no such inference necessarily follows from the facts stated in the case. Upon this point, however, the case of *Dickinson v. Lovell*, 35 N. H. 9, 17, and 18, is in point, and is entirely conclusive.

Judgment on the verdict.



BRABROOK v. BOSTON FIVE CENTS SAV. BANK.

(101 Mass. 228.)

Supreme Judicial Court of Massachusetts. Suffolk. March, 1870.

Contract for money had and received. Submitted on the following agreed facts:

On July 10, 1860, David Knowles, the father of the plaintiff, then Eliza H. Knowles, but since married to George Brabrook, gave to John T. Dingley \$3000, to deposit with the defendants. "If it would be competent to prove by parol evidence, it is agreed that Dingley informed David Knowles that the by-laws of the defendants did not allow so large a deposit in the name of one person, but that he could deposit it in the names of his children for himself. Thereupon Dingley, by the direction of David Knowles, deposited the same, in equal proportions, in the name of David Knowles, and his three children, one of whom was the plaintiff, took therefor four books from the defendants, informed David Knowles of what he had done, and showed him the books, and he approved the same. The entry in the book of the defendants, and in the pass-books, was as follows: 'David Knowles, trustee for Eliza Knowles,' with the date and amount of deposit. The deposit remained with the defendants unchanged, except that sums from time to time were drawn on account of interest, by Dingley, by the direction of David Knowles, and paid to him, so as to keep the whole sum below \$1000, until the death of David Knowles. Dingley was appointed executor of the will of David Knowles, and as such claimed the funds in defendants' hands as belonging to his estate. All four of the bank books remained in the possession of Dingley until the death of his testator, and have since been in his possession as executor. The defendants' by-laws may be referred to if deemed material. If, upon these facts, the court should be of opinion that the plaintiff is entitled to said funds, judgment is to be entered for the plaintiff for the amount in the defendants' hands; otherwise the plaintiff is to become nonsuit."

H. C. Hutchins, for plaintiff. J. P. Henly, for defendant.

WELLS, J. The plaintiff shows no right to hold the money deposited with the defendant by David Knowles. It was not money that belonged to her originally, as was the case in *Farrelly v. Ladd*, 10 Allen, 127, and *Hunnewell v. Lane*, 11 Met. 163, relied upon by the plaintiff's counsel. The money belonged to David Knowles in his own right. He was not in fact trustee for Eliza Knowles, otherwise than by the form of the deposit. He was under no previous obligation to pay the money to her, or to hold it for her benefit. The voucher for the deposit, without the production of which, according to the conditions under which it was made, it could not be withdrawn, was never delivered to her, but retained exclusively in his own hands. *Wall v. Provident Institution for*

Savings, 3 Allen, 96. The whole transaction was his own voluntary act, to which she was in no way a party or privy. There was no declaration made to her, or to be communicated to her, of any intention that the money should be hers. Even if the form of the deposit is to be taken as conclusive proof of the existence of such an intention in his mind, the execution of that intent was not so far complete as to operate to pass the title. Knowledge of the gift, on the part of the donee, at the time it is made, is not essential, it is true, in order that it may take effect. If the act of transfer be complete on the part of the donor, subsequent acceptance by the donee before revocation will be sufficient. But there must be some act of delivery out of the possession of the donor, for the purpose and with the intent that the title shall thereby pass. This principle is distinctly recognized in the case of *Minchin v. Merrill*, 2 Edw. Ch. 333, cited by the plaintiff's counsel. In that case, as well as in several others of those cited, there was a complete delivery of the subject of the gift to a third party, in whose hands it was charged with the trust, the donor having parted with the possession and control. In none of them is there a denial of the principle above stated. In *Howard v. Windham County Savings Bank*, 40 Verm. 597, the deposit was made directly to the credit of the intended donee, making it a completed gift. The deposit by Knowles was entered in his own name and to his own credit. The legal title, and right to draw money so deposited, remains with the depositor. There was no direction or authority for the bank to pay it to the plaintiff. The form of the deposit does not imply such an intent; nor any obligation or right, on the part of the bank, so to pay it over. The declaration of trust is evidence that Knowles, the depositor, held the fund in some manner for the benefit of the person named as cestui que trust. But it did not, of itself, transfer to her the possession, nor the right of possession; nor constitute a legal title in her. A deed, executed and put on record by the grantor, does not pass the title without some further act of delivery and acceptance. *Maynard v. Maynard*, 10 Mass. 456. *Samson v. Thornton*, 3 Met. 275. But if the grantor intend that the grantee shall receive it from the register, or if there be a previous agreement that the deed when made shall be so delivered at the registry, it will be effectual as a delivery. *Shaw v. Hayward*, 7 Cush. 170. So if there be an actual trust, and an obligation to make the transfer for the security of that trust, the continued possession of the instrument by the person who executed it, being also its proper custodian for the cestui que trust, is consistent with an assignment completed by delivery; and a legal delivery to pass the title will be inferred from very slight evidence. *Moore v. Hazelton*, 9 Allen, 102. But there must be delivery or some equivalent act with intent to pass the title. *Chase v. Breed*, 5 Gray, 410. When the instrument is in fulfillment of a legal obligation, the intent may be inferred from that fact. Perhaps the same would be true of

a moral obligation, such as provision for wife or child. *Astreen v. Flanagan*, 3 Edw. Ch. 279. We presume the decision in *Witzel v. Chapin*, 3 Bradf. 386, cited by the plaintiff, was made upon some considerations of this nature. That decision recognizes that it is a question of intent. See also *Granzia v. Arden*, 10 Johns. 293; *Goodrich v. Walker*, 1 Johns. Cas. 251. Assuming in this case that the deposit and declaration of trust was a sufficient act of delivery to pass the title, if such were the intent, we think the facts agreed show clearly that such was not the intent of the depositor. On the contrary, it would appear that it was the intention of Knowles to deposit the whole money as his own; and that the form of deposit was adopted for the sole purpose of evading a by-law of the bank and a provision of the statutes, limiting the amount that could be received from any one depositor to one thousand dollars.

1. The plaintiff contends that the written declaration of trust is conclusive, and objects to the competency of evidence to prove the facts relied on in defence; first, because it violates the rule excluding parol evidence to contradict or vary the terms of a written instrument. But that is a rule which applies to suits upon the instrument and between the parties to it. 1 Greenl. Ev. § 279. The plaintiff is no party to the contract between David Knowles and the defendant. She could maintain no action upon it. If she can recover at all, it is because the money belongs to her, and the trust, being a mere naked trust for her benefit, is terminable at her pleasure. The contract of deposit is collateral to her title, which depends upon her relations with David Knowles. As to her and her claim, whether upon the bank or upon David Knowles, the contract is merely evidence by way of admission, subject to be controlled by any competent evidence as to the actual facts. In *McCluskey v. Provident Institution for Savings*, 103 Mass. 300, a deposit in the plaintiff's own name was controlled by proof that the money deposited belonged in fact to the estate of her deceased husband.

2. For similar reasons the plaintiff cannot set up, as an estoppel against the defendant or against David Knowles, the by-law of the bank providing that "any depositor may designate, at the time of

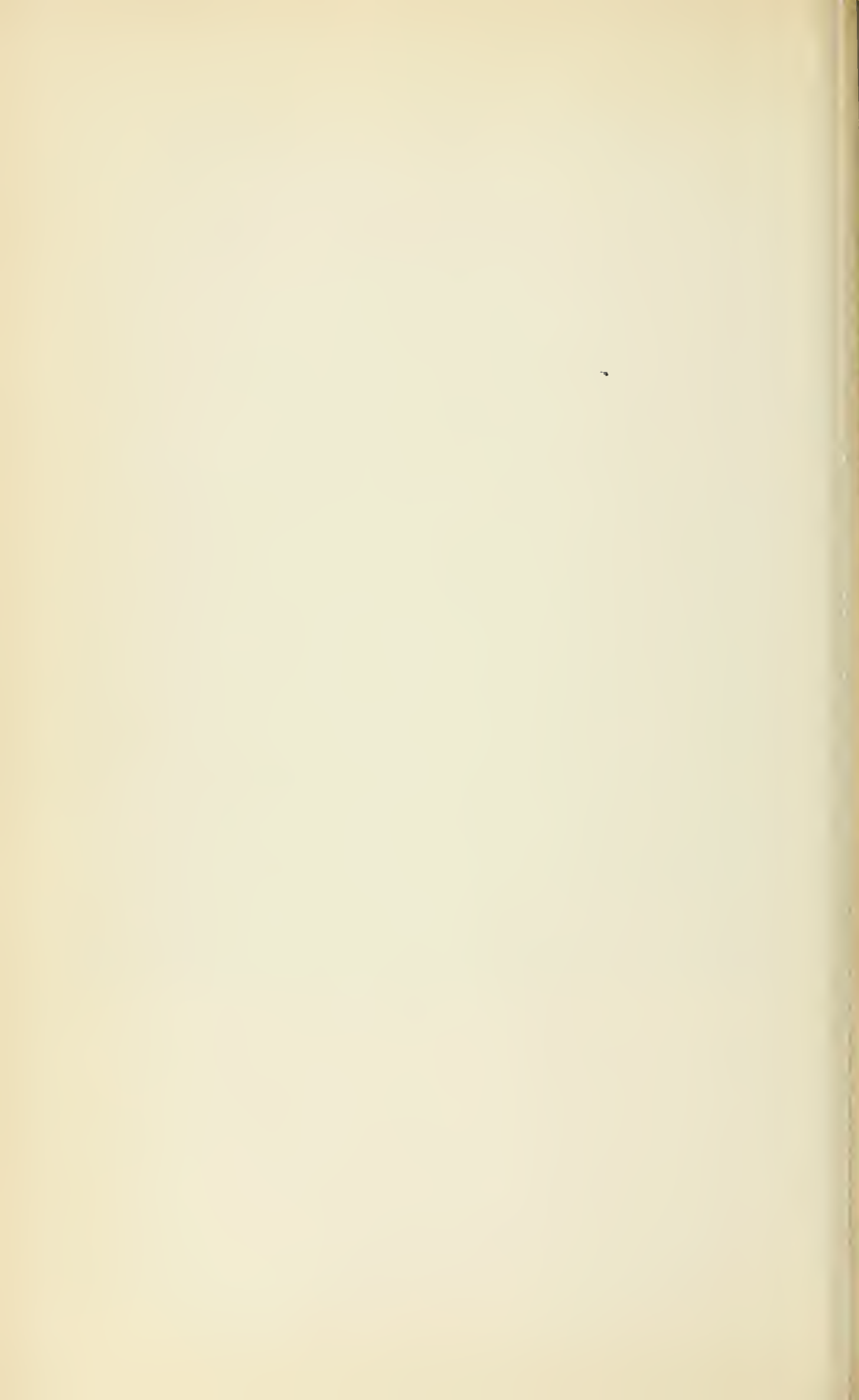
making the deposit, the period for which he is desirous that the same shall remain in the bank, and the person for whose benefit the same is made; and such depositor, and his legal representative, shall be bound by such conditions, by him voluntarily annexed to his deposit." She is a stranger to that contract. She does not claim under it as his legal representative, but by a superior right, of which the contract is the evidence. There can be no estoppel where there is no mutuality or privity. 1 Greenl. Ev. §§ 189, 204, 211. *Merrifield v. Parritt*, 11 Cush. 590, 598. *Sprague v. Oakes*, 19 Pick. 455, 458. *Worcester v. Green*, 2 Pick. 425. *Braintree v. Hingham*, 17 Mass. 432. If, upon due presentation of the book, the money had been paid to her, this provision in the contract of deposit might have availed the bank as a defence against the depositor or his legal representatives. But it can have no force as an estoppel, except when so set up by the bank.

3. Neither can the plaintiff avail herself of the fact that the alleged purpose of David Knowles, in making the deposits in the form he did, was an evasion or violation of law. Whatever effect any illegality on the part of Knowles might have upon his right to recover against the bank, it cannot operate to confer any title or legal right upon the plaintiff. The effect of illegality is to create a disability to sue, or to derive any legal right from the transaction affected by it. The plaintiff's right to recover depends upon proof of an intent to make an absolute gift of this money to her. The defendant is not precluded from disproving that intent because the evidence by which it is to be disproved tends also to show an unlawful act or purpose in a transaction between the defendant and David Knowles.

We have not considered the technical question whether any action could be maintained between these parties, for money so deposited, because that question seemed to be waived by the submission upon agreed facts, providing for a judgment for the plaintiff if the court shall be of opinion that she "is entitled to said funds."

Upon the facts stated, we are of opinion that she is not so entitled; and, according to the agreement, the plaintiff is to become nonsuit.

[illegible]



BRADFORD v. MANLY.

(13 Mass. 129.)

Supreme Judicial Court of Massachusetts.
Suffolk. March Term, 1816.

Assumpsit on divers special counts, to recover the difference in value between two casks of cloves, alleged to be sold by sample to the plaintiff, and the cloves actually delivered in virtue of the sale. At the trial, which was had on the general issue, before the chief justice, at the last November term in this county, the plaintiff produced a bill of parcels of 602 pounds of cloves at one dollar fifty cents per pound, on which payment was acknowledged by the defendant to have been received in the plaintiff's note payable in sixty days. He then produced a witness, who testified that on the 4th of January, 1814, the defendant came to the plaintiff's store, with a sample of cloves in a paper, and asked the plaintiff if he wished to purchase some cloves. The witness examined the sample, and found the cloves to be of the best quality of Cayenne cloves; and the defendant said, at a subsequent time, that the sample he showed was of fair cloves. On the same day that the purchase was made and the bill of parcels given, the casks were removed to the plaintiff's store, the price being that of cloves of the best quality.

It was in evidence, that the sample was not taken from the casks sold, but from an open barrel, out of which those casks had been filled, they not being before quite full; but the defendant did not know from whence the sample came. The market price of this article having fallen immediately after the sale, the plaintiff made no attempt to sell the cloves; and the casks were not opened, until May, 1815, when there being some application for the purchase of them, they were opened, and were found to contain a mixture of Cayenne cloves and an inferior and distinct species of the same article, the growth of the East Indies, in the proportion of one-third of the latter, which was worth from a fifth to a quarter less than the former. Whether the casks had been opened, or exposed, or mixed, while in possession of the plaintiff, were questions duly submitted to the jury. Before instituting this suit, and after the defect was discovered, the plaintiff offered to return the cloves, but the offer was not accepted. The defendant objected to the admission of any evidence, other than the bill of parcels, (which was of cloves generally without designating the kind,) to prove that any distinct species or quality of the article was sold. But the objection was overruled, and the jury were instructed that, although no fraud was proved or suggested, and no express warranty, other than what might be inferred from the exhibition of the sample, was proved; yet if they believed from the evidence, that the purchase was made upon the confidence that the whole quantity was represented by the sample; and that it was the intention of the defendant so to represent by exhibiting the sample; and that the article, when sold and delivered, was ma-

terially different in quality and value from that which was shown in the sample; they ought to find a verdict for the plaintiff, and assess in damages the difference in value at the time of the sale. The jury returned a verdict for the plaintiff, having found the facts specially as above stated, and having also found that there was no fraud in the sale on the part of the defendant. The defendant excepted against the direction of the judge, and moved for a new trial on that ground, and also on account of the admission of parol evidence to prove the contract.

Davis, Sol. Gen., and Thatcher, for plaintiff. Shaw, for defendant.

PARKER, C. J., delivered the opinion of the court.—The first point taken by the defendant's counsel is, that parol evidence was admitted, to control or explain the contract in writing, which subsisted between the parties.

The objection goes upon the supposition that a common bill of parcels, given upon or after the purchase of goods, is evidence, and the only proper evidence of such a contract. But it is not so. The bargain is usually made verbally, and without any intention that it shall be put in writing; and the bill of parcels is intended only to show that the goods have been purchased and paid for. It is seldom particular, or descriptive of the whole contract between the parties. But if it were not so, the paper introduced in this case is ambiguous with respect to the subject of the bargain; and the ambiguity is intent, so that parol evidence may be admitted to explain it. It states only that "2 casks of cloves" were purchased; leaving it uncertain what kind of cloves, of which it appears in the case that there are at least two kinds, differing materially in quality and value. We think this objection was properly overruled.

We may then come to the principal question, viz. Whether the evidence in the cause proved a contract to sell cloves of a different kind from those which were delivered. The defendant exhibited a sample, by which the plaintiff purchased. Among fair dealers there could be no question but the vendor intended to represent that the article sold was like the sample exhibited; and it would be to be lamented, if the law should refuse its aid to the party, who had been deceived in a purchase so made.

The objection is, that no action upon a warranty can be maintained, unless the warranty is express; and that no other action can be maintained, unless there be a false affirmation respecting the quality of the article. If such were the law, it would very much embarrass the operations of trade, which are frequently carried on to a large amount by samples of the articles bought and sold.

The authorities cited by the defendant's counsel have been carefully looked into; and we think they do not militate with this decision: unless it be the case of the Bezoar stone,¹ which we think would not

¹ Chandelor vs. Lepus, Cro. Jac. 4, Dyer, 75.

now be received as law in England: certainly not in our country. The vendor sold the stone as and for a bezoar stone, to one unacquainted with such articles, and it turned out to be of inferior value. The court held that no action would lie; and some of the judges stated that even if the vendor had known that it was not a bezoar, and it had been so alleged, an action could not be maintained without an express warranty.—The other case is that of *Parkinson vs. Lee*.² There the hops sold were of the same kind and quality as the sample: but there was an unknown deterioration by fermentation, caused by the grower of the hops, and not by the vendor. Hops being usually sold in pockets, and the quality ascertained by sample, it was held that the innocent vendor was not responsible to the vendee, for an unknown inherent defect, without an express warranty. That case does not militate with our opinion in the case at bar.

The fair import of the exhibition of a sample is, that the article proposed to be sold is like that which is shown as a parcel of the article: it is intended to save the purchaser the trouble of examining the whole quantity. It certainly means as much as this, "The thing I offer to sell is of the same kind, and essentially of the same quality, as the specimen I give you." I do not know that it would be going too far to say that it amounts to a declaration, that it is equally sound and good. But it is not necessary to go so far in the present case; and we are not disposed to question the correctness of the decision in *Parkinson vs. Lee*.

It is expressly found by the jury in the case at bar, that the cloves delivered were different in kind from those which composed the sample, and inferior in value, not from decay or exposure; but that there is a specific difference in the respective plants from which they are produced. Surely if a man were to exhibit to me a parcel of hyson tea as a sample, to induce me to buy a chest, and I should pay him the price of hyson, and he should deliver me a chest of bohea or sonchong; I might recover the difference in value, if he should refuse to do me justice, although he did not expressly warrant that the tea in the chest was the same as that in the sample. Indeed the exhibition of a sample must, in all fair dealing, stand in lieu of a warranty or affirmation. It is a silent, symbolical warranty, perfectly understood by the parties, and adopted and used for the convenience of trade.

The cases must be very strong, to estab-

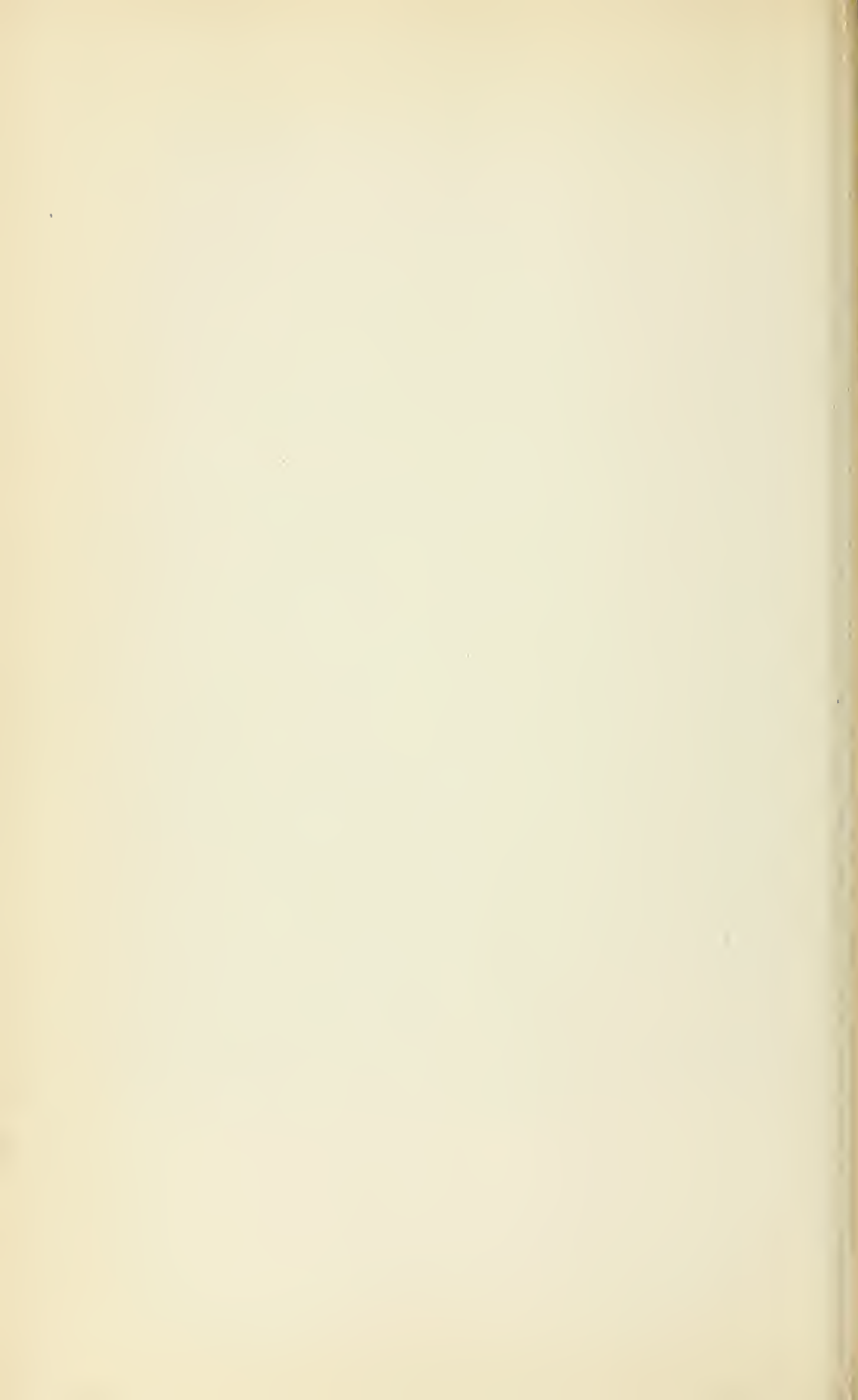
lish a principle so unjust, and so productive of distrust and jealousy among traders, as that contended for by the defendant's counsel. For what purpose is the sample exhibited, unless it is intended as a representative of the thing to be sold? What would an honourable merchant say if, when he took from a mass of sugar or coffee a small parcel, and offered to sell by it, the man who was dealing with him, should ask him if it was a fair sample, and call upon him to warrant it so? Mercantile honour would instantly take the alarm; and if such questions should become necessary, there would be no need of that honour, which happily is now general and almost universally relied upon. That there is not an unknown and invisible defect, owing to natural causes, or to previous management by some former dealer, he may not be presumed to affirm when he shows the sample; and as to these particulars an express warranty may be required, consistently with confidence in the fair dealing of the vendor. But that the thing is the same, generically and specifically, as that which he shows for it, he certainly undertakes, and if a different thing is delivered, he does not perform his contract, and must pay the difference, or receive the thing back and rescind the bargain, if it is offered him.

A case similar to this in principle came before me two or three years ago at nisi prius. An advertisement appeared in the papers, which was published by a very respectable mercantile house, offering for sale good Caraccas cocoa. The plaintiff made a purchase of a considerable quantity, and shipped it to Spaul; having examined it at the store before he purchased; but he did not know the difference between Caraccas and other cocoa. In the market to which he shipped it, there was a considerable difference in value, in favor of the Caraccas. It was proved that the cocoa was of the growth of some other place, and that it was not worth so much in that market. I held that the advertisement was equal to an express warranty; and the jury gave damages accordingly. The defendants had eminent counsel, and they thought of saving the question; but afterwards abandoned it, and suffered judgment to go. Surely if a sample of Caraccas cocoa had been shown to the purchaser, and any other cocoa had been delivered to him, the case would not have been less strong.

We are all decidedly of the opinion, that a sale by sample is tantamount to an express warranty that the sample is a true representative of the kind. There must therefore be entered judgment according to the verdict.

² 2 East, 314.

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BRIDGFORD v. CROCKER.

(60 N. Y. 627.)

Court of Appeals of New York. Feb. 23, 1875.

Action by James Bridgford against Lemuel L. Crocker, as survivor of the firm of L. Crocker & Co., to recover damages for the refusal of one Pat Gavin to receive certain cattle which plaintiff claimed he had purchased as agent for said firm, and to recover also the amount of a check drawn by said firm in favor of Gavin, and by him indorsed to plaintiff, in payment for certain other cattle delivered by plaintiff to said Gavin, and received by him. Plaintiff held the cattle which Gavin had refused to receive until the following spring, when he sold them at an advanced price, and defendant claims the benefit of such sale. There was a judgment in favor of plaintiff, and defendant appeals.

E. C. Sprague, for appellant. George Wadsworth, for respondent.

GROVER, J. The questions raised upon this appeal by the counsel for the appellant arise upon the defense sought to be made against his liability to the plaintiff as drawer of the check upon which the action was brought. This assumes that a *prima facie* liability had been shown by the plaintiff. The case shows that the check in suit was one of a large number made by the drawers in the spring and summer of 1867, amounting in all to \$50,000, payable to the order of Gavin, which during the spring and summer were delivered by the drawers to Gavin, upon an agreement, as they claimed, that he should use them in the west in the purchase of stock by him for the drawers, take such stock to and sell it in Chicago, and remit the proceeds to the drawers for the payment of the checks, and that he should receive for his services in transacting the business a portion of the profits. Evidence was given showing that the check in suit was indorsed by Gavin to the plaintiff, in payment for cattle purchased of him, but the proof tended to, and, as the trial judge held, did show, that the cattle were not purchased for the defendants pursuant to their agreement with Gavin, but for Gavin & Kelly. The judge held that this was a diversion of the check by Gavin from the purpose for which it was delivered to him by the appellant, and that the latter was not liable unless he had assented to such use of the check by Gavin. The counsel for the respondent insists that, if the proof was insufficient to show such assent, still the recovery thereon should be sustained upon various other grounds suggested by him. I think it unnecessary to determine whether the plaintiff would have been entitled to recover upon any of them, as the case was tried solely upon the theory, and the judge held, that the plaintiff could only recover by showing that the defendant assented to the use made of the check by Gavin. It is impossible to see what further proof affecting the other questions now sought to be made by the respondent might have

been given by the defendant had the ruling of the judge been otherwise. The only question as to the plaintiff's right to recover upon the check is, I think, whether the evidence was such as made the question whether the defendant assented to the use made by Gavin of the check one which should be determined by the jury, or whether the court should have directed a verdict thereon for the defendant upon this question. The proof of the plaintiff was circumstantial; that of the defendant direct; the latter consisting of the testimony of the defendant and Gavin that the former had never assented to or knew of any use made of any of the checks by Gavin, other than as provided by the agreement. On the part of the plaintiff it appeared that the defendant reposed unlimited confidence in Gavin; that he delivered to him this large amount of checks, and intrusted him to go into the western states, and operate with them in the purchase of cattle, sell the same, and with the proceeds provide for the payment of the checks; that Gavin, months before indorsing the check in question to the plaintiff, used the checks of the defendant to pay for cattle purchased by him for himself and Kelly to a large amount; that the defendant knew that these checks were issued by Gavin from their presentment to the drawer for payment, some of which were paid, and others protested for nonpayment, although ultimately provided for by Gavin. This presented a question for the jury as to whether, after the lapse of months, the defendant had made inquiry and ascertained the purposes for which this large amount of checks had been used by Gavin. This testimony tends to show that he had not, but it is opposed to, strong probability created by the circumstances. That a man should furnish to another \$50,000 of his checks to operate under such an agreement as is plain, should know that the checks, to a large amount, were being used, and that his credit was suffering by permitting some of them to go to protest, and should not for months make any inquiry into the operations of his agent, or endeavor to ascertain whether the business was successful, is so improbable that I think a jury fully justified in not crediting it. It is obvious that the defendant, if he inquired, could have readily ascertained the purposes for which the checks had been used. I think the question of the assent of the defendant to the use of the checks by Gavin to pay for stock purchased by him for himself, or for himself and Kelly, was not only one for the determination of the jury, but that the verdict that he did assent to such use was correct. A man ought not to complain of a verdict finding that he paid some attention to his important interests, having every opportunity and inducement so to do, although he may insist that he did not. Under the remarkable conduct of the defendant, as he claims it to have been, the jury might have thought that there was some understanding between him and Gavin that the stock was to be purchased for the defendant in case money was made thereon, and in that event the checks given in payment therefor paid,

but that in case of loss the purchases should be regarded as made for some one else, so as to evade payment of such checks.

The rule of damages as to the cattle not taken by Gavin of the plaintiff, pursuant to the contract, was correct. That was that the plaintiff was entitled to recover upon the failure of Gavin to take and pay for the cattle, as required by his contract, the difference between the contract price and the then market value. The plaintiff had a right to tender the cattle, and sue Gavin for the price agreed to be paid, or he could, at his election, keep the cattle as his, and recover his damages for the breach the difference between the contract price and then market value. Sedgw. Dam. (5th Ed.) 313, and cases cited in note 3. The plaintiff in the present case chose to adopt the latter course, and, in case the market fell subsequently, it was his loss; if it improved, it was his gain. The time at

which the damages were to be fixed, when the vendor, as in the present case, chooses to retain the property, is that fixed for the performance of the contract. *Dustan v. Andrew*, 10 Bosw. 130. So far as it countenances any different rule in this respect, it was not well considered, and cannot be regarded as law. It matters not to the defendant what the plaintiff got for the cattle six months or any other time after the breach of the contract by Gavin to take and pay for them. It appears that cattle rose in the market after this. This was the good fortune of the plaintiff, of which the defendant cannot avail himself.

The judgment appealed must be affirmed.

NOTE. The foregoing is Judge GROVER'S opinion in full. The report in 60 N. Y. 627, gives only a memorandum of the decision.

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BROOKS v. POWERS.

(15 Mass. 244.)

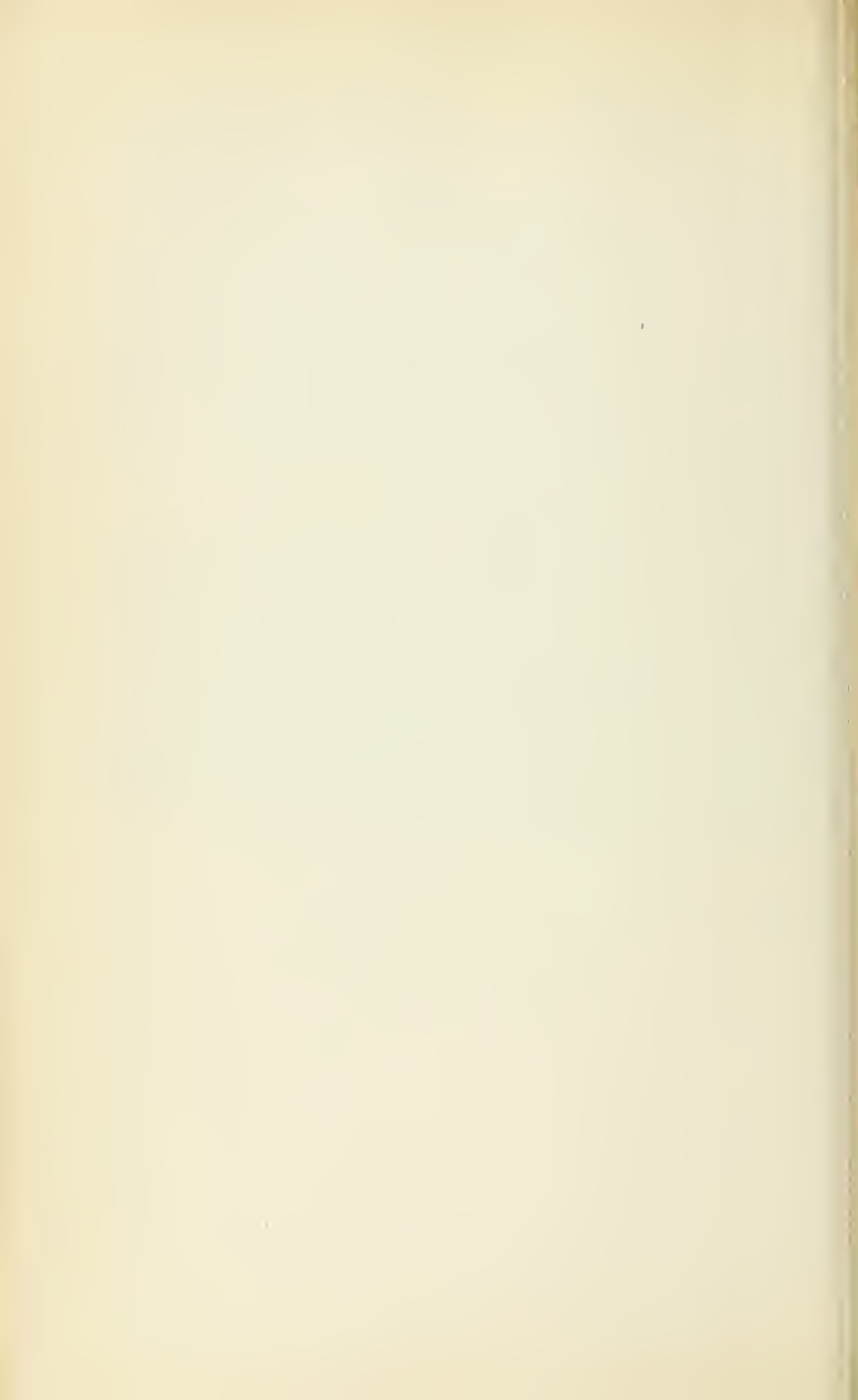
Supreme Judicial Court of Massachusetts.
Worcester. Sept. Term, 1818.

Replevin of a pair of oxen and other cattle, attached by the defendant, a constable, on an original writ against one Stephen Witt. The defendant pleaded property in Witt, traversed the property of Brooks, and avowed for a return. The plaintiff replied property in himself, upon which issue was joined. Upon the trial of this issue before Putnam, J., it appeared in evidence that Witt, during the years 1816 and 1817, lived on a farm owned by the plaintiff, who had leased the same to Witt for those years, making a distinct lease for each year, commencing on the 1st of April. A few days before the attachment by the defendant, viz. on the 14th of April, 1817, Witt gave to the plaintiff a bill of sale of the cattle, and made a delivery of them on the farm, in payment of a part of the rent for the preceding year, and of the whole for the year then ensuing; except the sum of three dollars, for which Witt gave his note to the plaintiff. Witt and the plaintiff then agreed, that Witt should have the oxen, to carry on the work of the farm that year, for which he was to support them free of expense to the plaintiff; and it was further agreed that the plaintiff might work the oxen, when Witt had no occasion to work them on the farm himself. It was further agreed that Witt should pasture the other cattle for the plaintiff, for which he was to pay the customary price. The cattle were in the possession of Witt, after the sale, in pursuance of said agreement, until they were attached as aforesaid. It was likewise proved that Witt, at the time of the sale to the plaintiff, was the owner and in actual possession of the cattle, of a part of which he had been the

owner, and in the continued possession, for a long time before the sale, and that the plaintiff had never had the property or possession thereof before the sale. The judge charged the jury, that if they were satisfied that the cattle were sold and delivered in the manner and for the consideration stated, the circumstance of Witt's retaining the possession of them, for the purpose of pasturing them, and of the plaintiff's permitting him to use the oxen, would not be conclusive evidence of fraud, so as to avoid the sale as to creditors; but was one of the circumstances, which was proper to be submitted to the jury, as tending to prove the sale fraudulent as to them; and that if, upon considering the whole evidence, they should believe the sale to have been bona fide and for a good consideration, and not made with a view to defraud creditors, their verdict should be for the plaintiff. And a verdict being so returned, the defendant filed his exceptions to the said opinion of the judge.

Lincoln, for plaintiff. L. Blgelow, for defendant.

BY THE COURT. It has been contended in this case, that the possession of the vendor of personal chattels, after the sale, is conclusive evidence in favour of creditors, that the sale was fraudulent; or rather that it is itself a fraud. But we are all of opinion that, although it is generally evidence of the strongest kind, it is not conclusive. The vendee may, notwithstanding, upon proof that the sale was bona fide and for a valuable consideration; and that the possession of the vendor, after such sale, was in pursuance of some agreement not inconsistent with honesty in the transaction; hold under his purchase against creditors. And so it has been often decided in this court, as well as in England. Judgment on the verdict.



BROWN et al. v. NORTHUTT.

GOODMAN et al. v. NORTHUTT.

(13 Pac. Rep. 485, 14 Or. 529.)

Supreme Court of Oregon. March, 1887.

N. B. Knight and J. A. Stratton, for appellant. Wm. M. Ramsey, for respondents.

THAYER, J. The main facts of this case are as follows: In January, 1880, certain parties, including the respondents and appellant, had wheat in different amounts on storage in the warehouse kept by one S. Harkleroad, at Gervais, in Marion county. The wheat had been received by Harkleroad as warehouseman, and was in mass. On the twenty-second of January, 1880, the appellant having made arrangements with Allen & Lewis, of Portland, to sell to them the wheat he had on deposit in said warehouse, gave an order to Harkleroad to ship it to said Allen & Lewis, and at the same time contracted with Harkleroad to procure for him the necessary sacks in which to place it for shipment. Harkleroad engaged transportation of the railroad company for the wheat. There was a side track to his warehouse, and the company left some cars upon it to receive the wheat. Harkleroad engaged in sacking and putting the wheat aboard these cars. After he had sacked up some 1,333 bushels, the greater part of which he had put aboard the said cars, he stopped sacking, and sent for appellant, who lived a few miles out in the country from Gervais. Appellant came to Gervais on the evening of the thirtieth of said month of January, and was then informed that there was not sufficient wheat on storage in said warehouse to pay all the depositors the amounts they had respectively stored with Harkleroad. A conference was had between Harkleroad and the respondents and appellant, which resulted in Harkleroad's making a bill of sale to them of certain effects, including the wheat, and on the following day they (respondents and appellant) entered into a written agreement between themselves, of which the following is a copy: "Articles of agreement made and entered into by and between N. Goodman, S. T. Northutt, and S. Brown, of Marion county, state of Oregon, on this thirty-first day of January, 1880, as follows, to-wit: Whereas, S. Harkleroad did, on the thirtieth day of January, 1880, make a bill of sale and deliver to the above-named parties to this agreement all his personal property, consisting in part of wheat in the warehouse at Gervais, and all other articles mentioned in said bill of sale, for the purpose of said parties converting the same into money, and paying themselves pro rata for the claims the said parties hold against said Harkleroad on account of having wheat stored in his (Harkleroad's) warehouse in Gervais. Each one of said parties' claim is as follows, to-wit: J. Stevens, per S. Brown, 702 31-60 bushels; S. T. Northutt, 1,721 23-60 bushels; N. Goodman, 788 bushels; W. McKee, per S. Brown, 10 49-60 bushels; and further agree

that, as soon as the wheat above referred to is converted into money or divided, then the fund arising from said wheat, as well as that of any other property so sold to us, shall be divided pro rata, as each claim bears to the whole amount claimed; and we further agree to convert all said property, real and personal, into money, then a full and equal division pro rata to be made, and all business to be settled up as soon as the nature of the business will admit of, with as little loss to us as possible; and it is further understood that the shiveled or spring wheat in said warehouse, turned over to us by said Harkleroad, does not belong to the parties to this agreement,—only such as is left, if any, after the parties who own the same have taken out their claims on said wheat. Witness, etc. N. Goodman, S. T. Northutt, S. Brown." The respondents and appellant were the principal owners of the wheat stored. There were, however, three parties besides those named in said written agreement who also had wheat stored with Harkleroad, viz.: John Wofford & Co., 117.60 bushels; James Broyles, 28 bushels; and Charles Barkhurst, 166.30 bushels,—subject to the general deficiency. The following is a copy of the bill of sale referred to in said agreement above set out, viz.: "Know all men by these presents, that I, Samuel Harkleroad, of Gervais, Marion county, state of Oregon, have this day sold to N. Goodman, S. T. Northutt, and Samuel Brown, and delivered to them, all my right, title, and interest in and to the following described property, to-wit, for the consideration hereinafter named: All the wheat in the warehouse which the said Harkleroad has been controlling during the year 1879, and up to this date, known as the H. Hewitt & Co. warehouse, in Gervais, and also all sacks in said warehouse, or due him from different parties; also all book accounts, and notes due said Harkleroad for storage, etc.; 1 pair platform scales; 1 beam scale; 1 pair trucks; 1 scoop-shovel, and some bedding; 1 bay horse named John; 1 sorrel mare named Nell; 1 Etna mower; some buck-wheat screenings, in said warehouse; 1 set double harness; 1 sulky-plow; 1 Stand-ard organ,—for the consideration of the sum of \$3,500, the receipt of which is hereby acknowledged. Done in Gervais, Oregon, this thirtieth day of January, 1880. S. Harkleroad. [L.S.]" After said bill of sale was executed, and the understanding had in reference to the closing out of the affair, the appellant became solicitous about his arrangement with Allen & Lewis to sell them his wheat, which resulted in an agreement between him and the respondents that he should have a sufficient part of it, at one dollar a bushel, to fill his contract with Allen & Lewis. The business and assets of said Harkleroad were, on the said thirty-first day of January, delivered over to respondents and appellant. The latter says in his testimony that "the next day—that is, Saturday, the 31st—the key of the warehouse was given to me. I went over to the warehouse for a few minutes, and came back to Mr. Goodman's." Then he went

and received the property; went by the warehouse; told the men that had been working there for Harkleroad that he did not think he could do any work in the warehouse that day; went up to Harkleroad's, and was busy until noon receiving the property; thinks that was all that was done that day between Brown, Goodman, and himself; thinks the agreement was drawn up and signed that day, and the next morning, Sunday, got some hands and went to work; the first work was to sew some sacks that were filled when he went in, and load a car; did not fill any wheat to load the car out of the bins; there was a car-load already filled; that appellant received of said wheat, including that which was at the time aboard the cars, and that had been sacked and left in the warehouse, 1,687 bushels, which he delivered to Allen & Lewis upon his contract with them, and received the price thereof. There was a deficiency of wheat held by Harkleroad, at the time appellant gave the order to ship his wheat to Allen & Lewis, and at the time Harkleroad began loading the cars, amounting to about one-third the quantity that had been stored with him by the several parties before mentioned. The suit was brought to adjust the matter, and to compel the appellant to account for the 1,687 bushels at one dollar a bushel, the price he had agreed to pay therefor if the respondents would permit him to ship it upon his said contract; and I am not able to discover any sufficient reason why he should not be required to do so.

It is true that the bill of sale and the written contract between the parties only specify the wheat in the warehouse; but it is evident, I think, that the parties intended them to include all the wheat Harkleroad had on hand, or that was in the cars, or that had been sacked. The written agreement shows that, and the testimony establishes it beyond any question. It is claimed upon the part of the appellant that all the wheat that had been placed in the cars prior to the time of the agreement between the parties, and all that had been sacked and left in the warehouse, belonged of right to appellant; that as soon as it was segregated from the mass of wheat it became his in severalty; and that he did not know at the time he signed the contract that the 1,233 bushels had been sacked, and the three cars loaded, and that he should, therefore, be entitled to claim that wheat notwithstanding he had agreed to receive it, and pay to respondents a dollar a bushel therefor. If it were material, I do not think appellant could establish from the testimony ignorance or want of knowledge of that fact. He had given the order to have his wheat shipped; was at the warehouse on the morning of the day the contract was entered into; testified that three cars were then loaded; went the next day, and began the completion of the shipment of the wheat; and on the second day of February thereafter, according to the testimony of Mr. W. T. Welch, book-keeper of the assignees, respondents and appellant, the amount of the wheat received by appellant, and

shipped to Allen & Lewis, was charged up against appellant upon the books of the said assignees, under the direction of the last-named parties, and apparently with the full approval of all of them. He certainly had the fullest opportunity to ascertain before signing the said contract what had been done by Harkleroad in compliance with his order.

But what does it signify whether he knew it or not? There was a shortage of wheat in the warehouse before any was taken out to put aboard of said cars. There was only about two-thirds enough to pay the depositors, including the appellant, the amounts they had respectively stored there; and, the wheat not having been kept separate, the deficiency or loss, from whatever circumstance it may have occurred, if not occasioned by the fault of any of them, must fall upon all in the proportion which the amount of wheat each had deposited bore to the whole amount deposited. This rule is based upon a maxim that all courts are bound to observe,—the maxim that equality is equity; and it certainly could have no better foundation. The authorities produced at the hearing by the respondents' counsel show that it has been recognized and approved by courts of the highest authority. See *Cushing v. Breed*, 14 Allen, 380; *Sexton v. Graham*, 53 Iowa, 192, 193, 4 N. W. Rep. 1090; *Dows v. Erkstrone*, 3 Fed. Rep. 19, 20; *Dole v. Olmstead*, 36 Ill. 150.

In *Cushing v. Breed*, supra, the court held that where several parties had stored various parcels of grain in an elevator, and it was put into one mass according to usage to which they must have been deemed to have assented, they were tenants in common of the grain, and that each was entitled to such a proportion as the quantity placed there by him bore to the whole mass; and in *Dole v. Olmstead*, supra, the court held the same doctrine; and held, further, that, the grain being thus owned in common, the several owners were compelled to sustain any loss pro rata which might occur by diminution, decay, or otherwise; and that, where the holder of a receipt had received the full quantity, or a larger proportion than his ratable share, in view of the deficiency, he would be bound to account for such excess received by him according to his proportion of the loss. This is undoubtedly the correct rule, as it is founded upon common justice.

The result of the rule is simply this: A. puts wheat in a warehouse for storage. B., C., and others severally have wheat there for the same purpose. It is all mingled together with the presumed consent of all parties. They each necessarily own the several amounts of wheat they have there, but neither can identify his own. But it is in common, and if a loss occurs by casualty, or the warehouseman wrongfully abstracts a part of the general lot, it must necessarily be borne by the depositors pro rata. Ent, to render A. liable to contribute to the loss, it must occur after he stored his wheat. He would not be affected by any deficiency which occurred prior to his deposit of his wheat. Former deficiencies would have to be borne by

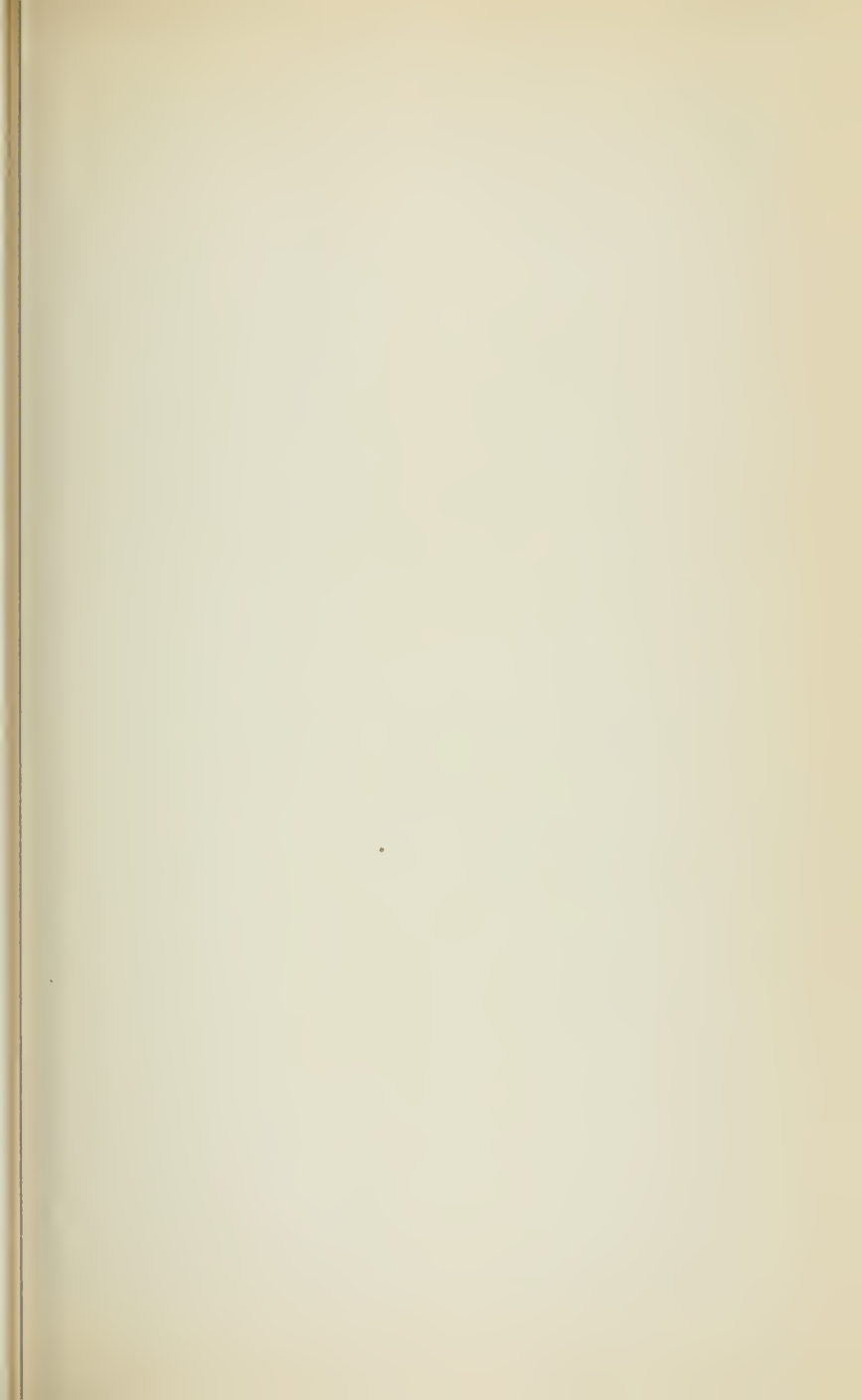
B., C., and others who had wheat there when it occurred. A's amount of wheat would be the proportion it bore to the whole amount actually in store when he placed his there, not to the amount it would be with what B., C., and others had really put there. Now, when the appellant gave the order to Harkleroad to ship his wheat to Allen & Lewis, he did not have on storage with him 1,723 23-60 bushels. Assuming that the deficiency amounted to one-third of the whole mass, he only had 1,148 and a fraction bushels there, and had no right whatever to take more than that from the warehouse. Any attempt upon his part to take beyond that quantity was an attempt to take wheat which did not belong to him, or to Harkleroad, but which did belong to the respondents and the other depositors. The diminution of the general lot of wheat in the warehouse, one-third, has diminished his quantity one-third also, and left him only the owner of the number of bushels before mentioned. His attempted shipment of his wheat, therefore, gave him no better standing or farther rights in the premises than the other depositors enjoyed, although it were sacked and put aboard of the cars, except this: He might, when he came to Gervais on the said thirtieth day of January, have elected to take the 1,148 bushels, but it was an advantage to him to accept the assignment, as he thereby also acquired an interest in the scales, horses, and other property included in the bill of sale from Harkleroad.

Some suggestion was made upon the argument that the law favored the vigilant in obtaining their rights. To a certain extent that is correct. The law looks with disfavor upon a party who sleeps upon his rights, but it certainly does not commend the vigilance of a party in his endeavors to deprive others of their rights. The vigilance that is exercised to get others' property from them may be tortious, and even criminal. I cannot see but that the respondents and appellant acted fairly and manly in their attempted adjustment of the matter. The respondents may have been officious in having Harkleroad quit the shipment of the wheat for appellant; but they had a right to be. Their wheat was there also. A deficiency had occurred in the amount of wheat on hand. There was not enough left to pay all the depositors in full, and, if the appellant were permitted to take out the full amount he had placed in the warehouse, their loss would be greater. It was right, under the circumstances, that Harkleroad should desist from shipping the wheat until the affair could be arranged, and it could not have been arranged in any better or more honorable way than it was. The respondents and appellant being the principal depositors of wheat, all that remained on hand, and all the other property Harkleroad had, was assigned to them, and they entered into the written agreement to administer upon it. Even if the appellant had obtained a legal advantage in consequence of a part of the wheat having been sacked and delivered aboard the cars, it would have been the

merest technical advantage imaginable, and would have operated inequitably and unjustly. I think a court should, in any case, require the clearest proof of fraud or imposition before relieving a party from his contract in order that he might profit by an unjust advantage the law may afford. But, as before stated, the appellant held no advantage on account of the segregation of the wheat sacked from the mass. He had no right to accept or remove a kernel of it beyond his pro rata portion, and that was awarded to him in the adjustment by the terms of the written agreement. The suit was brought to enforce that agreement, and for a final accounting between the parties to it. The able and experienced circuit judge has heard the case, and I think has decided it correctly in the main. There is a discrepancy in the account against the appellant arising out of charging him the full amount of storage on the wheat in controversy. This sum should have been deducted from the amount of appellant's wheat on storage on which his dividend is declared. The decree will therefore be modified accordingly, and in other respects affirmed; costs of appeal to be paid out of the funds in the hands of assignees.

LORD, C. J., (concurring.) This is a case of bailment. Upon that hypothesis, where wheat of different owners has been deposited in a warehouse, and so intermingled that identification of separate ownership is lost, the depositors of such wheat in mass are tenants in common. But the title of the depositors or the ownership of such wheat has not been destroyed by the intermixture; the depositors have simply transferred the possession to the warehouseman, and he holds it as their agent, and subject to their orders, for a delivery of the possession. In such case, the wheat is a common fund out of which each depositor is to be restored to his possession, or, so to speak, for the repayment of each owner's wheat. Any owner or depositor, upon the payment of charges for storage, has a right to demand the redelivery of his wheat, and to be restored to its possession. The segregation of the wheat from the bulk, and the delivery of it to the owner for the quantity of wheat to which he is entitled, only puts him in possession of his own property. The effect of the segregation is to identify the wheat for the purpose of delivering possession of it to the owner. But the segregation of the wheat, by which its identity is restored to make it available for a delivery of possession to the owner, always proceeds upon the principle that the warehouseman is in possession of the wheat, in mass, of such depositors, and from which, by segregation, he identifies the wheat of an individual owner, and restores it to his possession. His act is but a partitioning of the individual quantity from the mass with which it has been intermingled, and must, of necessity, operate upon the mass of which such individual quantity constitutes a part. But, being a part of such mass, whatever affects or diminishes that mass will affect or diminish proportion-

ally all the parts of such mass, and consequently such individual part or depositor's quantity of such mass. When, therefore, by reason of accident or other cause, there has been a loss or diminution of the mass, it affects ratably the quantities to which such depositor is entitled of such mass, reduces the gross quantity of the wheat in the possession of the warehouseman, and proportionally limits his power of restoring possession to them. His possession of the wheat in mass, being for the depositors, is affected in the same degree as their ownership is by the loss or diminution. His possession is still of a mass, but of a diminished mass, and they are tenants in common of such diminished mass. His power to restore possession is measured by the quantity to which each depositor is entitled of such diminished mass; and this is the ground of division, whether the warehouseman is in possession, or the depositors have taken possession of such mass. The warehouseman cannot rightfully give, nor can any depositor rightfully take, possession of any greater quantity than he is entitled to, based upon the mass affected by the loss or diminution. If the warehouseman should deliver to any depositor a greater quantity than he would be entitled to, from such residue, although the proper quantity to which he would have been entitled, if there had been no loss or diminution, it would be a wrongful taking, as well as a wrongful possession, as against the other depositors, for the surplus over the quantity to which he would have a right of such residue. Analogous to the principle upon which equity acts, where several parties are entitled to participate in a common fund, and awards a distribution upon the maxim that "equality is equity," it will treat such residue as a common fund, to be distributed in ratable proportions among the depositors entitled to participate in it. Upon this principle, as disclosed by the record, the decree can be sustained. So far as appears, all who have a right to participate in the distribution have been made parties. In such case, the remedy in equity is more complete, and certainly would avoid a multiplicity of suits. It acts upon the collective rights and liabilities of the parties, which is said to be a distinguishing feature of the equity system, and awards its distribution upon the equitable principles of the maxim cited.





BROWNE et al. v. HARE et al.

(3 Hurl. & N. 484.)

Exchequer of Pleas, Trinity Term. June 12, 1858.

(4 Hurl. & N. 822.)

Exchequer Chamber, Trinity Vacation. June 23, 1859.

Declaration. That defendants agreed with the plaintiffs to buy of them a certain quantity, to wit, ten tons, of the best refined rape oil, to be shipped free on board at Rotterdam in September, 1857, at £48 15s. per ton; to be paid for, on delivery to the defendants of the bills of lading, by bill of exchange to be accepted by the defendants payable three months after date, and to be dated on the day of shipment of the said oil. And although within the month of September, 1857, the plaintiffs shipped at Rotterdam a certain portion, to wit, five tons, of the best refined rape oil free on board a certain ship called the *Sophie*, and the residue thereof free on board a certain other ship, and delivered to the defendants the respective bills of lading of the said oil duly indorsed to the defendants; and although the plaintiffs performed all conditions precedent, and all things had been done and happened, and all time had elapsed, to entitle the plaintiffs to have the said oil paid for by bill of exchange as aforesaid, and to maintain this action; yet the defendants made default in paying for the said portion of the said oil so shipped on board the said ship called the *Sophie*, and in accepting a bill of exchange for the same. There was also a count for goods bargained and sold, and goods sold and delivered.

Pleas to first count. First, that defendants did not agree with plaintiffs as alleged. Secondly, that the plaintiffs did not ship the said portion of the oil on board the ship called the *Sophie*. Thirdly, that the plaintiffs did not deliver to the defendants the bill of lading of the said portion of oil shipped on board the *Sophie*, duly indorsed to the defendants. Fourthly, that the plaintiffs were not ready and willing to deliver the said portion of oil shipped on board the *Sophie*, or the bill of lading of the same oil, to the defendants, in accordance with the terms of the said agreement. Fifthly, that the said agreement was for the sale of ten tons of oil generally, and not of any specific or ascertained oil. That the said ship called the *Sophie* was a general ship, and was not a ship chartered by the defendants or in any way appointed or denoted by them. That the plaintiffs, when they shipped the said portion of oil on board the *Sophie*, took from the master of that vessel a bill of lading of the said oil, making it deliverable to the order of the plaintiffs or their assigns, and not otherwise. That before any delivery of the said oil to the defendants, and before any indorsement or delivery of the said bill of lading, or of any bill of lading of the said oil, to the defendants, the said ship called the *Sophie*, with the said oil on board, was totally lost, and the said oil then became and was without any neglect or default of the de-

fendants wholly lost and destroyed. That the plaintiffs never, in fact, delivered or offered to deliver, nor have they been ready and willing to deliver, the said oil to the defendants; nor have the plaintiffs ever delivered or offered to deliver, or been ready and willing to deliver, the said bill of lading or any bill of lading of the said oil to the defendants until after the said oil had been so wholly lost and destroyed as aforesaid. That when the plaintiffs delivered to the defendants the said bill of lading of the said oil as in the first count mentioned, the plaintiffs knew, and the defendants did not know, that the said ship and the said oil had been so lost and destroyed as aforesaid. That the defendants have not derived any benefit or advantage whatever or any possibility of benefit or advantage under the said agreement, or received any consideration or value whatever for the liability sought to be imposed on them in this action by the plaintiffs. To second count, never indebted. Issues thereon.

At the trial before Martin, B., at the London sittings after Hilary term, the following facts appeared. The plaintiffs were merchants at Rotterdam, and the defendants merchants at Bristol. On the 9th of April, 1857, the defendants wrote the following letter to one Goolden, a broker at Bristol, who had before negotiated purchases between the plaintiffs and the defendants:—"Messrs. Browne & Co. may send us 20 tons of best refined rape oil in September or October next, at or under 47s. free on board." Goolden accordingly communicated with the plaintiffs, and the defendants afterwards wrote to them that they might go as high as 48s. On the 14th the defendants wrote to the plaintiffs about the purchase of some black lead, and stated that they had rather that the plaintiffs would communicate with them, but that all their transactions in oil might go on through Goolden. After some further correspondence between the parties, a contract was made, through Goolden, for the sale by the plaintiffs to the defendants of twenty tons of the best refined rape oil, ten tons "to be shipped free on board at Rotterdam, September, 1857, at £18 15s. per ton, to be paid for, on delivery to the defendants of the bills of lading, by bill of exchange to be accepted, by the defendants, payable three months after date, and to be dated on the day of shipment of the oil;" the ten other tons were to be shipped in October on the same terms. On the 3d September the defendants requested the plaintiffs to send part of the oil by the first vessel from Rotterdam, which was the *Sophie*. On the 7th September the plaintiffs wrote to Goolden, who informed the defendants on the 9th, that five tons of the oil would be shipped on the following day. On the 8th September, the plaintiffs shipped on board the *Sophie*, which was a general vessel trading from Rotterdam to Bristol, five tons of the oil, and the master signed the following bill of lading: "Shipped in good order and well conditioned by Thos. Browne and Son in and upon the good steamship called 'The *Sophie*,' whereof is master, &c., and now

lying in this port and bound for Bristol, thirteen casks of oil, marked and numbered as in the margin, and to be delivered in the like good order and well conditioned at the aforesaid port of Bristol (the act of God, the Queen's enemies, fire, machinery, boilers, steam, and all and every other dangers and accidents of the seas, rivers, and steam navigation of what nature or kind soever excepted,) unto shippers' order or their assigns, he or they paying freight for the said goods 25s. st. per ton, Gr. W., with 10s. prime and average accustomed and disbursements as in the margin. In witness," &c. On the same day the plaintiffs endorsed the bill of lading as follows:—"Deliver the contents to the order of Messrs. Jno. Hare & Co. Thos. Browne & Son." The plaintiffs also made out an invoice as follows:—"Invoice of oil shipped on board 'The Sophie,' J. Van Knapen, for Bristol, by order of Mr. S. Goolden for account of Messrs. Jno. Hare & Co. there, 13 casks reid. Rape Oil, weighing nett 12235 in England, @ £48 15s. per ton. (fo. B.) £266 5s. 6d. Rotterdam, 8th Sept., 1857. Thos. Browne & Son." (Then followed a note of weights.) On the same day the plaintiffs enclosed in a letter to Goolden the bill of lading, invoice, and a bill of exchange drawn on the defendants in accordance with the contract. On the night of the 9th the Sophie was run down in the Bristol Channel, and the oil totally lost. The plaintiffs' letter of the 8th arrived at Bristol on the afternoon of the 10th, in due course of post, but after business hours. On the morning of the 11th, Goolden left with the defendants the bill of lading, invoice, and bill of exchange for their acceptance. At that time he knew of the loss of the Sophie. In about two hours the defendants returned to Goolden the documents which he left with them, on the ground that under the circumstances, they were not liable to pay for the oil. The other five tons arrived on the 28th of September, and were accepted and paid for by the defendants.

The learned judge was of opinion that under these circumstances the plaintiffs were entitled to recover; and the jury found a verdict for them, stating that in their opinion, according to mercantile usage, the risk of the loss of the oil was on the defendants. Leave was then reserved to the defendants to move to enter the verdict for them.

Hugh Hill, in last Easter term, obtained a rule nisi accordingly, against which Butt and Prideaux showed cause in the same term, (May 6, 8.) Hugh Hill and Raymond, in support of the rule.

The learned judges having differed in opinion, the following judgments were delivered.

BRAMWELL, B. I am of opinion that this rule should be made absolute. I will first consider the actual case independent of the pleadings. The plaintiffs agreed to sell to the defendants, and the defendants agreed to buy of the plaintiffs, a quantity of oil, the particular parcel not being ascertained. In addition to selling, the

plaintiffs were to ship the oil free on board a vessel to take it from the plaintiffs to the defendants. The defendants were to pay on delivery of the bills of lading, by bills to be dated on the day of shipment of the oil. Oil was shipped by the plaintiffs to the extent of about twenty tons. Various bills of lading in sets were signed: they were taken deliverable to the plaintiffs' order. One of a set, for about five tons, was indorsed by them specially to the defendants (i. e. such an indorsement was written on it) and tendered to the defendants, but before the tender the ship and oil were lost and destroyed. The plaintiffs, however, on the 7th September, wrote to Goolden to inform the defendants, which he did before the loss of the Sophie, that she would bring five tons of refined rape oil for the defendants; but they did not identify or appropriate any particular oil, nor even intimate that it had been shipped,—probably it had not been, as the bill of exchange is dated the 8th. This contract is essentially a contract for the supply of unascertained chattels, and I think it is clear law that, under such a contract, the seller can have no right of action till the seller has done an act which, by the agreement between him and the buyer, is to vest the property in the buyer: as, by delivery to him, or to a carrier for him, of goods corresponding with the writing, or till the seller has appropriated or offered to appropriate and supply to the buyer certain chattels which correspond with the contract. See Blackburn on Contract of Sale, pt. 2, c. 1. Have either of these things taken place here? I think not. An appropriation in the seller's own mind, a mere intent to appropriate,—a matter which the seller can suppress or undo at pleasure,—will not suffice. If he offers to appropriate particular articles, and the buyer without cause refuses them, a right of action for not accepting vests; but unless there is an appropriation offered, and accepted or refused, there is no cause of action. I do not understand there is any doubt on the law: then it remains to examine the facts. I think it immaterial, but the Sophie was selected by the plaintiffs, not by the defendants. If she had been the defendants' ship, and the oil had been put on board it, as it might have been delivered to a wagon, that would have been a delivery to the defendants, assuming the oil corresponded with the contract. So the Sophie being as it were a carrier's ship, the oil might have been put on board, as a parcel to be carried by land may be given to a common carrier, so as to vest the property in the consignee and be a delivery or not, according to the right of lien. So if, after the shipment, bills of lading had been taken in the defendant's name, or if taken in the plaintiffs' name they had been indorsed and delivered to the defendants while the goods were in existence, I think that would have been a compliance with the contract; because, even assuming the property is to be in the buyer from the time of shipment, and that the seller is the buyer's agent to ship, still I think he may exercise that agency in his own name,

and that it is no more necessary he should take the bill of lading in the buyer's name than it is that he should say at the moment of shipment, "These are the buyer's goods, I ship on his account." In such a case his tender of the bill of lading, properly indorsed to the buyer, may well be taken to show he was acting as the buyer's agent in the shipment, and consequently that he, in effect, shipped the goods for him. But if the seller had the right, as long as the goods were in existence, to say that he had done nothing to vest the property in the buyer, that he never offered to appropriate them, surely it was too late for him to do so after the goods were lost. Then had he done anything to vest the property, had he delivered, had he offered to appropriate this oil while it was in existence? If so, when? At the moment of shipment? Clearly not. How could it be? The ship was not the defendants'; the oil was put on board with no notice that it was for the defendants; other oil was put with it; and it was in the power of the plaintiffs to appropriate to the defendants such part, or no part, of the whole, as they pleased. The cases referred to below clearly show there was no delivery. Was it, then, when the plaintiffs took the bill of lading? Clearly not. When they indorsed it? I say, as clearly not, for there was nothing to prevent their erasing that indorsement, or destroying or suppressing that bill of lading, and indorsing another. Then was the property so vested or appropriated by the bill of lading so indorsed being sent to Gooden? That depends on whether Gooden was in any way the agent of the defendants, and otherwise the case is as though the sellers had themselves brought the bill of lading to Bristol: they retained their power over it as long as their agent held it. Then I am of opinion Gooden was in no way defendants' agent. It is said the sellers intended this oil for the defendants. I doubt it not; but intention is immaterial till it manifests itself in an act. If a man intends to buy, and says so to the intended seller, and he intends to sell, and says so to the intended buyer, there is a contract of sale; and so there would be if neither had the intention. If there is a contract of sale, and the seller intends to appropriate a particular chattel in fulfillment of it, and the buyer intends to accept, and accepts, the property vests in him; and so it would had there been no such intention. If the buyer refuses, and the chattel corresponds with the contract, the vendor has a right of action, not because of his intention, but of his offer. An intention not communicated to the buyer is immaterial. Telling it to an indifferent person is no more than though he had noted it in his memorandum book, which is no more than though it existed solely in his own mind.

If the case is tried by the pleadings, I come to the same conclusion. Either the shipment was to be for the defendants at the time of shipment, or it was to be appropriated to them afterwards. In the former case the declaration must be taken to allege such a shipment, and the second

plea is an answer. On the latter view, the delivery of the bill of lading must be taken to be a delivery while the oil was capable of appropriation, and then the fourth plea meets the case. Anyhow the fifth plea is proved, for the allegation that the plaintiffs knew the oil was lost, and the defendants did not, is immaterial,—of course if that plea is bad, it is not proved, as those allegations are not.

This opinion is warranted by the authorities. If no property vested in the defendants while the goods were in esse, it remained in the plaintiffs, and they must bear the loss. The following authorities show that no property did vest: *Turner v. The Liverpool Docks*;¹ *Eldershaw v. Magniac*,² where there is the expression in the judgment, "Though the goods might have been purchased with the intention they should be delivered to Eldershaw, that intention was never executed;" *Mitchel v. Ede*;³ *Van Casteel v. Booker*.⁴ No doubt in some of those cases the word "intention" is used, but it means "intention indicated." In the judgment in *Turner v. The Liverpool Docks* it is said: "The question really is whether any and what effect is to be given to the terms of the bill of lading; for if by those terms they reserved to themselves the dominion over the cotton, it would not pass to the assignees. And in this case it was well argued by Mr. Raymond, that had the position of the parties been reversed the defendants could not successfully have said, 'You took the bill of lading in your own name, but you intended it for us.' But *Wait v. Baker*⁵ seems to me in point, and the reasoning of Baron Parke decisive. Nay, it is stronger than the present case, for there it is manifest Lethbridge had intended the barley for the defendant, and had told him so; but having done an act which retained the property in himself, and there being no unqualified tender, it was held not to pass to the vendees. In conclusion, I say there was no delivery of the goods, because the only thing that could be called a delivery was the shipment, and that was none; for the same reason there was no bargain and sale, which supposes the goods are ascertained; and there was, for the same reason, no offer to supply by delivery on board, and no offer subsequent.

POLLOCK, C. B. I have to deliver the judgment of my Brother MARTIN, my Brother CHANNELL, and myself.

The declaration contained several counts. The first stated that the defendants agreed with the plaintiffs to buy of them ten tons of best refined rape oil to be shipped free on board at Rotterdam in September, 1857, at £48 15s. per ton; to be paid for on delivery to defendants of the bill of lading, by bill to be accepted by defendants at three months after date, to be dated on the day of shipment of the oil.

¹ 6 Exch. 543.

² 6 Exch. 570, n.

³ 11 A. & E. 888.

⁴ 2 Exch. 621.

⁵ 2 Exch. 1.

The count contained the necessary averments of performance, and stated as a branch the nonacceptance of the bill.

There were counts for goods bargained and sold and goods sold and delivered. The pleas denied liability, and there was a special plea which raised the same defence.

At the trial at Guildhall before my Brother Martin, the facts proved were these:—The plaintiffs were merchants at Rotterdam and the defendants merchants at Bristol, and through Mr. Goolden, a broker at Bristol, they had made the contract of sale in the terms stated in the first count. On the 8th September, the plaintiffs (having on the previous day advised that the shipment would be made) shipped on board a steamer (a general ship), trading between Rotterdam and Bristol, five tons, parcel of the ten tons agreed to be sold by the contract, and received a bill of lading made out deliverable "To the shipper's order." On the same day they indorsed it specially to the defendants, and enclosed it and an invoice and a bill of exchange drawn in accordance with the contract to Mr. Goolden, to be delivered to the defendants and their acceptance to the bill obtained. The letter arrived at Bristol on the afternoon of the 10th, in due course of post, but after business hours. On the morning of the 11th Mr. Goolden took all the documents, viz., the bill of lading, the invoice, and the bill of exchange, and delivered them to one of the defendants. He then knew, and the fact was, that on the night of the 9th the steamer in which the oil was, was run down in the Bristol Channel and the oil totally lost. In about two hours the defendants returned the documents, and insisted that under the circumstances they were not bound to accept the bill or pay for the oil. The action was bought upon the 12th December, and the jury found a verdict for the plaintiffs, and stated that in their opinion, according to mercantile usage, the risk of the loss of the oil was upon the defendants. My Brother Martin gave leave to move to enter a verdict for them. A rule was obtained for this purpose, and it has been argued. The objection made on their behalf was that the oil was not delivered "free on board" within the true meaning of the contract, because the bill of lading was made out deliverable to "the shipper's order," and that therefore the plaintiffs had the control over the oil, and the contract for the carriage with the master and owner of the steamer was made with them. Several cases were cited on behalf of the defendants, *Walt v. Baker*, *Turner v. Liverpool Docks*, *Van Casteel v. Booker*, and some others. We think they are all clearly distinguishable.

If, at the time the oil was snipped at Rotterdam, the plaintiffs had intended to continue their ownership, and had taken the bill of lading in the terms in which it was made for the purpose of continuing the ownership and exercising dominion over the oil, they would in our opinion have broken their contract to ship the oil "free on board," and the property would not have passed to the defendants; but if

when they shipped the oil they intended to perform their contract and deliver it "free on board" for the defendants, we think they did perform it, and the property in the oil passed from them to the defendants. If, when the bill of lading was made out, they of purpose and design had the oil made deliverable to "shipper's order" for an advantage and benefit to themselves, it would be a different case; but if they had no object in the matter,—and they clearly had none, for upon the same day they indorsed it specially to the defendants, and transmitted it to Bristol,—we think it is exactly the same thing as if the bill of lading had originally been made out deliverable to the defendants.

It was said that so long as the bill of lading was in the hands of the plaintiffs or of their agent Mr. Goolden, they had the control over the oil, and no doubt they had to a certain extent, but they would have had precisely the same control whether the bill of lading was made out deliverable to the defendants or to the plaintiffs' order, and indorsed by them to the defendants. It is clear that it was intended by the contract that the plaintiffs should have this control, for the delivery of the bill of lading to and the acceptance by the defendants of the bill of exchange were to be contemporaneous acts, and the plaintiffs or their agent were not bound to deliver the bill of lading until they received the acceptance.

In all the cases cited on behalf of the defendants the bills of lading were designedly and of purpose made out to shipper's order to prevent the property passing, and enable the vendor to retain the possession and control of the goods. This distinguishes them from the present case. As to the contract in the bill of lading being originally made with the plaintiffs, we do not think it at all affects the terms as to the shipment "free on board," and especially since the statute 18 & 19 Vict. c. 111, which transfers the contract of the bill of lading to the indorsees.

In our opinion, therefore, the law coincides with the view taken by the jury, and the plaintiffs are entitled to recover upon the special count. We also think they are entitled to recover upon the count for goods sold and delivered, for upon the delivery on board the general ship, we consider the property vested in the defendants, and that therefore this count is maintainable.

It was said that the defendants could not insure the oil. This is not so in fact, for by a letter of the 7th, which was communicated to them on the 9th, they were informed that the shipment would take place on the following day; but whether they had the opportunity to insure or not is immaterial to the present question, which depends upon the law as to contracts and the transfer of property to a vendee upon a sale.

(4 Hurl. & N. 822.)

This was an appeal against the decision of the court of exchequer in discharging a rule to set aside the verdict found for the plaintiffs and enter it for the defendants,

pursuant to leave reserved at the trial. The pleadings and material facts of the case are fully stated in the report of the case in the court below, (3 H. & N. 484.)

Before ERLE, WILLIAMS, CROWDER, CROMPTON, WILLES, and HILL, JJ.

Raymond argued for the appellants (the defendants) in last Easter vacation. Pridoux, (Butt with him,) for the plaintiffs, (May 18.) Raymond, in reply.

The judgment of the court was now delivered by

ERLE, J. In this case we are of opinion that the judgment of the court below should be affirmed.

The contract was for the purchase of unascertained goods, and the question has been, when the property passed. For the answer the contract must be resorted to; and under that we think the property passed when the goods were placed "free on board," in performance of the contract.

In this class of cases the passing of the property may depend, according to the contract, either on mutual consent of both parties, or on the act of the vendor communicated to the purchaser, or on the act of the vendor alone.

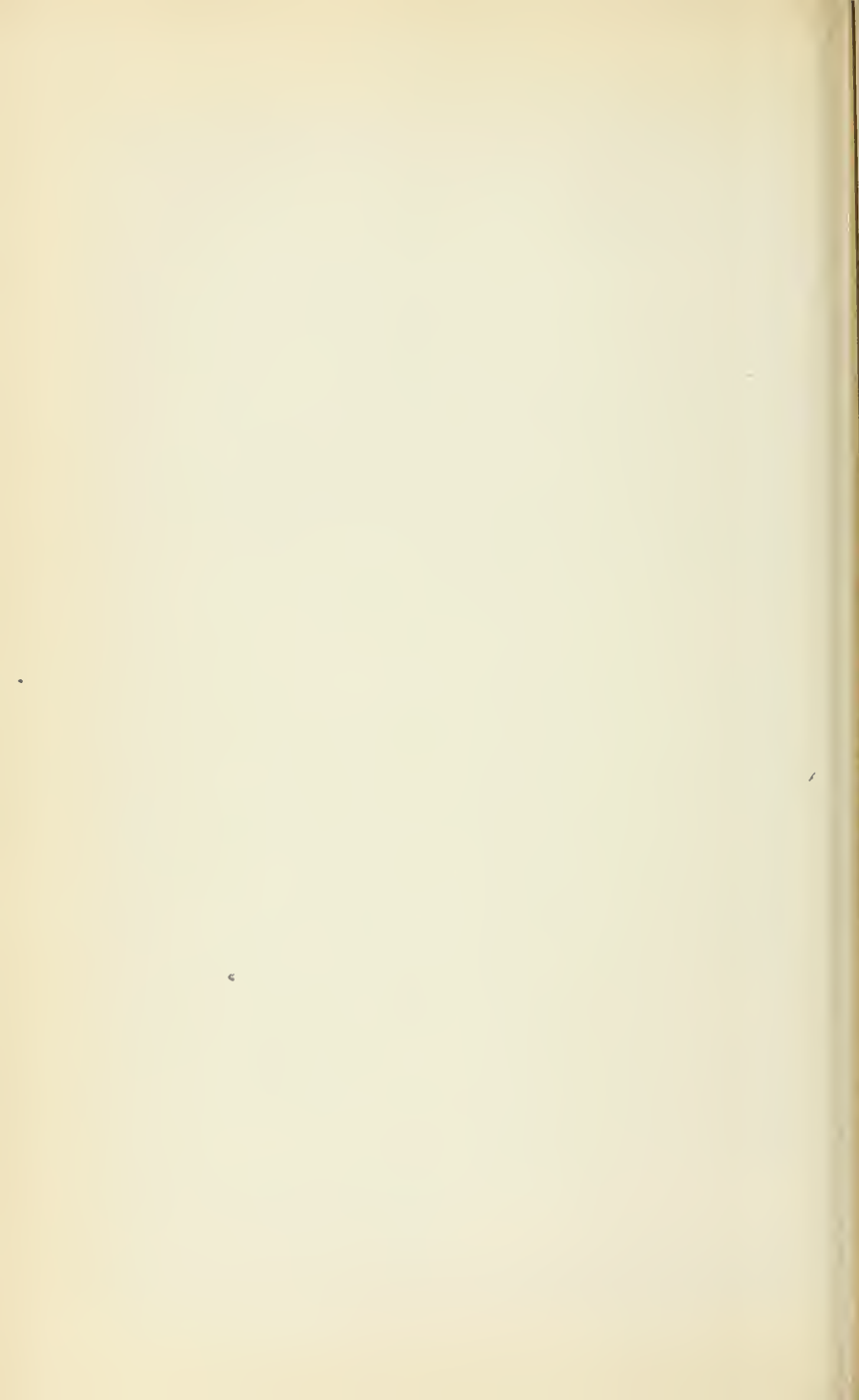
Here it passed by the act of the vendor

alone. If the bill of lading had made the goods "to be delivered to the order of the consignee," the passing of the property would be clear. The bill of lading made them "to be delivered to the order of the consignor," and he indorsed it to the order of the consignee, and sent it to his agent for the consignee. Thus the real question has been on the intention with which the bill of lading was taken in this form; whether the consignor shipped the goods in performance of his contract to place them "free on board," or for the purpose of retaining a control over them and continuing to be owner, contrary to the contract, as in the case of *Walt v. Baker*,⁶ and, as is explained in *Turner v. The Trustees of the Liverpool Docks*⁷ and *Van Casteel v. Booker*.⁸ The question was one of fact, and must be taken to have been disposed of at the trial; the only question before the court below or before us being, whether the mode of taking the bill of lading necessarily prevented the property from passing. In our opinion it did not, under the circumstances, and therefore the judgment must be affirmed. Judgment affirmed.

⁶ 2 Exch. 1.

⁷ 6 Exch. 513.

⁸ 2 Exch. 691.



BROWNFIELD et al. v. JOHNSON et al.
(18 Atl. Rep. 543, 128 Pa. St. 251.)

Supreme Court of Pennsylvania. Oct. 7, 1889.

Error to court of common pleas, Philadelphia county.

Before GREEN, CLARK, WILLIAMS, McCOLLUM and MITCHELL, JJ.

M. Hampton Todd, for plaintiffs in error.
John G. Johnson, for defendants in error.

CLARK, J. A complete understanding of the rules of law governing this case involves a brief statement of the material facts: On the 2d day of December, 1886, Brownfield & Co., the defendants, gave an order to Lawrence Johnson & Co., to purchase for them in Brazil 300 bags best quality of new Brazil nuts, of the first receipts, payment to be made in cash on arrival, or by 60-day note, etc., at the defendants' option, the plaintiffs to cable price at the time of shipment. On the same day the plaintiffs replied, stating that Brazil nuts were not bought by the bag, but by hectolitres, a measure which in past years averaged from 100 to 120 pounds; that the nuts came in bulk in the steamer, and the defendants would have to furnish the bags on arrival in New York; and as "the outturn of the measure is uncertain" they proposed to order 450 hectolitres, etc. To this the defendants replied by telephone: "Order 400 hectolitres, and buy only the very best nuts obtainable." The plaintiffs placed the order in the hands of their correspondents, La Roque, Da Costa & Co., Para, Brazil, who undertook the purchase, and on the 9th of February following advised the plaintiffs of shipment per steamer Portuence, upon board of which were nearly 6,000 hectolitres of Brazil nuts for other parties. Of this shipment, and of the price, notice was on the same day given to the defendants. Upon the arrival of the Portuence in New York, Lawrence Johnson & Co. handed to the defendants a delivery order for 400 hectolitres of Brazil nuts in bulk, in separate hold, on board the Portuence, with copy of original invoice, and the plaintiffs' bill, amounting to \$3,411.18. The invoice was for 312 hectolitres at 15,150 reis each, and 88 hectolitres at 14,000 reis each; showing that the nuts had been originally purchased in two separate lots, and at different prices. The defendants, with the delivery order in their possession, proceeded to New York, and went on board the Portuence, where they found one consignment of nuts in the name of Brownfield & Co., but the plaintiff's storekeeper informed them that the 400 hectolitres in question were embraced in a consignment of 582 hectolitres of Brazil nuts, in separate hold, in the name of the plaintiffs. The defendants thereupon refused to receive any portion of these nuts as an execution of their order. The plaintiffs tendered to the defendants the whole 582 hectolitres or 400 hectolitres thereof, at their option, at the invoiced prices; which tender, in either alternative,

the defendants declined to accept. The plaintiffs afterwards tendered 400 hectolitres at the average price, which the defendants also declined. Subsequently the plaintiffs separated the 400 hectolitres from the lot, and notified the defendants of their weight, but the defendants absolutely declined to accept the nuts on any of the several propositions made by the plaintiff. The 582 hectolitres were made up of two lots, — one of 312 hectolitres, invoiced at 15,150 reis; the other of 270 hectolitres, invoiced at 14,000 reis; 88 hectolitres of the latter were invoiced to the defendants, and the residue, being 182 hectolitres, to Lawrence Johnson & Co., for account of La Roque, Da Costa & Co., who, it is said, according to the method of dealing in Brazil, in order to get 88 hectolitres to fill the order, were obliged to buy a larger lot. That all parties acted in good faith is a fact found by the jury, and the case turns on the question whether the defendants' order was properly and legally executed.

If the purchase had been of 400 hectolitres only, shipped in separate hold, there could be no question as to the defendants' liability for the price. What, then, was the effect of placing the 182 hectolitres in the same hold with the 400 invoiced to the defendants? It may be conceded as a general rule that, as between vendor and vendee, when it is sought to compel a party to pay for goods which he has refused to accept, there can be no recovery unless the order has been strictly and literally fulfilled. The buyer is entitled to refuse the whole of the goods tendered if they exceed the quantity agreed, and the vendor has no right to insist upon the buyer's acceptance of all, or upon the buyer's selecting out of a larger quantity delivered. *Benj. Sales*, § 1031. To the same effect are the cases cited by the plaintiffs in error. With reference to quantity, however, the rule is less rigid where goods are ordered from a correspondent who is agent for buying them, (*Ireland v. Livingston*, L. R. 2 Q. B. 39; 36 Law J. Q. B. 50; L. R. 5 H. L. 395;) for the relation of vendor and vendee which finally results is preceded by the relation of principal and agent, and the agent in such a transaction is necessarily invested with some degree of discretion in making the purchase. See, also, *Johnston v. Kershaw*, L. R. 2 Exch. 82, 36 Law J. Exch. 44, and *Jefferson v. Querner*, 30 Law T. (N. S.) 867. It must be conceded, however, that the purchase and tender of 582 hectolitres, upon an order for 400, would involve a wider discretion than would be allowable under the special facts of this case, even as between principal and agent. In this case, however, the plaintiff's correspondent purchased for and invoiced to the defendants 400 hectolitres only, and that quantity was tendered. The remaining 182 hectolitres were not invoiced to the defendants, although the plaintiffs proposed that the defendants might have them if they chose to take them. The 400 hectolitres of nuts unquestionably became the property of the defendants when pur-

chased in Brazil, for they were purchased upon their order. By force of that order the plaintiffs became the defendants' agent, with authority to constitute an agent in Para for its execution; and the nuts were bought in virtue of the authority thus conferred.

The only question, therefore, would seem to be upon the effect of the shipping of the whole lot of 582 hectolitres in one hold. It was shown that this was the usual method of shipping, especially when the orders were small. There was no effort to establish a custom of this kind, but simply to show that this was the usual and ordinary method pursued in the shipping trade. The defendants had a right to suppose these goods would be shipped in the usual manner, unless they directed otherwise, and that, although intermingled with others in the forward hold of the vessel for transportation, they would be separated at the place of delivery. The nuts in question were of the same quality; they were bought at different prices, but the evidence is clear that they were of uniform quality. The weight of American authority supports the proposition that, when property is sold to be taken out of a specific mass of uniform quality, title will pass at once upon the making of the contract, if such appears to be the intent. Oil in a tank and grain in an elevator may serve as illustrations of this rule. Where, however, the property sold is part of a mass made up of units of unequal quality or value, such as cattle in a herd, selection is essential to the execution of the contract, and of course the rule cannot apply. *Benj. Sales*, 477-531, and cases there cited. The storage of oil in tanks and of grain in elevators, although not universal, is the usual and ordinary means employed by large dealers in those commodities; and, while no custom of that kind, technically speaking, could be established, the usage of the trade and general course of business in this country is well known. In view of the necessities which grow out of such usage the American courts have departed from the rule adhered to in England, and have recognized a rule for the delivery of this class of property more in con-

formity with the commercial usages of the country. A distinction is made between those cases where the act of separation is burdensome and expensive, or involves selection, and those where the article is uniform in bulk, and the act of separation throws no additional burden on the buyer. In the latter class of cases a tender of too much, from which the buyer is to take the proper quantity, is a good delivery. *Id.* 1030, note. See, also, *Kimberly v. Patchin*, 19 N. Y. 330; *Hutchison v. Com.*, 82 Pa. St. 472; *Wilkinson v. Stewart*, 85 Pa. St. 255; *Bretz v. Diehl*, 117 Pa. St. 589, 11 Atl. Rep. 893.

The case at bar bears no analogy whatever to *Stevenson v. Burgin*, 49 Pa. St. 44, for all that is decided by that case is that, in a contract for a fixed quantity of merchandise to be delivered on board a vessel, the purchaser is not bound to accept and pay for a larger quantity. The principle has no application to the evidence in this case. The case at bar bears a closer analogy to *Lockhart v. Bonsall*, 77 Pa. St. 53. In that case a tender of 5,000 barrels of oil was made by *Lockhart* to *Bonsall* out of a bulk of 5,981 barrels, contained in 118 bulk cars. As it was the duty of *Bonsall* to pump the oil from the cars into the tanks of the Anchor works, which had been designated as the place of delivery, it was held that *Lockhart* was not bound to set apart the precise quantity named in the contract before offering to deliver. So, here, the measuring of the nuts, and their removal from the vessel, was the work of the defendants, and as the article was uniform in bulk, selection was of no consequence, nor was the act in any sense burdensome or expensive; for, assuming that the whole bulk was to be measured, yet the expense attached to the whole, and each part-owner was liable to share it.

We are of opinion that, when the nuts were delivered on board the *Portuence* at Para, the title to 400-582 of the bulk belonged to the defendants, and that upon the arrival of the vessel at New York the tender of the 582 hectolitres from which the defendants were invited to take their share was a good delivery. The judgment is affirmed.





BUFFINGTON et al. v. GERRISH et al.

(15 Mass. 153.)

Supreme Judicial Court of Massachusetts.
Cumberland and Oxford. May Term, 1818.

Replevin for two pipes of brandy and sundry other articles of merchandize. The defendants pleaded property in one Ezekiel Walker, traversing the property of the plaintiffs, and issue was joined on the traverse. At the trial of this issue before Wilde J. at the last October term in this county, it was admitted by the plaintiffs, that the articles in question were sold by them to Walker, and that his notes for the stipulated price were received by them, payable in two and four months from the date; but they contended that the sale was void, on the ground of fraud and deception practised upon them by Walker. It was in evidence that Walker was an inhabitant of Portland, and in April 1816 applied to the plaintiffs, merchants in Boston, to whom he was a stranger, for the purchase of goods; and that he represented himself as a merchant engaged largely in business, having one store in Portland and another in the country, and of undoubted ability to pay.—The plaintiffs then wished for the recommendation of some one known to them, and Walker referred them to a Mr. McLellan, a merchant in Boston, for information; of whom, however, for some reason which did not appear, the plaintiffs made no inquiry: but confiding in the representations made by Walker, completed the sale, and delivered the goods. Whereupon Walker immediately transported them to Portland, where they were attached by the defendants, being deputy-sheriffs of this county, at the suit of divers creditors of Walker, to whom he had been indebted for several years. The plaintiffs then proved that the representations made by Walker were false and fraudulent: that he had no store in Portland, although he had one there a number of years ago but soon failed, and had since been wholly without visible property or credit, and deeply involved in debt. The plaintiffs finding that they had been imposed upon by Walker, pursued him to Portland, where they found the

goods in question, which had been attached by the defendants, as above stated; whereupon they commenced this suit. The judge instructed the jury that, if they should be of opinion, that the sale of the goods was effected by the fraudulent misrepresentations and deception of Walker, it would be sufficient to render the sale void; and that it might be avoided by the plaintiffs, notwithstanding the attachments of the bona fide creditors of Walker, without notice of the fraud; and the jury returned their verdict for the plaintiffs accordingly. If the said directions to the jury were, in the opinion of the whole court, substantially correct, judgment was to be rendered upon the verdict; otherwise the plaintiffs were to become nonsuit.

Mellen and Todd, for defendants. Longfellow, for plaintiffs.

PER CURIAM. It is not necessary in this case to consider, whether the property could be reclaimed by the plaintiffs, out of the hands of a bona fide purchaser, ignorant of the fraud, by which Walker obtained possession. As the possession of the goods by Walker, with the appearance of ownership, was with the consent of the plaintiffs, it is probable such sale would be held good.

The case here is very different. The plaintiffs endeavour to recover their merchandize, as soon as the fraud practised upon them is discovered. It never had become the property of Walker, and the right of the plaintiffs to reclaim it against him is indisputable. He had done no act, by which any of his creditors had been deceived with respect to this property; for their debts all existed before he acquired the possession. They claim title to it as his, not as their property: yet they cannot, under the circumstances proved, and the fact of fraud found by the jury, establish it as his. They are in the same condition, as to their debts, they were in before the commission of the fraud; and they ought not to reap the fruits of it, no credit having been given on account of this property.

Judgment on the verdict.



BULWINKLE et al. v. CRAMER et al.

3 S. E. Rep. 776, 27 S. C. 376.)

Supreme Court of South Carolina. Oct. 14,
1887.Appeal from common pleas circuit court,
Charleston county; Kershaw, Judge.Hayne & Ficken, for appellants. Simons
& Cappelmann, opposed.

McGOWAN, J. This was an action against the defendants Cramer & Blohme for \$1,138.70, damages sustained upon a lot of shelled corn in sacks purchased from them by the plaintiffs on May 17, 1884. The following writing was offered as the written contract of the parties:

"May 17th. Sold H. Bulwinkle & Co.—
5,000 Bu. mixed sacked corn @ 71½¢.
1,000 " " " 80½¢.

"Schooner-shipment, payable on arrival.
No wharfage.

[Signed] "Cramer & Blohme."

At the time the purchase was made, the corn was not in the city; but soon after, about the last of May or first of June, the schooner May Williams reached Charleston with the corn. Upon its arrival in the harbor, the plaintiffs were notified of the fact. Mr. Haesloop, one of the plaintiffs, went down to the vessel, and, finding about 150 sacks out, examined the corn in two or three of them, and found that "it seemed good." On June 4th, before all the corn was out of the vessel, the defendants presented their account for the corn, \$4,400.45. The odd cents were paid, and the plaintiffs gave their note as follows: "\$4,400. Charleston, S. C., June 4, 1884. Forty days after date, we promise to pay to the order of Cramer & Blohme forty-four hundred dollars at any city bank. Value received. Due July 19-22. H. Bulwinkle & Co." Indorsed as follows: "Pay A. Bequest, without recourse. Cramer & Blohme. A. Bequest." Written across the face: "Paid July 22, 1884."

A few days after the note was given, in removing the corn it was discovered that some of the sacks were damaged. Immediate notice was given to the defendants, but as they refused to correct the matter, or to have anything to do with it, the corn was "surveyed" by two gentlemen at the request of the "Merchants' Exchange," and 1,470 sacks were found to contain corn in "a damp, blue-eyed, and musty condition." This damaged corn was sold at auction, and brought less than the price of good corn of the same kind by \$1,138.70. In the mean time and before the note fell due, the defendants transferred it, and, as the defense of unsoundness of the corn could not be made to it in the hands of an innocent holder before due, the plaintiffs paid it, and brought this action for the damages sustained.

The cause came on for trial before Judge Kershaw and a jury. A witness, one of the defendants, was asked whether they (the defendants) contracted in their individual capacity, or in what capacity. The plaintiffs objected to the question; claiming that parol testimony could not be offered to alter the written contract.

The judge admitted the parol evidence, saying: "I do not regard this paper, which is a mere memorandum of contract taken down at the time, as precluding testimony as to the conversation between the parties, which might in any way throw light on the contract they were making. If these parties knew from any source, at the time that the paper was made, that they were actually dealing with the defendants as agents, I think it can be shown as part of the res geste," etc. The testimony being admitted, the jury, under the charge of the judge, found for the defendants.

The plaintiffs appeal upon the following exceptions: "(1) That his honor committed error in ruling that the paper or contract sued on was a mere memorandum of contract, and did not preclude testimony as to conversations between the parties which might in any way throw light on the contract, or the nature of the contract, they were making, and that if the plaintiffs knew from any source, at the time that paper was made, that they were dealing with the defendants as agents, it could be shown as part of the res geste. (2) Because his honor ruled that if, in this case, there was a clear understanding between the parties that defendants were acting as agents, such understanding was not excluded by that paper. (3) Because his honor admitted parol evidence on behalf of defendants, after objection thereto, as to conversations between the parties tending to throw light on the contract, or nature of the contract, they were making. (4) Because his honor admitted parol testimony, on behalf of defendants, tending to show that defendants were dealing as agents, and not as principals, in signing the written contract sued on by plaintiffs. (5) Because his honor admitted parol testimony, on behalf of defendants, tending to show in what character defendants were contracting, whether as agents or principals, when they signed the contract or writing sued on, and put in evidence by plaintiffs. (6) Because his honor erred in instructing the jury as follows: 'If the jury find that the defendants, or either of them, signed the written contract offered in evidence by the plaintiffs, they are personally bound by said contract, unless it was distinctly understood by both parties that the defendants were not to be personally liable for defects in the article purchased.'"

We agree with the circuit judge that in this state, as to personal property, the rule of law is that "sound price requires sound property," and the contract for the corn must be read as if these words were added, "corn warranted to be sound." A part of the corn turned out to be "unsound," and it would seem that the plaintiffs are entitled to redress on the warranty, unless they, in some way, waived their rights. Something was said in the case about the plaintiffs having accepted the corn for themselves after an examination; but, as there is no reference to that subject in the exceptions, the matter, of course, is not now before us.

As we understand it, the sole question

in the case is as to who is liable,—whether the defendants, who sold the corn, signed the agreement, and took the note of plaintiffs, and realized upon it in their own name, had the right, at the trial, to introduce parol testimony tending to show that they were not acting as principals, but as agents of Robert Turner & Son, of Baltimore, and, the contract of plaintiffs having been made with Turner & Son through them, they are not liable individually. The question as to the admissibility of the evidence, seems to have been considered in two aspects: First, whether the paper offered as the agreement was such a contract in writing as to be within the rule which excludes parol testimony; and, if so, second, whether the judge erred in charging the jury "that the defendants were not liable if it was distinctly understood by both parties that the defendants were not to be personally liable for defects in the article sold."

All the authorities agree that, as a general and most inflexible rule of evidence, "whenever written instruments are appointed, either by the requirements of the law, or by the compact of parties, to be the depositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy." *Starkie, Ev. 648.* This seems very plain, but the application of the rule is not always free from difficulty. In the infinite combination of circumstances, cases arise which seem exceptions, but, when clearly examined, are found not to fall within the principle. As, for example, it may happen, that the written instrument does not purport to cover the whole field of contract, and is not intended to be the "depository" of the whole agreement, but only one branch of it. In such case, the whole contract may be proved by parol, without touching the principle; the object being, not to add to or alter the written instrument, but to show the whole agreement, of which the writing is only a part. *Kaphan v. Ryan, 16 S. C. 360,* is an example of this class, where the court were "not called on to give construction to the note and mortgage, but to determine, from the evidence, for what purpose they (as executed) were to be used," etc. Here, the writing covers the whole field; stating who are the parties, and what the consideration and the price, in condensed form, but with exhaustive particularity. Sometimes the "written instrument" does not state specifically the consideration; as where a note says, generally, "for value received." There is a class of such cases where the consideration may be inquired into; and in that way matter may get in by parol "which does not necessarily tend to change the terms of the note, although, by showing the true consideration upon which it was given, it may control the recovery upon the note." See *McGrath v. Barnes, 13 S. C. 322,* where the court reviewed our cases upon the subject, and the former chief justice, Willard, endeavored to reconcile them on the distinction here indicated. In that case it was

held that "when an executor gave his promissory note for the payment of money, which was expressed to be the amount due by his testator's estate for medical services rendered, most of which during last illness, parol evidence of a contemporaneous agreement that the note was to be paid only upon a certain condition (that the probate judge would pass the account) is incompetent." In the case before us, there cannot be the slightest doubt that the consideration was as stated in the instrument. There is no doubt that a mere receipt, although in writing, may be explained by parol; but that goes on the ground that a receipt does not necessarily import a contract. As was stated in the case of *Heath v. Steele, 9 S. C. 92:* "In itself a receipt does not express the terms of any contract or writing of the minds of the parties between whom it passes, but merely evidences, by way of admission, the fact stated in it." See *Moffatt v. Hardin, 22 S. C. 9; 1 Greenl. § 305.*

But, assuming that this case does not come within any of the seeming exceptions above indicated, it is urged that the paper was too informal and *ex parte* to amount to a contract, but must be considered as a "mere memorandum of a contract," and therefore not such "a written instrument" as to come within the rule as to the exclusion of parol evidence. Most assuredly, a simple bill of parcels is not a contract, for the very good reason that it lacks the essential element of agreement, being only the statement of a fact,—a memorandum; "a note to help the memory;" as, for instance, the bill for the price of the corn rendered in this case was a mere memorandum. But a contract is a promise from one to another, either made in fact, or created by the law, to do, or to refrain from doing, some lawful thing. *Bish. Cont. § 1.* There is no particular form required; the only requirement being that it must contain the contract of the parties, and be definite and free from ambiguity. We can well understand how, in the hurry of business, parties would substitute condensed forms for regularly drawn out covenants or agreements. The defendants were offering corn for sale, to come by a vessel; the plaintiffs agreed to purchase a lot, and the defendants committed the agreement to writing thus: "May 17. Sold to H. Bulwinkle & Co., * * * corn," etc. "Schooner shipment, payable on arrival. [Signed] Cramer & Blohme." Why was that not a complete contract? It is said the plaintiffs did not sign it. The whole case shows that it was not *ex parte*, but expressed the contract of both parties. We think it is not unusual, in a certain class of agreements, to be signed only by one party; as in the case of an ordinary note, the terms of which are binding upon both parties. Suppose the defendants had offered the corn for sale at public auction, and, upon a lot being purchased by the plaintiffs at a certain price, the defendants had made upon their sale-book the same entry precisely as they made in this case, "Sold, etc., to Bulwinkle & Co.," would they not be

liable upon it as their contract? The research of the plaintiffs' attorney enabled him to furnish the court with references to several cases, which seem to conclude this.

In *Meyer v. Everth*, 4 Camp. 22, the action was on a contract in these words: "50 hogshheads of Hambro's sugar loaves at 155s., free on board of a British ship. Acceptance at 70 days." Lord Ellenborough held that it was a contract, and refused to admit parol testimony tending to show that, when the sugar was purchased, a sample was exhibited, saying: "When the sale note is silent as to the sample, I cannot permit it to be incorporated into the contract. This would amount to an admission of parol evidence to contradict a written document," etc. In *Powell v. Edmunds*, 12 East, 10, the action was on a sale note in these words: "April, 1806. I agree to become the purchaser of lot the first (timber trees) at £700, and agree to fulfill the conditions of sale. [Signed] A. Edmunds." At the trial an effort was made to show, by parol testimony, a warrant as to quantity by the auctioneer, but the evidence was rejected; the court saying: "There is no doubt that the parol evidence was properly rejected. The purchaser ought to have had it reduced into writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. If the parol testimony were admissible in this case, I know of no instance where a party may not, by parol testimony, superadd any term to a written agreement, which would be setting aside all written contracts, and rendering them of no effect," etc. In *Smith v. Jeffries*, 15 Mees. & W. 560, the terms were: "I hereby agree to sell Mr. Smith, of Tanner Hill, Deptford, sixty tons of Ware potatoes, at £5 per ton, and for which he has given me a bill for £250 for three months, and is to give £50 cash on Friday next. [Signed] Samuel Jeffries." It appeared that in the neighborhood three qualities of potatoes were known as "Wares," and the effort was to show, by parol, that the contract was for a particular kind of Wares. Held, "that the evidence ought not to have been received; it went to vary and limit the contract between the parties." In *Greases v. Ashlin*, 3 Camp. 426, the words were: "Sold to John Greases 50 quarters of oats, at 45s. 6d. per quarter, out of 175 quarters. [Signed] I. Stevenson, for I. Ashlin." The defendant attempted to prove that his agent Stevenson had verbally made it a condition of sale that the plaintiff should take away the oats immediately, and had abated 6d. per quarter of the price originally offered, in expectation of his agreeing to do so. The court held that "it was not competent to the defendant to give such evidence, as it materially varied the contract, which had been reduced into writing." In each of the two last cases cited, the paper was signed only by one of the contracting parties, and the action was brought by the party who had not signed it. See, also, *McClannaghan v. Hines*, 2 Strob. 122, and *Gibson v. Watts*, 1 McCord, Eq. 490.

We think the paper proved in this case,

LAW SALES—8

was a contract in writing of both parties, within the rule as to the exclusion of parol evidence.

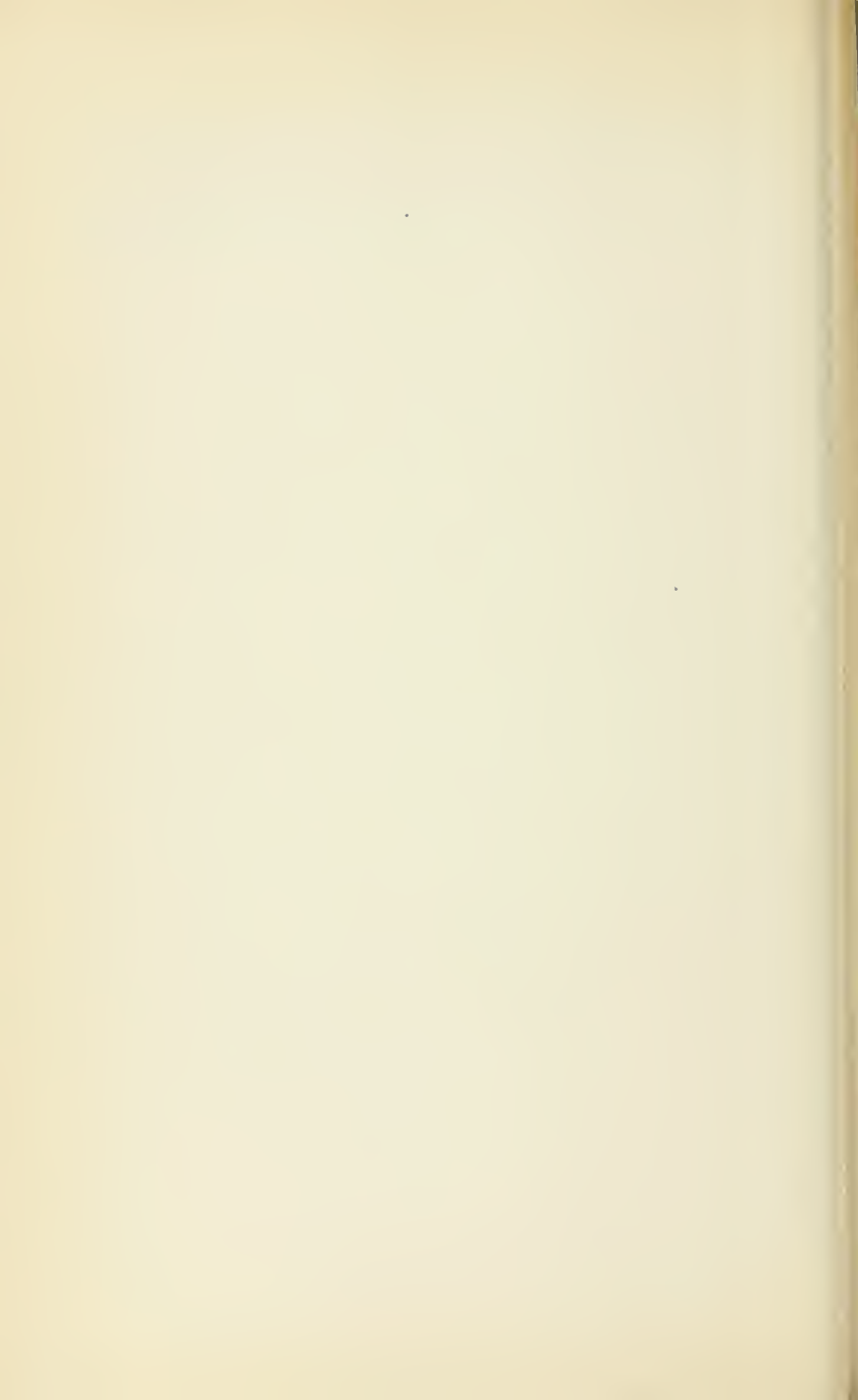
But it is insisted that, while this may be so as to what may be called the terms of the paper,—the quality of the article, consideration, time of payment, etc.,—yet parol testimony was admissible tending to show that the defendants Cramer & Blohme, in selling the corn, committing the agreement to writing, taking the note, and realizing upon it in their own name, were acting, not as the papers represented, but as agents of a house in Baltimore, and that the plaintiffs contracted with said house, through Cramer & Blohme as their agents. Is not the signature to a contract in writing, showing who made it, and in what character, a part, and a very important part, of that contract? We are unable to see any good reason why this part should not be protected from alteration or addition, as well as any other part of the contract in writing. It seems to us that, when the defendants signed the contract in their own names, that became a part of it, and could not be altered by parol, so as to add to the signature, "as agents of Robert Turner & Son, of Baltimore." "A person contracting as agent will be personally liable, whether he is known to be an agent or not, in all cases where he makes the contract in his own name. * * * If an agent selling goods as bought of him, (the agent,) he would be personally liable for a failure to deliver the goods." Story, Ag. 269. See, also, *Id.* § 219; *Benj. Sales*, § 219; *Higgins v. Senior*, 8 Mees. & W. 834; *Nash v. Towne*, 5 Wall. 703; and *Jones v. Littledale*, 6 Adol. & E. 486, in which last case cited Lord Chief Justice Denman said: "There is no doubt that evidence is admissible, on behalf of one of the contracting parties, to show that the other was agent only, though contracting in his own name, and so fix the real principal; but it is clear that, if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility. In this case there is no contract signed by the sellers, so as to satisfy the statute of frauds, until the invoice, by which the defendants represent themselves to be the sellers; and we think they are conclusively bound by that representation. Their object in so representing was, as appeared by the evidence of custom, to secure the passing of the money through their hands, and to prevent its being paid to their principals; but in so doing they have made themselves responsible," etc.

In the case from Wallace, Mr. Justice Clifford said: "Parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency, and mentioned the name of his principal, at the time the contract was executed. Where a simple contract other than a bill or note is made by an agent,

the principal whom he represents may lawfully maintain an action upon it in his own name, and parole evidence is admissible, although the contract is in writing, to show that the person named in the contract was an agent, and that he was acting for his principal. 'Such evidence,' says Baron Parke, 'does not deny that the contract binds those whom on its face it purports to bind, but shows that it also binds another;' and that principle has been fully adopted by this court,"—citing numerous authorities.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause remanded to the circuit court for a new trial.

SIMPSON, C. J., and McIVER, J., concur.



BUNN et al. v. MARKHAM et al.

(7 Taunt. 224.)

Court of Common Pleas, Michaelmas Term,
1816.

This was an action of trover, brought to recover from the defendants, who were the executors of Sir Jervase Clifton, Bart. deceased, certain India bonds, bank notes, guineas, an iron chest, and the boxes and envelopes in which these securities and money had been contained. The cause was tried at Guildhall at the sittings after Trinity term, 1816, before Gibbs C. J. The evidence was, that Sir Jervase Clifton, being of an advanced age, and confined to his bed, and having by his will, dated in 1814, bequeathed all his cash, notes, and India bonds to his executors, to be sold and invested in trust for his daughter, the wife of the defendant Markham, and her children, on 24th March, thinking himself near his end, sent for his solicitor, the defendant Jamson, to make a codicil to his will, whose partner Leeson attended him, and prepared a codicil, by which the testator gave the plaintiff, Mary Bunn, otherwise Clifton, (who had for more than thirty years cohabited with him, and was the mother of the other plaintiff,) £2000, and to his and her daughter, the plaintiff Rebecca Clifton, the like sum of £2000. While the solicitor was in the house, the testator taking some keys from a basket which he always kept by his bed-side, delivered them to John Bunn Clifton, (his son by the one, and the brother of the other plaintiff,) Leeson, and a tenant named Sandby, in whom he reposed great confidence, and directed them to go to an iron chest in which he kept his valuables, fixed in the wall of another room in his house, and to bring from it whatever property they found there. They brought three parcels, and laid them on his bed, one of which contained three India bonds, value £1500, and bank notes together of the value of £2225, another contained £1100 in bank notes, and the other contained 479 guineas, the value of the whole being £3829. The testator, on being informed that the amount was about £170 short of £4000, said it should be made up to £1000 even money, and directed for the plaintiffs, £2000 for each; but the complement was never in fact added. On the box which contained the £2225 Mr. Bunn Clifton had before, on the 7th of March, by the testator's direction, written "For Mrs. and Miss Clifton £504." The other two parcels, Mr. Bunn Clifton, by his father's direction, on the present occasion sealed up and wrote on them the words, "For Mrs. and Miss Clifton." The testator charged Mr. Clifton, that after his decease he should deliver these to his mother and sister, the plaintiffs. Mr. Clifton, by his father's direction, replaced this property in the iron chest, locked it, and brought back the keys, which Leeson, by the testator's direction, sealed up in a paper parcel, and wrote thereon, "To be delivered to Mr. Jamson after Sir Jervase Clifton's decease." The keys were then again put into the basket by the testa-

tor's bed-side. The plaintiffs were not then in the house, but upon Mrs. Clifton's arrival some days after, the testator intrusted to her the keys of the iron chest, and told her that the contents were to be her's and her daughter's, and charged her to keep the keys; and many times afterwards, particularly on 27th April, on the occasion of his making a further codicil, he declared, that the money in the iron chest was for the plaintiffs. After this time, the testator frequently expressed anxiety respecting the keys of the iron chest, and required them to be shown him, and on learning that they had been obtained from Mrs. Clifton by his eldest son, he expressed great displeasure, and caused the keys to be replaced in the basket of keys which was always kept in his bed-room. The parcels, and the property therein, continued in the same state until after the testator's decease, which happened a year afterwards. Gibbs C. J. left to the consideration of the jury the probability that the intended £4000 of which the testator had spoken, was the same sum designated by the codicil of 24th March; and also the question, whether the testator meant to make this an absolute gift to the plaintiffs, or only provisional, upon the probability that he might not survive long enough to complete the codicil. The jury found that this was not the £4000 designated by the codicil, and that the testator intended it as an absolute and not a provisional gift. His lordship reserved the point, whether there had been in this instance such a sufficient delivery of the property, as was necessary to constitute a donatio mortis causa.

Best and Blosset Serjts. showed cause. Shepherd, Solicitor-General, and Copley Serjt., who were to have supported the rule, were relieved by the court.

GIBBS C. J. The two grounds on which the present application is made, have a different object in view. The one is, that the jury did not draw a correct conclusion from the facts submitted to them: the other is, to enter a nonsuit, on the ground that the facts, taking them to be proved, do not make out the title of the plaintiffs. The first question stands principally on the evidence of Mr. Bunn Clifton. If his memory has not failed him, the verdict is certainly right, and his credit and character stand unimpeached. I say this, in justice to a young man whose character is his best possession. As to the other points, it is agreed on all hands, that a donatio mortis causa cannot exist, without a delivery. The facts of this case are, that the property was taken out of a chest of the testator, looked over by him, and sealed up in three different parcels: being so sealed, he declares that it is intended for the witness's mother and sister, and directs that it shall be given to them after his decease; there is no other delivery but that: it is replaced in the chest, and the keys are re-delivered to the testator, or by him to persons whom he always nominates as his servants for that effect, and he expresses

a continual anxiety about the custody of the keys. The question is, whether this be a sufficient delivery to make a *donatio mortis causa*; and we are clear that it is not. It is argued by the counsel for the plaintiffs, that there needs not to be a continuing possession in the donee; but that the donor may resume the possession without determining the gift. There is no case which decides that the donor may resume the possession, and the *donatio* continue. *Smith v. Smith*, 2 Str. 955, is a very confused case. Where the master died, it does not appear: inasmuch as it is stated that the master delivered the keys of his rooms to his servants when he went out of town, probably he died in the country, and then the delivery of the keys last made to his servant, would be a continuing of possession up to his decease. But all the cases agree, that if the donor resumes the possession, it ends the gift. Lord Hardwicke expressly so holds in *Ward v. Turner*, where it suited the purpose of the counsel to argue, 2 Vez. Sr. 433, that if the donor, after making a complete delivery, receives back the article, the donation remains perfect. Lord Hardwicke immediately denied that proposition, and held, that if the possession of the donee do not continue, the gift is at an end. Seeing, therefore, that it is in the power of the donor at any time to revoke the donation before his death, and that there must be a continuing possession of the donee after the delivery to the time of the donor's death: seeing too, here, that there is neither a delivery, nor a continuing possession, we are of opinion that no interest in this property passed to Mrs. and Miss Clifton under the supposed delivery to the son for the use of his mother and sister; and that therefore a nonsuit must be entered.

DALLAS J. I am of the same opinion. The facts of the case denote an intention only: there is an indorsement of the names of the mother and daughter on the paper; but they denote the testator's intention only. The property is disposed in a chest belonging to the testator; he retains the key; he does not even deliver it to the persons for whom the contents were intended. If he had chosen to take out the bank-notes the next day, and dispose of them to another, it was competent for him so to do. The donor, therefore, never divested himself of the possession for a moment, and therefore this is not a *donatio mortis causa*.

PARK J. concurred. Both by the civil and by the English law, in this kind of *donatio* there must be an act of delivery. Even in that strongest case of *Smith v. Smith*, Lord Hardwicke C. J. held that there must be an act of delivery, to constitute a gift: here is not only no evidence of a delivery, but the evidence is against a delivery; for the testator states that it was to be delivered at a future time; in addition to this, the donor gets the keys, and is offended if any other gets the keys: neither is there a continuing possession, which is necessary.

BURROUGH J. The son had no authority whatever to deliver over these articles into the hands of his mother, and if he had no such authority, it was not a *donatio mortis causa*. In Burn's Ecclesiastical Law, all the cases are collected: they all indicate, that there must be a delivery either to the donee himself, or to some one else for the donee's use: here is no such delivery, and therefore a nonsuit must be entered.

Rule absolute.



BUTLER v. BUTLER.

(77 N. Y. 472.)

Court of Appeals of New York. June 3, 1879.

Appeal from a judgment, general term, third department, affirming a judgment in plaintiff's favor entered upon the report of a referee.

George W. Miller, for appellant. Samuel Hand, for respondent.

DANFORTH, J. The plaintiff submitted a proposition in writing to the defendant, and it was in like manner accepted. By it the plaintiff said: "I propose to furnish you, for your hotel in Luzerne, N. Y., one of Butler's Gas Generators and Holders. * * * The holder to be of sufficient capacity to contain fifteen hundred cubic feet of gas. To furnish all pipes to connect the generator with the holder, and the holder with the main pipe leading to the hotel; all weights and chains, sheaves and pulleys to support and balance the holder. All labor for putting up and setting the retorts, and hanging the holder, and connecting the pipes as before mentioned, and a sufficient air-mixing meter, for the sum of \$1,500. You (the defendant) are to furnish the tank and house for holder and generator, and gallows frame for support of holder, to pay the freight on the machine from New York, and board one mechanic while putting up and connecting as above, exclusive of the cost of the machine, and furnish one man to help rivet the gas-meter. I guarantee * * * that the machine shall be put up in the best and most workmanlike manner and all ready to make gas by June 7, if your part of the work does not delay us. Payments to be \$500 cash when the works are on that ground, \$500 in one bond, due September 25, 1872, and \$500 in one bond, due September 25, 1873, with interest."

The plaintiff in his complaint alleges that he "delivered the gas-works to the defendant at Luzerne in accordance with the contract;" avers a constant readiness on his part "to set the same up and make the connections in accordance with the agreement," but says, "the defendant has never permitted him to do so," and for breach, that the defendant, "except to pay freight charges on said gas-works, has wholly failed to perform the agreement on his part, and has not paid the sum of \$1,500, and for that sum, with interest, he demands judgment."

Upon the trial the referee found in accordance with the complaint, and among other things, "that the plaintiff delivered the gas-works to the defendant at Luzerne; that the extra expense which the plaintiff would have incurred to set the same up and make the connections is \$100;" and deducting that from the contract-price finds that the plaintiff is entitled to recover the balance, and directs judgment therefor with interest from the 1st of July, 1871. The defendant excepted to these findings, and the exceptions, I think, are well taken. The contract is single and entire. If performed by the plain-

tiff he would be entitled to recover the full sum of \$1,500, part in cash, part in bonds. He was not to furnish materials and perform labor upon them for the defendant, but from his own materials and by his own labor furnish to the defendant, properly affixed to his premises, a completed machine of a particular kind, "all ready to make gas."

It is not pretended that this has been done; on the contrary, the defendant has not permitted him to do it—and as the contract-price is not divisible, there is no ground on which a recovery can be had for any part of it. *Inchbold v. Western, etc.*, 17 C. B. (N. S.) 733; *Planche v. Colburn*, 8 Bing. 14. Nor is it in any sense true that the gas-works have been delivered to the defendant. Certain materials, among others sheet and other kinds of iron, in bundles and rolls, castings, grates, rings, retort covers, and "one machine bottom," which, when properly arranged and joined together, may compose a machine, were delivered by the plaintiff to a common carrier, who received them at 'owner's risk.' They were marked B. C. B., or B. C. B. for B. C. Butler, Luzerne, N. Y., and the defendant paid the freight upon them. Even these things did not thereby become his property: the freight was paid in execution of the contract, but the goods remained the goods of the plaintiff. If lost during transportation, or if destroyed after reaching the place of destination, the plaintiff would have to bear the loss. He could change their destination, and make such use of them as he saw fit. If creditors could take them in execution (*Atkinson v. Bell*, 8 B. & C. 277), for the defendant was to have, not these articles, as separate parts or members from which by the application of skill and labor a machine could be constructed, but a complete thing, placed upon his own premises, of the required capacity and ready for use; and until that was furnished the property in these chattels did not pass from the plaintiff. *Atkinson v. Bell*, 8 B. & C. 277; *Johnson v. Hunt*, 11 Wend. 137; *Tripp v. Armitage*, 4 M. & W. 698; *Andrew v. Dieterich*, 14 Wend. 35; *Andrews v. Durant*, 11 N. Y. 35; 62 Am. Dec. 55; *Ward v. Shaw*, 7 Wend. 404; *Decker v. Furniss*, 14 N. Y. 611; *Clark v. Bulmer*, 11 M. & W. 243. Doubtless the plaintiff may in this, as in other cases where the performance of a contract has been prevented by the act or omission of the other party, recover what he has lost thereby, if any thing, or the damages sustained, if any. *Hosmer v. Wilson*, 7 Mich. 294; 74 Am. Dec. 716. Such a case however was not presented to the referee, nor was it suggested by the pleadings. The plaintiff neither claimed nor proved damages arising from the breach of the contract, nor from being prevented from performing it. On the contrary the cause of action was treated by the plaintiff and referee and by the court below as one where property bargained for had been delivered and title vested in the purchaser, and for which therefore the plaintiff, within well-settled rules of law, might maintain the action and recover the purchase-price. And such

is the contention of the learned counsel for the respondent upon this appeal. There is however nothing in the evidence to warrant that view of the case, or permit the application of such rule of law.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.



BUTLER v. THOMSON et al.

(92 U. S. 412.)

Supreme Court of the United States. Oct. Term, 1875.

Error to the circuit court of the United States for the southern district of New York.

Mr. William M. Evarts for the plaintiff in error. Mr. E. H. Owen, contra.

Mr. Justice HUNT delivered the opinion of the court.

The plaintiff alleged that on the eleventh day of July, 1867, he bargained and sold to the defendants a quantity of iron thereafter to arrive, at prices named, and that the defendants agreed to accept the same, and pay the purchase-money therefor; that the iron arrived in due time, and was tendered to the defendants, who refused to receive and pay for the same; and that the plaintiff afterwards sold the same at a loss of \$3,581, which sum he requires the defendants to make good to him. The defendants interposed a general denial.

Upon the trial, the case came down to this: The plaintiff employed certain brokers of the city of New York to make sale for him of the expected iron. The brokers made sale of the same to the defendants at 12 $\frac{3}{4}$ cents per pound in gold, cash.

The following memorandum of sale was made by the brokers; viz.:

"New York, July 10, 1867. Sold for Messrs. Butler & Co., Boston, to Messrs. A. A. Thomson & Co., New York, seven hundred and five (795) packs first-quality Russia sheet-iron, to arrive at New York, at twelve and three-quarters (12 $\frac{3}{4}$) cents per pound, gold, cash, actual tare. Iron due about Sept. 1, '67. White & Hazzard, Brokers."

The defendants contend, that, under the statute of frauds of the state of New York, this contract is not obligatory upon them. The judge before whom the cause was tried at the circuit concurred in this view, and ordered judgment for the defendants. It is from this judgment that the present review is taken.

The provision of the statute of New York upon which the question arises (2 R. S. p. 136, sect. 3) is in these words:—

"Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless (1) a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or (2) unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or (3) unless the buyer shall at the time pay some part of the purchase-money."

The eighth section of the same title provides that "every instrument required by any of the provisions of this title to be subscribed by any party may be subscribed by the lawful agent of such party."

There is no pretense that any of the

goods were accepted and received, or that any part of the purchase-money was paid. The question arises upon the first branch of the statute, that a memorandum of the contract shall be made in writing, and be subscribed by the parties to be charged thereby.

The defendants do not contend that there is not a sufficient subscription to the contract. White & Hazzard, who signed the instrument, are proved to have been the authorized agents of the plaintiff to sell, and of the defendants to buy; and their signature, it is conceded, is the signature both of the defendants and of the plaintiff.

The objection is to the sufficiency of the contract itself. The written memorandum recites that Butler & Co. had sold the iron to the defendants at a price named; but it is said there is no recital that the defendants had bought the iron. There is a contract of sale, it is argued, but not a contract of purchase.

As we understand the argument, it is an attack upon the contract, not only that it is not in compliance with the statute of frauds, but that it is void upon common-law principles. The evidence required by the statute to avoid frauds and perjuries—to wit, a written agreement—is present. Such as it is, the contract is sufficiently established, and possesses the evidence of its existence required by the statute of frauds.

The contention would be the same if the articles sold had not been of the price named in the statute; to wit, the sum of fifty dollars.

Let us examine the argument. Blackstone's definition of a sale is "a transmutation of property from one man to another in consideration of some price." 2 Bl. 446. Kent's is, "a contract for the transfer of property from one person to another." 2 Kent, 615. Bigelow, C. J., defines it in these words: "Competent parties to enter into a contract, an agreement to sell, the mutual assent of the parties to the subject-matter of the sale, and the price to be paid therefor." *Gardner v. Lane*, 12 Allen, 39, 43. A learned author says, "If any one of the ingredients be wanting, there is no sale." *Atkinson on Sales*, 5. Benjamin on Sales, p. 1, note, and p. 2, says, "To constitute a valid sale, there must be (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; (4) a price in money, paid or promised."

Now, then, can there be a sale of seven hundred and five packs of iron, unless there be a purchase of it? How can there be a seller, unless there be likewise a purchaser. These authorities require the existence of both. The essential idea of a sale is that of an agreement or meeting of minds by which a title passes from one, and vests in another. A man cannot sell his chattel by a perfected sale, and still remain its owner. There may be an offer to sell, subject to acceptance, which would bind the party offering, and not the other party until acceptance. The same may be said of an optional purchase upon a sufficient consideration. There is also a

class of cases under the statute of frauds where it is held that the party who has signed the contract may be held chargeable upon it, and the other party, who has not furnished that evidence against himself, will not be thus chargeable. Unilateral contracts have been the subject of much discussion, which we do not propose here to repeat. In *Thornton v. Kemster*, 5 Taunt. 788, it is said,—

"Contracts may exist, which, by reason of the statute of frauds, could be enforced by one party, although they could not be enforced by the other party. The statute of frauds in that respect throws a difficulty in the way of the evidence. The objection does not interfere with the substance of the contract, and it is the negligence of the other party that he did not take care to obtain and preserve admissible evidence to enable himself also to enforce it."

The statute of 29 Car. II., c. 3, on which this decision is based, that "no contract for the sale of goods, wares, and merchandise, for the price of £10 sterling or upwards, shall be allowed to be good except the buyer," &c., is in legal effect the same as that of the statute of New York already cited. See *Justice v. Lang*, 42 N. Y. 493, that such is the effect of the statute of New York.

The case before us does not fall within this class. There the contract is signed by one party only; here both have signed the paper; and, if a contract is created, it is a mutual one. Both are liable, or neither.

Under these authorities, it seems clear that there can be no sale unless there is a purchase, as there can be no purchase unless there be a sale. When, therefore, the parties mutually certify and declare in writing that Butler & Co. have sold a certain amount of iron to Thomson & Co. at a price named, there is included therein a certificate and declaration that Thomson & Co. have bought the iron at that price.

In *Newell v. Radford*, L. R. 3 C. P. 52, the memorandum was in these words: "Mr. H., 32 sacks culasses at 39s., 280 lbs., to wait orders;" signed, "John Williams." It was objected that it was impossible to tell from this memorandum which party was the buyer, and which was the seller. Parol proof of the situation of the parties was received, and that Williams was the defendant's agent, and made the entry in the plaintiff's books. In answer to the objection the court say, "The plaintiff was a baker, who would require the flour, and the defendant a person who was in the habit of selling it;" and the plaintiff recovered. It may be noticed, also, that the memorandum in that case was so formal as to contain no words either of purchase or sale ("Mr. H., 32 sacks culasses at 39s., 280 lbs., to wait orders"); but it

was held to create a good contract upon the parol evidence mentioned.

The subject of bought and sold notes was elaborately discussed in the case of *Sivewright v. Archibald*, 6 Eng. L. & Eq. 286; s. c. 17 Q. B. 103; Benj. on Sales, p. 224, sect. 290. There was a discrepancy in that case between the bought and sold notes. The sold note was for a sale to the defendant of "500 tons Messrs. Dunlop, Wilson, & Co.'s pig-iron." The bought note was for "500 tons of Scotch pig-iron." The diversity between the bought and sold notes was held to avoid the contract. It was held that the subject of the contract was not agreed upon between the parties. It appeared there, and the circumstance is commented on by Mr. Justice Patteson, that the practice is to deliver the bought note to the buyer, and the sold note to the seller. He says, "Each of them, in the language used, purports to be a representation by the broker to the person to whom it is delivered, of what he, the broker, has done as agent for that person. Surely the bought note delivered to the buyer cannot be said to be the memorandum of the contract signed by the buyer's agent, in order that he might be bound thereby; for then it would have been delivered to the seller, not to the buyer, and vice versa as to the sold note."

The argument on which the decision below, of the case we are considering, was based, is that the contract of sale is distinct from the contract of purchase; that, to charge the purchaser, the suit should be brought upon the bought note; and that the purchaser can only be held where his agent has signed and delivered to the other party a bought note,—that is, an instrument expressing that he has bought and will pay for the articles specified. Mr. Justice Patteson answers this by the statement that the bought note is always delivered to the buyer, and the sold note to the seller. The plaintiff here has the signature of both parties, and the counterpart delivered to him, and on which he brings his suit, is, according to Mr. Justice Patteson, the proper one for that purpose,—that is, the sold note.

We do not discover in *Justice v. Lang*, reported in 42 N. Y. 493, and again in 52 N. Y. 323, any thing that conflicts with the views we have expressed, or that gives material aid in deciding the points we have discussed.

The memorandum in question, expressing that the iron had been sold, imported necessarily that it had been bought. The contract was signed by the agent of both parties, the buyer and the seller, and in our opinion was a perfect contract, obligatory upon both the parties thereto.

Judgment reversed, and cause remanded for a new trial.



CAMPBELL PRINTING-PRESS CO. v.
THORP et al.

(36 Fed. Rep. 414.)

Circuit Court, E. D. Michigan. Oct. 16, 1888.

At Law. On exceptions to referee's report.

The facts fully appear in the following statement by BROWN, J.:

Plaintiff agreed to sell to the defendants certain printing-presses, rollers, and other property connected with a printing establishment, and guaranteed that the presses should be "free from defective material or workmanship, and should do their work satisfactorily." The referee, to whom the case was referred, found that neither of the three presses was satisfactory to defendants; nor did they do their work reasonably well, yet he found as a conclusion of law that the plaintiff was entitled to recover the whole agreed price, less a small sum, conceded as a set-off, upon the theory that it was the duty of the defendants to reject the presses if they were not satisfied with them, and that, having kept them, there was no method of estimating the loss they suffered by reason of their dissatisfaction; in other words, that the value of a press that should work to their satisfaction was not capable of pecuniary estimation.

Charles A. Kent, for plaintiff. W. L. Carpenter, for defendants.

Before JACKSON, Circuit Judge, and BROWN, District Judge.

BROWN, J., (after stating the facts as above.) The correctness of the referee's ruling depends largely upon the proper construction of the guaranty that the presses should be free from defects of material or workmanship, and should do their work satisfactorily. There is no doubt of the general proposition that where one party agrees to do a piece of work to the satisfaction of another, the excellence of which work is wholly or in part a matter of taste, such, for instance, as a portrait, a photograph or bust, a suit of clothes, a musical instrument, or a piece of furniture, the buyer may reject it without assigning any reason for his dissatisfaction. In such case the law cannot relieve against the folly of the vendor, by inquiring whether the dissatisfaction of the vendee was based upon reasonable grounds or not. It is even doubtful whether it can inquire into the good faith of the vendee's decision. *Brown v. Foster*, 113 Mass. 136; *McCarren v. McNulty*, 7 Gray, 139; *Gibson v. Crannage*, 39 Mich. 49; *Hoffman v. Gallaher*, 6 Daly, 42; *Zaleski v. Clark*, 44 Conn. 218; *McLure v. Briggs*, 58 Vt. 82, 2 Atl. Rep. 583. The true doctrine is expressed in *McCarren v. McNulty*, 7 Gray, 139, 141: "It may be that the plaintiff was injudicious or indiscreet in undertaking to labor and furnish materials for a compensation, the payment of which was made dependent upon a contingency so hazardous or doubtful as the approval or satisfaction of a party particularly in interest. But of that he was the sole judge. Against the consequences re-

sulting from his own bargain the law can afford him no relief. Having voluntarily assumed the obligations and risk of the contract, his legal rights are to be ascertained and determined solely according to its provisions." Other cases extend the same doctrine to contracts for the performance of labor, or for the support of another to his satisfaction. In such case the employer may be wholly dissatisfied with the character of the service rendered, or the beneficiary made exceedingly uncomfortable by his surroundings, without in either case being able to assign what the law would recognize as a sufficient reason for his dissatisfaction. It makes him, however, the sole judge of the reasonableness of his own discontent. *Taylor v. Brewer*, 1 Maule & S. 290; *Rossiter v. Cooper*, 23 Vt. 522; *Tyler v. Ames*, 5 Lans. 280; *Spring v. Clock Co.*, 24 Hun, 175; *Hart v. Hart*, 22 Barb. 606; *Ellis v. Mortimer*, 1 Bos. & P. N. R. 257.

Whether these words should receive the same construction where the suitability of the article furnished involves no question of taste or personal feeling, but simply one of mechanical fitness to do a certain work, or accomplish a certain purpose, admits of some doubt. The authorities are not entirely harmonious, but the decided weight of authority is in favor of the construction given to it by the referee. So far as this state is concerned, two decisions seem to put the matter entirely at rest. In *Machine Co. v. Smith*, 50 Mich. 565, 15 N. W. Rep. 906, it was held that where the vendor of a harvesting-machine gave a warranty that the contract of purchase should be of no effect unless the machine worked to the buyer's satisfaction, it was held the purchaser had reserved the absolute right to reject the machine, and that his reasons for doing so could not be investigated. A still stronger case is that of *Manufacturing Co. v. Ellis*, 68 Mich. 101, 35 N. W. Rep. 841. The agreement was that a certain grain-binder should do good work and "give satisfaction." It was held that, unless the defendant was satisfied with the machine, although it did good work, he was not bound to purchase. See, also, *Platt v. Broderick*, 70 Mich. 577, 38 N. W. Rep. 579. In the case of *Machine Co. v. Chesson*, 33 Minn. 32, 21 N. W. Rep. 846, plaintiff guaranteed to furnish defendant a cord-binder guaranteed to work satisfactorily. It was held that in case, upon reasonable trial, it did not work satisfactorily, it was unnecessary for the defendant to return it to plaintiff, but it was sufficient for him, within a reasonable time, to notify plaintiff, in substance, that it did not work satisfactorily, and that he declined to accept it. The same ruling was made with regard to a steam-boiler, in *Gray v. Railroad Co.*, 11 Hun, 70; with regard to a machine for generating gas, in *Aiken v. Hyde*, 39 Mass. 184, with regard to a fanning mill, in *Goodrich v. Van Nortwick*, 43 Ill. 445; and with regard to a passenger elevator, in *Singerly v. Thayer*, 108 Pa. St. 201, 2 Atl. Rep. 230. In this latter case a large number of authorities are cited by counsel and court to the same effect. The New York cases at first blush

would seem to lay down a different rule, but when carefully examined the difference is more apparent than real. The earliest case is that of *Folliard v. Wallace*, 2 Johns. 395, in which one covenanted that in case the title to a lot of land conveyed to him should prove good and sufficient in law, that he would pay to a third party, three months after he should be well satisfied that the title was undisputed and good against all other claims. It was held that the award of certain commissioners on the title in favor of the covenantor ought to satisfy him, and that it was not enough for the defendant to allege that he was not satisfied with the title without some good reason being assigned for his dissatisfaction, and that he was not to judge for himself, but that the law would determine when he ought to be satisfied. Chancellor Kent, who delivered the opinion, observed that "if the defendant were left at liberty to judge for himself when he were satisfied, it would totally destroy the obligation, and the agreement would be absolutely void." In *City of Brooklyn v. Railway Co.*, 47 N. Y. 475, an action was brought upon a covenant in which the defendant agreed to keep the pavement of certain streets in thorough repair within the tracks, etc., under the direction of such competent authority as the common council might designate. The court held that, if the pavement were kept in thorough repair, it was sufficient though it was kept up without direction from the competent authority designated by the common council. "That which the law shall say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with." A like ruling was made in *Misell v. Insurance Co.*, 76 N. Y. 115, with reference to the certificate of a physician in a life insurance case; and, finally, in *Boiler Co. v. Garden*, 101 N. Y. 387, 4 N. E. Rep. 749, the parties entered into a contract by which plaintiff agreed to alter certain boilers belonging to defendants, for which the defendants agreed to pay the stipulated price "as soon as they are satisfied the boilers as changed are a success." In an action to recover the contract price, the defendants claimed the question as to whether the work was a success was one alone for them to determine. This was held to be untenable, and that a simple allegation of dissatisfaction without a good reason therefor was no defense. The prior cases were quoted as settling the law in that state. None of these cases, however, related to the sale of manufactured articles. In none of them was there an opportunity for a rescission, and restoring the parties to their statu quo. The last case particularly is much like that of *Iron Co. v. Best*, 14 Mo. App. 503, hereafter cited, and is subject to the same criticism.

Notwithstanding the cases in New York, and admitting all that is claimed for them, the weight of authority as well as of reason inclines us to the opinion that the parties must stand to their contract as they have made it, and if the vendor has agreed to furnish an article that shall be satisfactory to the vendee, he consti-

tutes the latter the sole arbiter of his own satisfaction. It is entirely well settled that if the acceptance of a machine is made dependent upon the approval of an engineer, or if a pavement is to be laid to the satisfaction of a street commissioner, or if lumber is to be sealed by an inspector, the decision of such agent, in the absence of fraud, bad faith, or clear error, is conclusive. We know of no reason of public policy which prevents parties from contracting that the decision of one or the other shall be conclusive. In the case of chattel mortgages the rule is entirely well settled that, if the mortgage provides that mortgagee may take possession whenever he deems his security unsafe, the mortgagor thereby submits himself to the judgment of the mortgagee on the question of security, and the latter is not bound to prove circumstances justifying his action. Certain cases, however, establish a reasonable modification of this rule, to the effect that the dissatisfaction must be real, and not feigned, and that the vendee is not at liberty to say he is dissatisfied when in reality he is not; in other words, that his discontent must be genuine. *Manufacturing Co. v. Brush*, 43 Vt. 528; *Daggett v. Johnson*, 49 Vt. 345; *McClure v. Briggs*, 58 Vt. 82, 2 Atl. Rep. 583. The same cases, however, hold that, while the vendee is bound to act honestly, it is not enough to show that he ought to have been satisfied, and that his discontent was without good reason. See, also, *Lynn v. Railroad Co.*, 60 Md. 404; *Railroad Co. v. Brydon*, 65 Md. 198, 611, 3 Atl. Rep. 306, and 9 Atl. Rep. 126. In *Manufacturing Co. v. Chico*, 24 Fed. Rep. 893, it was held that where, under a contract, a fire-engine was to be made and delivered which should be satisfactory to the purchaser, it must in fact be satisfactory to him, or he is not bound to take it; but that, where the purchaser was in fact satisfied, but fraudulently, and in bad faith, declared that he was not satisfied, the contract had been fully performed by the vendor, and the purchaser was bound to accept the article. This I regard as an accurate summary of the whole law upon the subject.

Some doubt is thrown upon this case by the stipulation that the presses shall work satisfactorily, without stating the person to whom they shall be satisfactory. We think, however, that there can be but one interpretation fairly given to these words. When, in common language, we speak of making a thing satisfactory, we mean it shall be satisfactory to the person to whom we furnish it. It would be nonsense to say that it should be satisfactory to the vendor. It would be indefinite to say that it should be satisfactory to a third person, without designating the person. It can only be intended that it shall be satisfactory to the person who is himself interested in its satisfactory operation, and that is the vendee. This was the view taken of similar words in *Taylor v. Brewer*, 1 Maule & S. 290; *Machine Co. v. Chesrown*, 33 Minn. 32, 21 N. W. Rep. 846; and in *Singerly v. Tayer*, 108 Pa. St. 291, 2 Atl. Rep. 230. The case of *Iron Co. v. Best*, 14 Mo. App. 503, is clearly distin-

guishable from the cases last cited. In this case defendant agreed to build an air-furnace in plaintiff's warehouse, according to a plan to be furnished by himself. The furnace thus became attached to the freehold of the plaintiff, and was incapable of severance. It was a structure into which the plaintiff had put all the materials and the defendant had put all the labor. Defendant could not take away the materials, because they were not only attached to plaintiff's freehold, but actually belonged to him. His labor was gone, and could not be recalled. To permit the plaintiff, under such circumstances, to refuse to pay, if in fact the furnace worked reasonably well, and at the same time to retain the fruits of defendant's labor, would have been an unwarrantable extension of the doctrine applied to machines or articles of manufacture which can be rejected. The court very properly held that the covenant was satisfied if the furnace worked reasonably well. Conceding, then, that the plaintiff was bound to furnish presses that should work satisfactorily to the defendants, it is very evident that they were not satisfied with their operation, and that they had reasonable grounds for their dissatisfaction, as the referee finds that the presses neither worked to their satisfac-

tion, nor reasonably well. This undoubtedly gave them the power to reject the machines. Instead of doing this, however, they kept them, and now seek to recoup their damages by reason of their failure to work as they ought to. Had the covenant been that the presses should work well, we should have no doubt that the defendants might have recouped such damages, and that the referee would have found them capable of estimation. These damages would have been the difference in value between presses which would work reasonably well and those which were actually furnished. But in attempting to apply the same rule in the present case, we encounter a formidable difficulty from the impossibility of fixing the value of machines which shall work to the satisfaction of the defendants. It will not do to say that such value is to be gauged by that of a machine which shall work reasonably well, because such a press might not have been satisfactory to the vendee, or he might have been content with one which would not have worked to the satisfaction of experts in the business. We think that, having elected to retain the presses, they are bound to pay the full price for them. The exceptions to the referee's report will therefore be overruled, and judgment entered upon his finding.



CARDINELL v. BENNETT et al.

(52 Cal. 476.)

Supreme Court of California. Oct. Term, 1877.

Action by John A. Cardinell against Charles A. Bennett and another, to recover a horse or its value. From a judgment for plaintiff defendants appeal. Reversed.

One Carpenter, the owner of the horse, agreed with plaintiff to give it to him on a date named, in exchange for a buggy and \$250, plaintiff paying one dollar at the time the agreement was made. Thereafter Carpenter sold the horse to defendant Bennett, and could not deliver it to plaintiff when called on to do so.

Tilden & Willson, for appellant. Thomas V. O'Brien, for respondent.

BY THE COURT. Plaintiff had no property, either general or special, in the horse "Chief Crowley" at the time of the alleged conversion, or when this action was commenced. The transaction did not amount to a sale on credit from Carpenter to Cardinell, but a contract whereby it was agreed that the latter should acquire the property on the performance of certain conditions promised by him to be performed.

Judgment and order reversed and case remanded.



CAULKINS v. HELLMAN.

(47 N. Y. 449.)

Court of Appeals of New York. 1872.

Action to recover for wines and casks sold.

Stephen K. Williams, for appellant. E. G. Latham, for respondents.

RAPALLO, J. The instructions to the jury as to the legal effect of the delivery of the wine at Blood's Station in conformity with the terms of the verbal contract of sale were clearly erroneous. No act of the vendor alone, in performance of a contract of sale void by the statute of frauds, can give validity to such a contract.

Where a valid contract of sale is made in writing a delivery pursuant to such contract at the place agreed upon for delivery, or a shipment of the goods in conformity with the terms of the contract, will pass the title to the vendee without any receipt or acceptance of the goods by him. But if the contract is oral, and no part of the price is paid by the vendee, there must be not only a delivery of the goods by the vendor, but a receipt and acceptance of them by the vendee to pass the title or make the vendee liable for the price; and this acceptance must be voluntary and unconditional. Even the receipt of the goods, without an acceptance, is not sufficient. Some act or conduct on the part of the vendee, or his authorized agent, manifesting an intention to accept the goods as a performance of the contract, and to appropriate them, is required to supply the place of a written contract. This distinction seems to have been overlooked in the charge. The learned judge instructed the jury, as a matter of law, that if they were satisfied that the wine or any portion of it was actually delivered in pursuance of the verbal contract, that circumstance was sufficient to take the contract out of the statute of frauds, and the contract was a valid one, and might be enforced notwithstanding it was not in writing. The intention of the jury was directed to the inquiry whether the plaintiffs had faithfully performed their part of the contract rather than to the action of the defendant, and the judge proceeded to state that if the wine was delivered to the express company at Blood's Station in good order, in merchantable condition, and corresponded in quality and all substantial and material respects with the samples, then he instructed the jury as a matter of law, that if they found the contract as Gordon testified with respect to the place of delivery, that was a complete delivery under the contract, and passed the title from the plaintiffs to the defendant, and the plaintiffs were entitled to recover the contract price of the wines.

The plaintiff's counsel suggests in the statement of facts appended to his points, that Gordon was the agent of the defendant, to accept the goods at Blood's Station. But this statement is not borne out by the evidence; Gordon was the agent of the plaintiffs for the sale of the goods; it

was incumbent upon them to make the shipment. All that Gordon testifies to is that the defendant requested him to make the best bargain he could for the freight. He does not claim that he had any authority to accept the goods for the defendant.

According to the defendant's testimony Gordon clearly had no such authority, nor did the defendant designate any conveyance, and the judge submitted no question to the jury as to the authority either of Gordon or the express company to accept the goods. On the contrary, he repeated that if when the wine was delivered at Blood's Station it was in good order and corresponded with the samples, the plaintiffs would be entitled to a verdict for the contract price, upon the ground that the parties by the contract (assuming it to be as claimed by the plaintiffs), fixed upon that station as the place of delivery; "that it was true that the defendant was not there to receive it, and had no agent at Blood's Station to receive it, and had no opportunity to inspect it there; but that that was a contingency he had not seen, and which he might have guarded against in the contract."

It is evident that the learned judge applied to this case the rule as to delivery, which would be applicable to a valid, written contract of sale, but which is inapplicable when the contract is void by the statute of frauds.

The effect of the delivery of goods at a railway station, to be forwarded to the vendee in pursuance of the terms of a verbal contract of sale, was very fully discussed in the case of *Norman v. Phillips*, 14 Mees. & Wels. 277, and a verdict for the plaintiff founded upon such a delivery, and upon the additional fact that the vendor sent an invoice to the vendee, which he retained for several weeks, was set aside. The English authorities on the subject are reviewed in that case, and the American and English authorities bearing upon the same question are also referred to in the late cases of *Rodgers v. Phillips*, 40 N. Y. 519, and *Cross v. O'Donnell*, 44 id. 661; 4 Am. Rep. 721. The latter case is cited by the counsel for the plaintiffs as an authority for the proposition that a delivery to a designated carrier is sufficient to take the case out of the statute; but it does not so decide. It holds only that the receipt and acceptance need not be simultaneous, but that they may take place at different times, and that after the purchaser had himself inspected and accepted the goods, purchased the delivery of them by his direction to a designated carrier was a good delivery, and the carrier was the agent of the purchaser to receive them. No question however arises in the present case as to a delivery to a designated carrier, as the evidence in respect to the agreed mode of delivery is conflicting, and no question of acceptance by the carrier as agent for the defendant was submitted to the jury.

The judge submitted to the jury two questions, to which he required specific answers.

1st. Was the wine delivered at the railroad station at the time agreed upon by

the parties, and was it then in all respects in good order, and like the samples exhibited by the plaintiff to the defendant? and,

2d. Was the wine accepted by the defendant after it reached his place of business in New York?

The jury answered both of these questions in the affirmative, and it is now claimed that the answer to the second question renders immaterial any error the judge may have committed in respect to the effect of the delivery at the station.

It is difficult to find any evidence justifying the submission to the jury of the second question; but no exception was taken to such submission. The motion for a nonsuit would have raised that point, were it not for the fact that there was evidence to go to the jury on the claim of \$52 for barrels, and this precluded a nonsuit. We think however that the error in the charge may have misled the jury in passing upon the second question; at all events, it is not impossible that it should have done so. Having been instructed that upon the fact as they found it in respect to the agreement for a delivery at Blood's Station, the title to the goods had passed to the defendant before the receipt of them at New York, and that their verdict must be for the plaintiffs, they may have examined the question of his acceptance of them at New York with less scrutiny than they would have exercised had they been informed that the result of the case depended upon their finding on that question. And the construction of the defendant's acts and language may, in some degree, have been influenced by the consideration that when the wine arrived in New York the title had, according to the theory on which the case was submitted to them, passed to the defendant, and he had no right to reject the wines. Furthermore, we think the judge erred in excluding the evidence of the contents of the telegram which the defendant attempted to send to the plaintiffs immediately upon the receipt of the wine. If, as was offered to be shown, it stated that he declined to accept the wine, it was material as part of the res geste. A bona fide attempt, immediately on the receipt and examination of the wine, to communicate such a message, was an act on his part explaining and qualifying his conduct in receiving the wine into his store and allowing it to remain there. And even though the message never reached the plaintiffs, it bore upon the question of acceptance by the defendant. The objec-

tion to the evidence of the contents of the telegram was not placed on the ground of omission to produce the original, and the judge in his charge instructed the jury that the attempt to send this telegram did not affect the plaintiffs' rights, for the reason that it was not shown to have been received by them, and this was excepted to. In *Norman v. Phillips*, 14 Mees. & Wels. 277, the defendant was allowed to prove that on being informed by the railway clerk that the goods were lying for him at the station, he said he would not take them, and stress was laid upon the fact. Yet this statement to the clerk was not communicated to the plaintiff. Evidence of an attempt to send a message to them to the same effect, though unsuccessful, would have been no more objectionable than the declaration to the clerk. The acts of the defendant at the time of the receipt of the goods, and his bona fide attempt to communicate to the plaintiffs his rejection of them were I think material and competent to rebut any presumption of an acceptance arising from their retention by him.

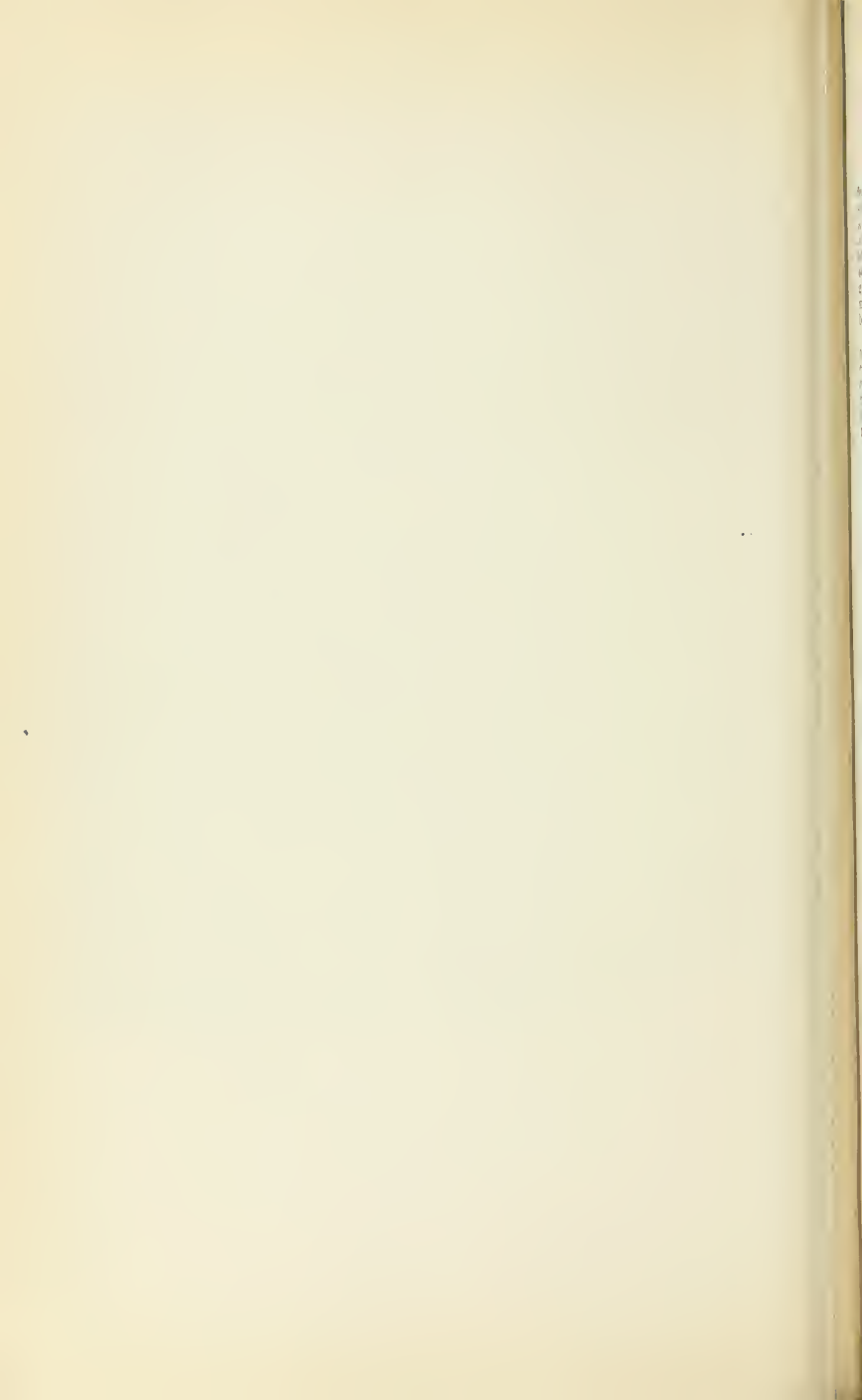
The judge was requested to instruct the jury that the true meaning of the defendant's letter of March 31 was a refusal to accept the wine under the contract. A careful examination of that letter satisfies us that the defendant was entitled to have the jury thus instructed. The letter clearly shows that the defendant did not accept or appropriate the wines. After complaining in strong language of their quality and condition, and of the time and manner of their shipment, he says to the plaintiffs, "what can be done now with the wine after it suffered so much, and shows itself of such a poor quality? I don't know myself and am awaiting your advice and opinion." He concludes by expressing his regret that their first direct transaction should have turned out so unsatisfactory, and by stating that he cannot be the sufferer by it, and he awaits their disposition.

This language clearly indicates an intention to throw upon the plaintiffs the responsibility of directing what should be done with the wine, and is inconsistent with any acceptance or appropriation of it by the writer.

For these reasons the judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.



CHANDELOR v. LOPUS.

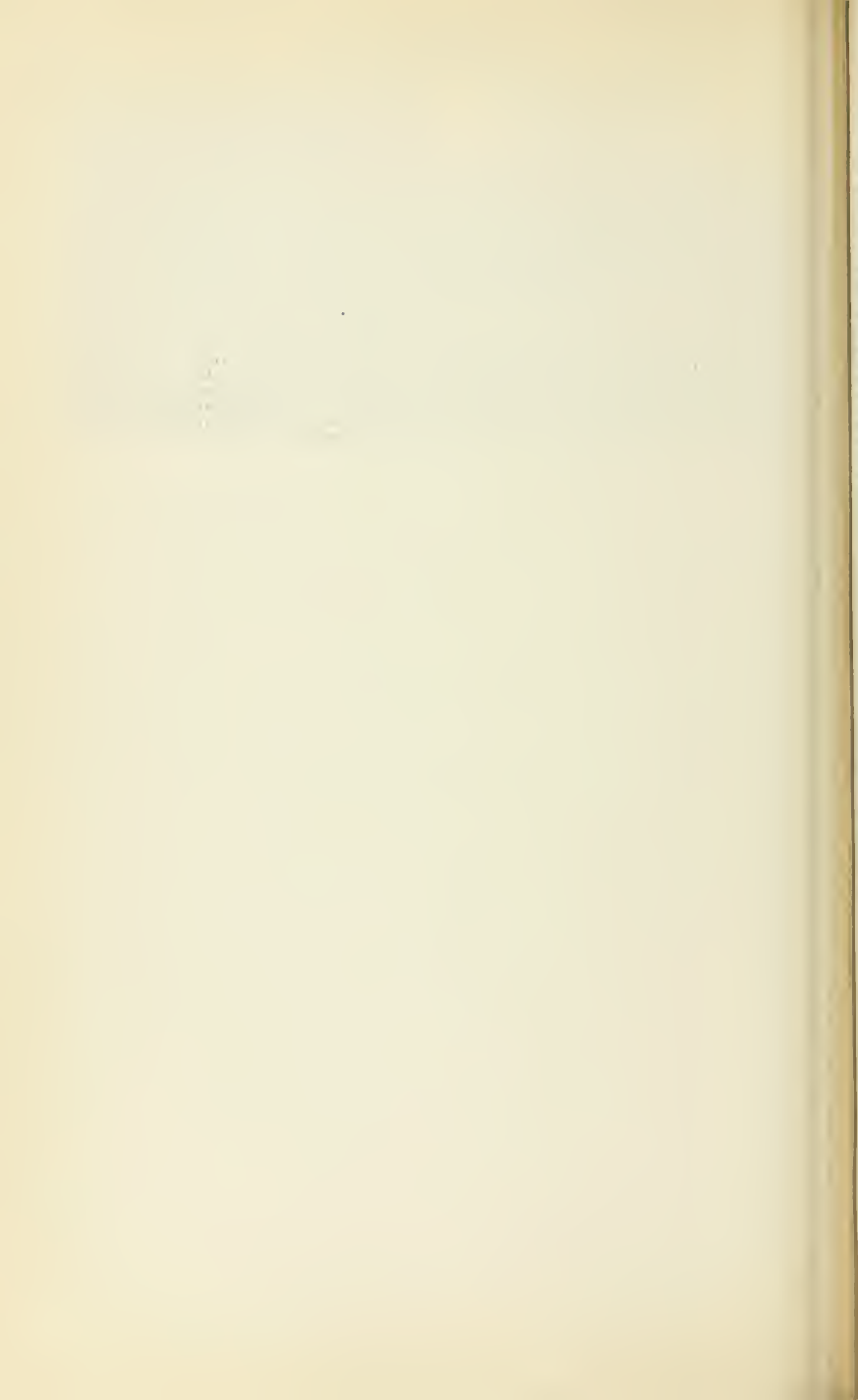
(2 Cro. Jac. 2.)

Exchequer Chamber, Easter Term.

Action upon the case: Whereas the defendant being a goldsmith, and having skill in jewels and precious stones, had a stone, which he affirmed to Lopus to be a bezar-stone, and sold it to him for one hundred pounds; ubi revers, it was not a bezar-stone. The defendant pleaded not guilty, and verdict was given and judgment entered for the plaintiff in the king's bench.

But error was thereof brought in the exchequer chamber; because the declaration contains not matter sufficient to charge the defendant, viz. that he warranted it to be a bezar-stone or that he knew that it was not a bezar-stone; for it may be that he himself was ignorant whether it

were a bezar-stone or not. And all the justices and barons (except ANDERSON) held, that for this cause it was error. For the bare affirmation that it was a bezar-stone, without warranting it to be so, is no cause of action. And although he knew it to be no bezar-stone, it is not material. For every one, in selling his wares, will affirm that his wares are good, or the horse which he sells is sound: yet if he does not warrant them to be so, it is no cause of action. And the warranty ought to be made at the same time as the sale. Fitz. Nat. Brev. 94, c. & 98, b; 5 Hen. 7, pl. 41; 9 Hen. 6, pl. 53; 12 Hen. 4, pl. 1; 42 Ass. 8; 7 Hen. 4, pl. 15. Wherefore, forasmuch as no warranty is alleged, they held the declaration to be ill. ANDERSON to the contrary; for the deceit in selling it as a bezar, whereas it was not so, is cause of action. But notwithstanding it was adjudged to be no cause, and the judgment was reversed.



CHAPMAN v. MURCH.

(19 Johns. 290.)

Supreme Court of New York. Jan. Term,
1822.

In error to the court of common pleas of Washington county. Chapman brought an action of assumpsit against Murch in the court below. The declaration stated, that the defendant, on the 1st of December, 1818, in consideration that the plaintiff would deliver to the defendant, a certain horse of the plaintiff of great value, in exchange for a certain horse of the defendant, the defendant undertook and promised, that the horse of the defendant was then and there sound, &c.; that the plaintiff, confiding in the said promise of the defendant, delivered to him the said horse of the plaintiff, in exchange for the defendant's horse, &c. Yet the defendant, &c. fraudulently, &c. did not perform or regard his said promise, &c., for that the horse of the defendant was not sound, but, on the contrary, was unsound, and had a certain disease, called the yellow water, of which he afterwards, to wit, on the 2d day of December, 1818, died, whereby, &c. The defendant pleaded the general issue, and on the trial of the cause, the plaintiff offered to prove, that the parties exchanged horses; that the plaintiff let the defendant have a horse worth 100 dollars, in consideration of which the defendant let the plaintiff have another horse, which the defendant, at the time, represented to be sound; that the horse of the defendant, so delivered to him in exchange, was not sound, but that he had the disease, called the yellow water, which rendered him useless and of no value, and that he died the next day. The evidence so offered was objected to by the defendant's counsel, and rejected by the court, on the ground, that this being an action of assumpsit founded on a warranty of the soundness of the horse, the plaintiff, in order to entitle himself to a recovery, was bound to prove an express warranty, and that the testimony offered by the plaintiff did not amount to such a warranty. A bill of exceptions was taken to

the opinion of the court, on which the writ of error was brought. The case was submitted to the court without argument, on a statement of the points and authorities.

SPENCER, C. J., delivered the opinion of the court. In the various cases which have been cited, it appears, abundantly, that when the action is founded on a warranty of the soundness of a chattel sold, a warranty must be proved; but it no where appears, that it is necessary that the vendor should use the express words, that he warranted the soundness. If a man should say, on the sale of a horse, "I promise you the horse is sound," it is difficult to conceive, that this is not a warranty, and an express one too. Peake (on Evid. 22s) says, "in an action on a warranty, the plaintiff must prove the sale and warranty." "In general, (he says,) any representation made by the defendant of the state of the thing sold, at the time of the sale, will amount to a warranty." He adds, "but where the defendant refers to any document, or to his belief only, in such cases no action is maintainable, without proof, that he knew he was representing a falsehood." In every action on a warranty, it must be shown that there was an express and direct affirmation of the quality and condition of the thing sold, as contradistinguished from opinion, &c., and when that is made out, it would be an anomaly to require that the word warranty should be used. Any words of equivalent import, showing the intention of the parties, that there should be a warranty, will suffice. In the present case, the plaintiff offered to prove what, under the circumstances, might be an express warranty; and that was for the consideration of the jury, under the advice of the court. *Seixas v. Woods*, 2 Caines, 56. *Pasley v. Freeman*, 3 Term Rep. 57. *Cramer v. Readshaw*, 10 Johns. Rep. 484.

The judgment must be reversed, and a venire de novo awarded to the court below.

Judgment reversed.

CLARK v. DRAPER.

(19 N. H. 419.)

Superior Court of Judicature of New Hampshire. Hillsborough. July Term, 1849.

Trover by one Clark against Aaron Draper for a pair of oxen. A verdict was taken by consent for plaintiff, on which judgment was to be entered, or the verdict was to be set aside and judgment entered for defendant, as the opinion of the court should be upon the whole case. Verdict set aside, and judgment for defendant.

Plaintiff purchased the oxen in suit of defendant for \$60, giving his note for that amount, and defendant agreeing to keep the oxen for plaintiff until the following Saturday. At the same time defendant gave to plaintiff some brass knobs, which he said the oxen wore on their horns. Subsequently plaintiff sent for the oxen, and defendant refused to give them up without receiving the money for them, whereupon this action was instituted.

Pierce, for plaintiff. Sawyer, for defendant.

WOODS, J. This is an action of trover, and the plaintiff, in order to maintain it, must have either a special or general property in the thing demanded, together with the right of immediate possession. The property may be absolutely his, yet another may have had such a right to the possession of it when the demand was made and the action brought, that the plaintiff could not, against the will of such person, lawfully have taken it into his possession, and cannot, therefore, maintain the present action, founded, as it is, upon the assumption that his right to possess the chattels has been violated by the defendant.

It appears that in the month of September, 1847, the plaintiff bought the oxen of the defendant for sixty dollars, who agreed to keep them till the following Saturday for the plaintiff, at his request. No money or other thing was paid for the oxen, and no credit was stipulated for. Now that transaction constituted a sale of the chattels from the defendant to the plaintiff, who thereupon became the owner of them. A loss or destruction of them, or any damage happening to them afterwards, would have been the loss or detriment of the purchaser and not of the seller, and the claim of the latter for the price would have been in no wise affected by such an occurrence. 1 Inst. 24, 3.

But notwithstanding such change of property or ownership, the vendor had a right to retain the oxen till the price was paid. This lien of the vendor upon the goods sold for the payment of the purchase money, has been universally recognized at common law, and its principles somewhat extensively discussed in the cases. It will be sufficient to cite one or two of them.

A hop merchant sold to B. on diverse days in August, various parcels of hops. Part of them were weighed and an ac-

count of the weights, together with samples, delivered to the purchaser. The usual time of payment with the trade was the second Saturday subsequent to the sale. B. did not pay for the hops at the usual time, whereupon A. gave notice that unless they were paid for by a certain day they would be re-sold. The hops were not paid for, and A. re-sold a part, with the consent of B., who afterwards became a bankrupt, and then A. sold the remainder of the hops without the consent of B. or his assignees. Account of the hops so sold was delivered to B., in which he was charged warehouse rent from the 30th of August. The assignees of B. demanded the hops of A., and tendered the charges of warehouse rent, &c., and on the refusal of A. to deliver them, brought trover. It was held that the assignees could not maintain the action, because the party must have for that purpose, not only a right of property but a right of possession; and that although a vendee of goods acquires a right of property by the contract of sale, yet he does not acquire a right of possession to the goods until he pays or tenders the price. *Bloxham v. Sanders*, 4 B. & C. 941, 10 Eng. C. L. Rep. 868.

Nor as between the original vendor and vendee is the lien of the former divested by his giving to the vendee a delivery order for the goods sold, but remaining in the vendor's warehouse rent free, although it appeared that by the usage of trade in Liverpool, where the parties dealt, goods sold while in warehouse are delivered by the vendor's handing to the vendee a delivery order, and that the holder of such order may obtain credit with a purchaser, as having possession of the goods. *Townley v. Crump*, 4 Ad. & El. 58.

To the same effect is the case of *Tooke v. Hollingworth*, 5 Term Rep. 215.

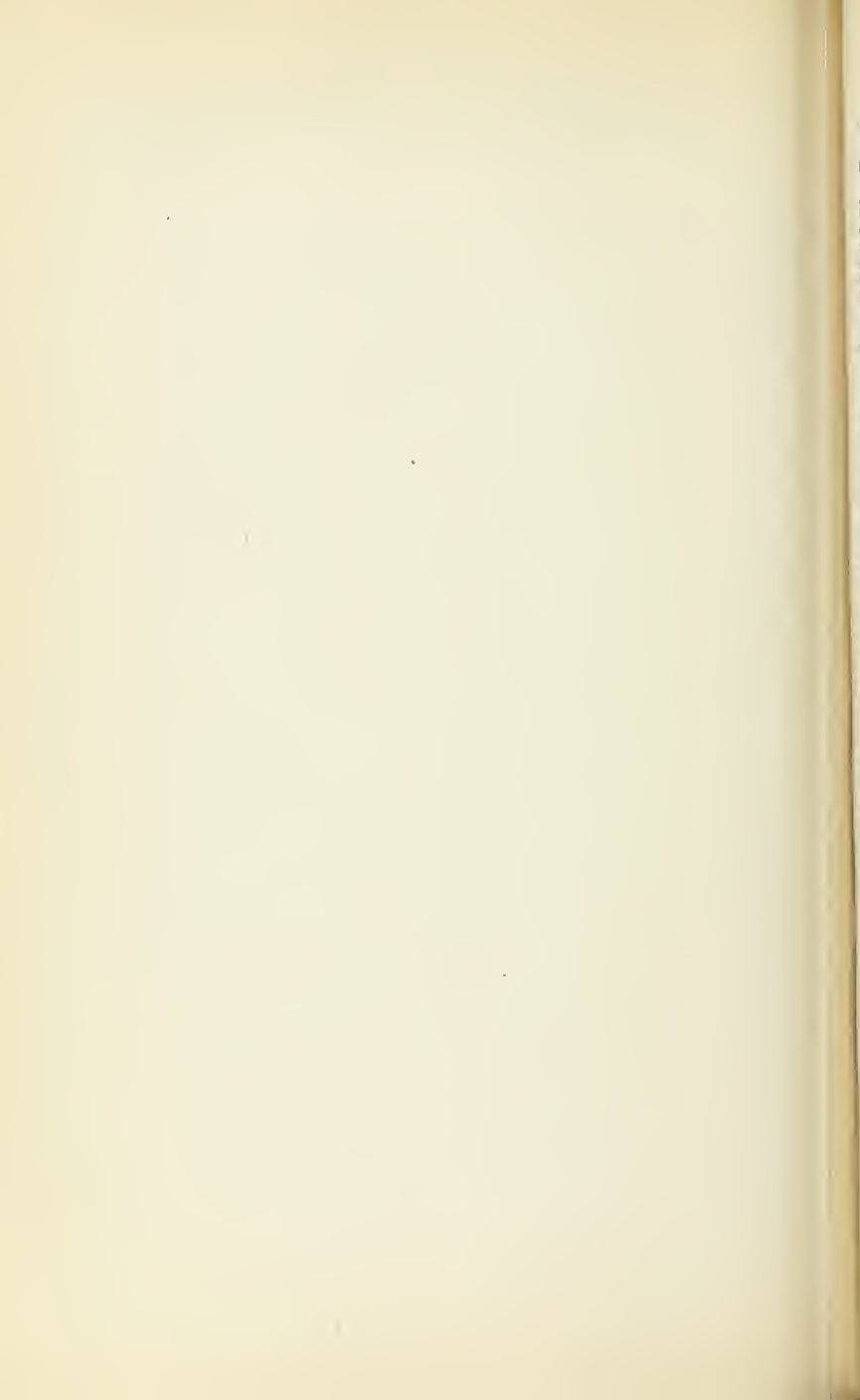
The doctrine is fully established in this state by the case of *Williams v. Moore*, 5 N. H. Rep. 235.

That there was no actual delivery in this case, so as to destroy the lien of the defendant for the price, is clear. And the delivery of a part as and for the whole, or a symbolical or constructive delivery, if sufficient for such an effect, is not made out by the delivery of the brass knobs that had been worn upon the horns of the oxen. They were not delivered with the intention of thereby making a tradition of the oxen, which is the essence of a symbolical delivery. But the cases plainly show that the lien is preserved upon all and every parcel of the goods sold which actually remain in the hands of the vendor.

Nor can the giving of the note for the price, payable on demand, in any view, be considered as a payment of the price. The doctrine on this head was fully considered and settled in *Jaffrey v. Cornish*, 10 N. H. Rep. 505, where it was held that a promissory note given for the amount of a party's taxes, was not a payment of the taxes for the purpose of gaining a settlement. The taking of a note is in no case the payment of a debt, unless there be a special agreement to that effect.

The present is a strong and clear case for the application of that doctrine; and distinct proof that the party taking the note intended thereby to part with his lien upon the property, would be required.

The conclusion, therefore, is, that the present action cannot, upon the evidence reported, be maintained; that the verdict must be set aside, and there must be Judgment for the defendant.



CLARK et al. v. FEY.

(24 N. E. Rep. 703, 121 N. Y. 470.)

Court of Appeals of New York. June 3, 1890.

Appeal from supreme court, general term, first department.

Action by Clarence H. Clark against John Fey for damages alleged to have been caused by defendant's failure to accept goods (iron "T" rails) sold him by plaintiff by a written contract of sale. A judgment dismissing the complaint was affirmed by the general term, and plaintiff appeals.

Trendwell Cleveland, for appellants.
John E. Parsons and *Albert G. McDonald*, for respondent.

FINCH, J. It is not disputed that the rails which were finally tendered to the vendee, and then sold for his account and risk, producing a deficiency below the contract price, which deficiency forms the subject of the action, were not the rails which the vendee bought and the vendor sold. By the original written contract, those rails were to be 500 tons, shipped "from the other side, January or February or March, seller's option." It is the settled rule that, in a case like the present, the date of the shipment is a material element in the identification of the property. *Hill v. Blake*, 97 N. Y. 216; *Tobias v. Lissberger*, 105 N. Y. 404, 12 N. E. Rep. 13. It was not 500 tons of rails generally that were the subject of the contract, but a specific quantity, shipped from the other side during the three named months, and unless such were tendered the contract was not performed. The offer of other rails would impose no obligation upon the purchaser. It is clear, therefore, that the tender finally made was not of the property specified in the contract, and left no liability upon the vendee resulting from his refusal to accept, unless there is something else about the case.

There is something else about the case upon which the vendors rely as entitling them to a recovery; and that is an alleged parol modification of the original contract which made the final tender and the sale founded upon it sufficient. A conversation relative to the existing agreement took place between the vendee and Mr. Post, representing the vendors, on or about the 20th day of April. That was within the permitted time of delivery. The seller might have shipped during the last days of March by sail instead of by steam, and so had an average of from 35 to 45 days for the arrival. The conversation, as detailed by Mr. Post, was thus stated: "Mr. Fey came in, and said that, in consequence of the price of old rails falling from \$45 a ton to practically \$23 a ton, it was a very difficult thing for him to take those rails; that he could not sell them now to anybody, and wanted me to be as easy with him as I could, and wanted me to carry the rails, and give him some rails later. I told him, on personal considerations,—I had known him for a long time,—that I would do everything I could to accommodate him. I said I

would carry the rails for him, and give him some rails a little further on in place of them, and perhaps the price would get better." It is evident that this conversation on the part of Mr. Fey was based upon the assumption that the contract rails had arrived, and were ready for delivery, and had been duly tendered. Indeed, Mr. Post was asked, "In that conversation, at that time, did you say anything about your readiness to deliver the iron that he had bought of you?" and answered, "Perhaps I should have said earlier that that was the basis of having informed him we were ready to do it, and wanting him to pay for it was the reason he wanted us to make it easy for him." Mr. Post was further asked, "You did make such an offer to him at that time?" and replied in the affirmative. And thus the basis of this new negotiation was an understanding on both sides that the contract rails had arrived, were ready for delivery, and that payment was due. By the contract, the purchase price was payable in part upon delivery to the vendee of "order on vessels," and balance "on handing weighmaster's return." No such order or return was tendered in April, and the facts leave it doubtful whether the sellers in the month of April were in possession of or could have tendered either. But assuming that they could have made delivery in the mode prescribed by the contract, and that they were excused from the formal tender of the papers by the act of Fey, it is yet apparent that one of two things followed dependent upon the construction of the parol agreement. That is somewhat ambiguous in its terms, but it could have had only one of two meanings. It must be construed as an agreement, either that the plaintiffs, having set apart and tendered the contract rails which had arrived, and payment for which was due, would "carry them" for the account, and at the risk of Fey, for an indefinite but reasonable period, or that the sale of the contract rails should be mutually abandoned, and instead thereof the sellers should be permitted to deliver, and the buyer would accept, other and different rails from those specified in the written contract. I do not see how, upon either construction, the plaintiffs could recover.

They did not "carry" the contract rails. At the conversation in April, none had been set apart and identified as the property of Fey under the contract, even if we concede that such separation and identification was within the then power of the sellers. They had not set apart rails for Fey as his, and as being carried for him. It was not until some time in June that 500 tons of rails were set apart as the property of Fey, and that was done upon the requirement of parties interested with the vendors, who "insisted upon it that Mr. Fey should take those rails so as to make him pay the storage." It is plain that up to that time no specific rails had been set apart or identified as the contract property of Fey upon which he was liable for storage. But the sellers did not carry the contract rails. If they even in any manner separated or identified them, they sold them to other parties; for Mr. Post

says that he told Fey in June, "We were going to set aside five hundred tons of rails for him, and he said that was all right." The 500 tons thus set apart in the month of June, to be carried for Fey, and upon which, therefore, he was to pay storage, were rails not shipped in the contract months, or not shown to have been so shipped. When ultimately sold, it appears from the bills of lading that some were shipped on the *Ivanhoe* at Antwerp, April 9, 1880; some by the *Apotheke* *Deisingt* Amsterdam, April 23, 1880; and some by the *Sara Caino*, whose date of sailing from the other side is unproved. And it was these rails which the vendee was called upon to accept, and which were sold for his account on his refusal. So that the sellers did not carry for Fey the contract rails, and tender them for final acceptance.

The other view of the April conversation dispenses with such tender of contract rails, and permits the carrying and offer of any old rails shipped from the other side, irrespective of the date of shipment. But that is a new contract, and not a modification of the old one. It

substitutes for the sale of the contract iron a new sale of different iron, which never before had been the subject of a contract. It was not merely a change of the date of delivery and the time of payment, but of the very subject-matter of the contract,—of the thing sold on the one hand, and purchased on the other. It touched and altered the consideration and substance of the agreement, instead of merely modifying the terms and manner of performance. The old contract was not to be performed at all. The property which it stipulated about was not to be sold by one party or bought by the other, but instead thereof, and in place of the iron to which it related, a new contract for the sale and purchase of different iron entirely. That new contract was by parol, and void under the statute of frauds; and so neither view of the new agreement will enable the plaintiffs to recover. The old contract was rescinded; the new one remained wholly executory on both sides. We discover no ground upon which the judgment can be deemed erroneous, and it should be affirmed, with costs. All concur.

CLARKSON et al. v. STEVENS et al.

(1 Sup. Ct. Rep. 200, 106 U. S. 505.)

Supreme Court of the United States. Nov. 27, 1882.

In error to the court of chancery of the state of New Jersey.

Walter L. Clarkson and Frederick W. Stevens, for plaintiffs in error. John P. Stockton, Atty. Gen., and Leon Abbett, for defendants in error.

MATTHEWS, J. The controversy in this case arises between the plaintiffs in error, who are, with others, heirs at law of Robert L. Stevens, deceased, and the state of New Jersey, and involves the title to an uncompleted ship-of-war known as the Stevens battery.

The claim of the plaintiffs in error is founded on a resolution of congress approved July 17, 1862, (12 St. 628,) as follows: "A resolution releasing to the heirs at law of Robert L. Stevens, deceased, all the right, title, and interest of the United States in and to Stevens battery. Resolved, by the senate and house of representatives of the United States of America, in congress assembled, that all the right, title, and interest of the United States in and to Stevens battery be, and the same hereby are, released and conveyed to the heirs at law of the said Robert L. Stevens, or their legal representatives."

Robert L. Stevens died in 1856, having his domicile in New Jersey, and by his will constituted his brother, Edwin A. Stevens, who was one of his heirs at law, and whom he appointed one of his executors, his sole residuary devisee and legatee.

Conceiving himself to be the owner of the unfinished vessel, of which he had been in possession since the death of his brother, and claiming as his residuary legatee, Edwin A. Stevens, who died August 7, 1868, directed, by his will, his executors to complete it on his general plan, at a cost not exceeding \$1,000,000, and then to offer it to the state of New Jersey as a present. The executors, after having expended \$99,915.49 upon the vessel, found that they could not finish it for the amount of money to which they were limited, and discontinued the work. In the mean time the state of New Jersey had accepted the bequest, and the consent of congress thereto was given in the following resolution, approved July 1, 1870: "A resolution giving the consent of congress to the reception of a certain bequest by the state of New Jersey under the will of the late Edwin A. Stevens. Whereas, Edwin A. Stevens, who was in his life-time the owner of the ship known as the Stevens battery, originally commenced under contract for the United States government, and upon the building of which large sums of money were spent by his brother and himself, did, by his last will and testament, (the United States having previously relinquished all claims to said ship,) leave the same to be finished by his executors, at an expense not exceeding the sum of \$1,000,000, and when finished to be offered to the state of New Jersey as a present, to be by her received and disposed of as the said state

shall deem proper; and whereas, doubts have been suggested as to the right of the said state to accept the said bequest without the consent of congress, under the prohibition of the tenth section of the first article of the constitution of the United States; therefore, resolved, by the senate and house of representatives of the United States of America, in congress assembled, that the consent of congress is hereby given that the state of New Jersey shall receive and dispose of the said ship according to the terms and conditions of said bequest."

A bill in equity was filed in the chancery court of New Jersey by the executors of Edwin A. Stevens, asking for a construction of the will in certain particulars, including the questions arising upon this bequest to the state. The attorney general appeared on behalf of the state, and filed an information by way of cross-bill, to which the heirs at law of Robert L. Stevens were made parties, as claiming an adverse title. A final decree was made, establishing the title of the state, which was affirmed on appeal by the court of errors and appeals. To reverse that decree the present writ of error was brought, the question presented being one, which, as it arises under a law of the United States, and the decision thereon of the state court bring in denial of the title claimed under the authority thereof, falls within the jurisdiction of this court.

To determine the proper construction and legal effect of the resolution of congress of July 17, 1862, it becomes necessary to trace from its origin the history of the Stevens battery.

By the act of congress of April 14, 1842, "authorizing the construction of a war-steamer for harbor defense," it is enacted "that the secretary of the navy be and he is hereby authorized to enter into contract with Robert L. Stevens for the construction of a war-steamer, shot and shell proof, to be built principally of iron, upon the plan of the said Stevens; provided the whole cost, including the hull, armament, engines, boiler, and equipment, in all respects complete for service, shall not exceed the average cost of the steamers Missouri and Mississippi;" and \$250,000 was thereby appropriated towards carrying the law into effect. 5 St. at Large, 472.

In pursuance of this law, the secretary of the navy entered February 10, 1843, into a contract with Robert L. Stevens for the construction of a war-steamer for harbor defense, which recited his proposal, describing the vessel, and containing certain specifications as to its construction, with a covenant on his part that he would faithfully build and construct the steamer conformably to the plan submitted, and complete the same within two years, provided congress should make the further appropriations necessary for the purpose within a reasonable period.

According to the plan proposed the war-steamer was to be shot and shell proof against the artillery then in use on board vessels-of-war, viz., from 18-pounders to 64-pounders; to be propelled by submerged machinery, called Stevens' circular shells; to have greater speed than any of

our steam vessels-of-war then built; the whole engine to be out of the way of shot from any vessel of an enemy; and with other specifications as to the character of the material and the dimensions and relations of the parts, which are important to be noticed only so far as to show that the proposed vessel was to be constructed upon a plan original and novel, and with the expectation of results not previously obtained in any naval construction.

The secretary of the navy and Stevens entered, November 14, 1844, into an explanatory contract, which recited that the stipulations of the former had been found to be too loose and indefinite as to the details of its execution, and that the parties considering themselves bound by so much thereof as related to the dimensions, power, ability to resist shot and shell, and other qualities and arrangements of the vessel, and the amount to be paid therefor, entered into further stipulations modifying and explaining the same. The time for the completion and delivery of the vessel was extended two years from the date of the new contract. Many additional specifications as to the details of construction were inserted. It was agreed that if the cost of making any models or patterns used in the construction should be included in bills paid by the United States in the course of the work or at its completion, they should become the property of the United States.

It was also agreed that the secretary of the navy should appoint some person, whom Stevens should admit within his establishment for building said vessel, whose duty it should be to receive and receipt for, on account of the navy department, all materials delivered therein for constructing said steamer; which materials, when so received and receipted for, should be distinctly marked with the letters U. S. and should become the property of and belong to the United States; and it should be his further duty to certify all accounts, presented and certified by Stevens, for materials and labor, which should form the evidence on which payment should be made; but the authority of such inspecting officer, it was understood, should not extend to a right to judge of the quality or fitness of the materials or workmanship, but merely as to the cost thereof; "it being understood," the contract proceeds, "that the quality and fitness thereof, with other matters concerning the performance of the contract, are to be inspected and determined in the manner hereinafter provided for."

It was thereupon further stipulated that, before the final payment for the said war-steamer should be made, a certificate should be rendered to the navy department that in her construction, armament, and equipment, all the provisions of the contract had been fully performed by Stevens, which certificate should be given and signed by persons appointed to examine the vessel,—one by Stevens, one by the secretary of the navy, and, in case of disagreement, a third by the other two,—the decision of the majority to be conclusive. It was also agreed that Stevens, in lieu of other security for the faithful performance

of the contract on his part, should make to the United States a mortgage, which should be a first lien on all the land, docks, wharves, slips, and all their appurtenances belonging to and embraced within the establishment at Hoboken, New Jersey, at which the war-steamer was to be constructed, with ample power to enter upon and sell the same in case of failure on his part to fulfill the contract, or so much thereof as should be necessary to complete any deficiencies on his part.

The secretary of the navy agreed to pay, as the price of the said war-steamer when fully completed and delivered at the navy-yard at Brooklyn, in conformity with the contract, the sum of \$586,717.84, the supposed mean cost of the steamers Missouri and Mississippi, or any additional sum that might afterwards be ascertained as properly included in that cost, to be indorsed on the contract "as the price which is to be paid for the said war-steamer when fully completed, delivered, and accepted."

Payments were to be made, from time to time, upon bills certified by Stevens and the agent of the United States, for not less than \$5,000 each, and approved by the navy department, until the sum of \$500,000 should have been paid; at which time, it was stipulated, that an examination should be had of the war-steamer, by persons to be appointed, as before agreed, for final examination, and if a majority of them should certify their opinion that the vessel could be fully completed according to contract for the remaining balance which might then be due, then payments of further bills in full should continue, not exceeding the full amount of the whole agreed price; but otherwise the examiners were required to certify the amount which, in their opinion, would be required to complete the steamer, when the secretary of the navy was authorized to withhold from future payments such deductions as might be necessary to meet the probable excess of cost. It was further provided that when Stevens should have fully completed the said war-steamer, and she should have been duly delivered to and received by the agent of the United States, according to the terms of the contract, the full amount of the price remaining unpaid and to become due when she should be fully completed and accepted, was required to be paid and the mortgage security canceled and returned.

In pursuance of his contract to that effect, Stevens executed and delivered a mortgage on the premises therein described, being the basin, dock, shops, etc., wherein the war-steamer was to be constructed, conditioned to be void in case he fully performed his contract in relation thereto, with a power of entry and sale, on the part of the mortgagee, in case default should be made in the completion and delivery of the said war-steamer at the expiration of four years from that date, according to the conditions and stipulations of the contract, and out of the proceeds of such sale to retain any dues that might have accrued by reason of the failure to perform the contract, or so much thereof as should be necessary to complete

any deficiencies on the part of the said Stevens.

The time for the performance of the contract was by a subsequent agreement extended for four years from September 9, 1848.

From January 5, 1845, to December 14, 1855, there was paid out by the navy department on account of the vessel \$500,000.

Robert L. Stevens had, in addition, expended in its construction, of his own means, \$113,579.

The act of August 16, 1856, (11 St. at Large, 48,) contains an appropriation "for Stevens war-steamer, \$86,717.85," being the remainder of the contract price, but no portion of this was ever paid.

In the mean time Edwin A. Stevens took possession of the work upon the death of his brother, as executor and residuary legatee, and expended thereon, prior to September 5, 1857, of his own money, the sum of \$89,185.37.

Nothing further appears to have been done until the passage of the act of April 17, 1862, (12 St. at Large, 380,) making an additional appropriation for the naval service for the year ending June 30, 1862. The second section is as follows: "And he is further enacted, that the sum of \$783,291, being the amount necessary to be provided, as estimated by a board appointed for that purpose, to pay for and finish the Stevens battery, now partially constructed at Hoboken, New Jersey, be and the same is hereby appropriated out of any money not otherwise appropriated for the immediate construction of said battery: provided, that in the contract for the completion of said vessel it shall be stipulated that no part of the money claimed by Edwin A. Stevens to have been heretofore expended by him upon said vessel shall be refunded until the amount of said claim shall be established to the satisfaction of the secretary of the navy, and the payment of the said sum shall be contingent upon the success of said vessel as an iron-clad, sea-going war-steamer, to be determined by the president, and such contract shall stipulate the time within which the vessel shall be completed: provided, nevertheless, that said money shall not be expended unless the secretary of the navy is of opinion that the same will secure to the public service an efficient steam-battery."

The board, whose estimate is adopted in this act, was one appointed by the secretary of the navy, under the authority of a joint resolution of congress, approved July 24, 1861, whose report was communicated to the house of representatives in a letter of the secretary of the navy to the speaker, dated January 2, 1862. Ex. Doc. No. 23, H. R. 37th Congress, 2d Sess. Upon the question of the expediency of completing the vessel, the board specify six important particulars, as among "the many novel characteristics which she would possess," in which she differed from ordinary war-vessels, and conclude by saying: "We cannot recommend the expenditure of important sums of money upon projects of more than doubtful success when put into practical execution; and therefore we do not deem it expedient to

complete this vessel upon the plan proposed." The report had previously stated "that the original projector of the vessel was the late Robert L. Stevens, Esq., deceased, and that his brother, Edwin A. Stevens, Esq., who now proposes to complete it, has materially changed the plans from what appears to have been originally intended."

No part of the sum appropriated by the act of April 17, 1862, was applied to the purpose of completing the battery. The secretary of the navy declined to do so, in the exercise of the discretion confided to him in the last clause of the section, for reasons set forth in his letter to the speaker of the house of representatives, dated May 27, 1862, in which he states that he had taken the opinion of a commission of experts, who had reported that "the vessel, if completed on the plans of Mr. Stevens, will not make an efficient steam-battery," and therefore that he did not feel authorized to make the expenditure unless congress should so direct.

Congress thereupon passed the joint resolution, approved July 17, 1862, on which the plaintiffs in error found their claim.

Nothing appears to have been done towards resuming work on the vessel, from the date of the last previous expenditure in 1857, until the death of Edwin A. Stevens, on August 7, 1868, during which time it remained in his possession, and control. His will contained the following provision: "I empower my executors to apply not exceeding the sum of \$1,000,000 to finish, on my general plans, as near as may be, in the discretion of my said executors, the battery known as the Stevens battery, and for the accomplishment of the said object I give to them the use of the dock and yards and basin heretofore appropriated to the said battery, and all the material provided for said battery. When said battery shall be finished, I direct my executors to offer the same to the state of New Jersey as a present, to be disposed of as the said state shall deem proper; and if not accepted by the said state, I direct my executors to sell the same, and the proceeds thereof shall fall into the residue of my estate."

In execution of this authority the executors, prior to February 27, 1873, expended \$919,915.19, of which \$27,309.79 was received from the sale of old material.

The legislature of New Jersey, on March 21, 1871, had authorized the appointment of commissioners with power to sell the battery, and, in pursuance of that authority, the vessel, never having been finished, was sold for the sum of \$75,000.

The contention of the plaintiffs in error is that the title to the unfinished vessel passed, as the work progressed, to the United States, and became vested, together with the right to enforce the contract for its completion, and the security of the mortgage, as against the estate of Robert L. Stevens, in his heirs at law, by force of the joint resolution of July 17, 1862.

In support of the proposition that by the building contract the title to the unfinished ship vested, as the work progressed, in the United States, counsel rely upon the rule of construction announced

by Lord Tenterden in *Woods v. Russell*, 5 Barn. & Ald. 942, and followed by the English cases of *Clarke v. Spence*, 4 Adol. & E. 448; *Carruthers v. Paine*, 5 Bing. 270; *Laidler v. Burlington*, 2 Mees. & W. 602; *Wood v. Bell*, 5 El. & Bl. 355, affirmed in the exchequer chamber, 6 El. & Bl. 355; *McBain v. Wallace*, L. R. 6 App. Cas. 589; and the American cases of *Moody v. Brown*, 34 Me. 107; *Butterworth v. McKinley*, 11 Humph. 209; *Sandford v. Wiggins Ferry Co.*, 27 Ind. 522; *Seudder v. Calais Steamboat Co.*, 1 Cliff. 370.

This conclusion was assented to in the present case by the chancellor, who proceeded to a final decree, however, against the plaintiffs in error, on the ground that the title of the United States passed by the resolution of July 17, 1862, not to the heirs at law of Robert L. Stevens for their own benefit, but to or for the benefit of Edwin A. Stevens, the residuary legatee. The court of errors and appeals while affirming his decree, took a different view, and decided that the title of the ship never vested in the United States as owner, following its own previous decision in *Elliott v. Edwards*, 35 N. J. Law, 265; S. C. 36 N. J. Law, 449; the New York case of *Andrews v. Durant*, 11 N. Y. 35, and supported by the decision in *Williams v. Jackman*, 16 Gray, 514, in which the rule is stated by Bigelow, C. J., as follows: "Under a contract for supplying labor and materials and making a chattel, no property passes to the vendee till the chattel is completed and delivered, or ready to be delivered. This is a general rule of law. It must prevail in all cases, unless a contrary intent is expressed or clearly implied from the terms of the contract."

The rule first introduced in *Woods v. Russell*, 5 Barn. & Ald. 942, as interpreted by the English courts, according to *Clark v. Spence*, 4 Adol. & E. 448, is "founded on the notion that provision for the payment, regulated by particular stages of the work, is made in the contract with a view to give the purchaser the security of certain portions of the work for the money he is to pay, and is equivalent to an express provision that on payment of the first installment the general property in so much of the vessel as is then constructed shall vest in the purchaser." This dictum from *Woods v. Russell*, according to *Benj. Sales*, 246, (2d Ed.) was deliberately adopted as a rule of construction by which, in similar ship-building contracts, the parties are held to have, by implication, evinced an intention that the property shall pass, notwithstanding the general rule to the contrary, and adds: "The law thus established has remained unshaken to the present time."

Nevertheless, in *Wood v. Bell*, 5 El. & Bl. 791, Lord Campbell, C. J., said: "When a man contracts with another to make any article for him for a given price, the general rule is, in the absence of all circumstances from which a contrary conclusion may be inferred, that no property passes in the chattel until it be completed and ready for delivery. On the other hand, where a bargain is made for the purchase of an existing ascertained chattel, the general rule, in the same absence of opposing

circumstances, is that the property passes immediately to the vendee; that is, that there is at once a complete bargain and sale. But these general rules are both and equally founded on the presumed intention of the parties. If, in the first, there are attendant circumstances from which the intention may be inferred that the property shall pass in the incomplete and growing chattel as the manufacture of it proceeds, or even in ascertained materials from which it is to be carried to perfection, that intention will be effectuated; and, equally in the latter, if it appear that the parties intended to postpone the transfer of the property till the payment of the price or the performance of any other condition, such intention will be upheld in the courts of law." "This principle," he added, "we believe to be well settled;" and referring to the cases of *Woods v. Russell*, *Clark v. Spence*, *Laidler v. Burlington*, and others cited in argument, he remarked that "previous decisions, therefore, are mainly useful as serving to guide our judgment in estimating the weight of circumstances as evidence of intention;" and concluded by saying: "Still it must be remembered, after all, that what we have to determine is a question of fact, namely, what, upon a careful consideration of all the circumstances, we believe to have been the contract into which the parties have entered."

It is, perhaps, worthy of remark that this passage from the judgment of Lord Campbell has by the editors of *Abb. Merch. Ships & Seamen*, 4, been incorporated into the text of that treatise.

The courts of this country have not adopted any arbitrary rule of construction as controlling such agreements, but consider the question of intent, open in every case, to be determined upon the terms of the contract, and the circumstances attending the transaction. (1 *Pars. Shipp. & Adm.* 63;) and such seems to us to be the true principle.

Accordingly, we are of opinion that the fact that advances were made out of the purchase money, according to the contract, for the cost of the work as it progressed, and that the government was authorized to require the presence of an agent to join in certifying to the accounts, are not conclusive evidence of an intent that the property in the ship should vest in the United States prior to final delivery. Indeed, in reference to the latter circumstance, it is noticeable, as indicating a contrary intention, that the authority of the inspecting officer was expressly limited, so that it should not extend to a right to judge of the quality and fitness of the materials or workmanship; such matters, and all others concerning the performance of the contract, being reserved for determination after the completion of the work, as a condition of acceptance and final payment.

Much stress is laid, in argument, upon that provision of the contract which required all materials received at the yard for use in constructing the steamer, to be distinctly marked with the letters U. S., and declared that they should become the property of and belong to the United

States. But it does not follow, because the materials provided for that use were declared to be the property of the United States, it was intended that they should remain so after becoming part of the structure. Such a precaution might well have been suggested, as a security against a diversion of the materials to any unauthorized use, or to preserve them to the United States, in case, by reason of the failure of the work or from any other cause, they should not be used in the vessel. Indeed, as is remarked by the learned judge who delivered the opinion of the court of errors and appeals in this case, the express declaration that defined the property in the unused materials, seems to exclude the implication sought to be raised as to the property in the unfinished ship; for the inference is obvious, from the particularity of such a provision, that the larger interest would not be left to mere indentment.

There are two other provisions of the contract, which seem to us conclusive of the question, and, in a sense, adverse to the construction of the plaintiffs in error.

The first of these is that which requires Stevens, in lieu of other security, for his faithful performance of the contract, to execute and deliver a mortgage on all the land, docks, wharves, slips, and all their appurtenances belonging to and embraced within the establishment at Hoboken, New Jersey, at which the war-steamer was to be constructed, with power to the United States to enter upon and sell the same in case of his failure to fulfill his part of the contract, or so much thereof as should be necessary to complete any deficiencies on his part.

The taking of this security, as an indemnity to the United States, assumes the anticipated possibility that the failure might be total, so that the vessel, when offered for delivery, might be altogether rejected. And it does not detract from the force of this conclusion, that the alternative provides for completing deficiencies, if they should prove to be remediable; for, in that case, the United States, at its option, might accept the vessel, thus becoming invested with the title, and make good its deficiencies out of this security.

The other feature of the contract, which corroborates this view, is that which provides that final payment for the steamer shall be made only upon the certificate of examiners, to be appointed for that purpose, that in her construction, armament and equipment, all the provisions of the contract have been fully performed and completed, which requires that the steamer shall be fully completed and delivered at the navy-yard at Brooklyn, and fixes the gross amount which is to be paid for it when fully completed, delivered, and accepted. The fact that advances are to be made in the mean time is expressly stated to be in consideration of the security to be given by Stevens for the faithful performance of his contract, and that compensation for his time and services must be wholly deferred until the final completing and delivery of the vessel.

It is thus apparent, as we think, from

these stipulations, that the vessel was in all respects to be at the risk of the builder, until, upon its completion, the United States should accept it, upon final examination and certificate, as conforming in every particular with the requirements of the contract, and answering the description and warranty of an efficient steam-battery for harbor defense, shot and shell proof.

And looking at the situation of the parties and the objects they must have had in view, all doubt is removed as to their intention. Stevens was an ardent and sanguine inventor, who had convinced himself that his unique design of a naval structure was practicable and of great value, and that, if adopted, it would prove to be of immense public utility. He succeeded also in persuading the government to make the experiment and give him the opportunity of realizing his theories. But it was understood to be merely an experiment, and evidently, by the navy department, naturally conservative and inclined to adhere with some tenacity to its own traditions, regarded, at best, as of very doubtful success. The steamer when built was to constitute a part of the naval establishment of the United States. Can it be supposed that this was to take place except upon condition that, after completion and sufficient examination, it should be found fit for the service? This is the view, as it seems to us, which congress by its legislation, and the navy department in all its dealings with the subject, constantly entertained and acted upon, and which both Robert L. Stevens and his brother, Edwin A. Stevens, did not hesitate to accept; the latter not shrinking from a further investment of \$1,000,000 in an enterprise which he still cherished with confidence of ultimate success, after it had become to almost every one else a demonstrated failure, and after the government, for whom it was originally intended, had refused to it all further subsidies.

We find, therefore, that on July 17, 1862, the date of the joint resolution of congress, under which the plaintiffs in error make their claim, the United States had no title to the Stevens battery; but that the property in it had continued in Robert L. Stevens until his death, and passed by his will to Edwin A. Stevens, as residuary legatee. It follows that it did not pass to the heirs at law of Robert L. Stevens by virtue of the joint resolution.

It is urged, in argument, that, if the right to the vessel itself did not pass, then the joint resolution must be construed as a transfer to the heirs of Robert L. Stevens of the right of action of the United States to recover against his estate damages for his non-performance of his contract, together with the securities, by way of mortgage and lien, it held as indemnity. We see no ground for a construction that leads to so remarkable a result. The plain meaning of the resolution is limited to a relinquishment on the part of the United States of any interest it might be supposed to have in the vessel, in which the heirs of Robert L. Stevens are mentioned, probably, because it was with him that the building contract was made;

and if it could operate at all as a release, would be to them, for the benefit of those who, by law, had become his successors in the title; and that release would necessarily convey with it, as an incident, an extinguishment of the obligation of the contract for construction, and all the securities taken for its performance. It was, in effect, and was doubtless intended as, a declaration on the part of the United States, for the benefit of whom it might concern, of its entire abandonment of all further connection with the battery and the contract for its construction. The subsequent assent on the part of congress

to its acceptance by the state of New Jersey, as a bequest from Edwin A. Stevens, while it could not operate to affect any rights vested in the interval, is, at least, a legislative interpretation of its previous release. This resolution expressly recites that Edwin A. Stevens was the owner of the battery in his life-time, and is scarcely more explicit in the recognition of his title than was the conduct of all the parties, including the present plaintiffs in error.

We are of opinion, for the reasons stated, that there is no error in the decree complained of, and it is accordingly affirmed.

CODDINGTON et al. v. GODDARD.

(16 Gray, 436.)

Supreme Judicial Court of Massachusetts.
Nov., 1860.

Action of contract to recover damages for not delivering two hundred thousand pounds of copper alleged to have been sold by the defendant to the plaintiff. Trial and verdict for the plaintiff before Merrick, J., who reported the case to the full court, in substance as follows:—

Charles Canterbury, called as a witness for the plaintiffs, testified that he was a merchandise broker; that on the 9th of December, 1856, acting under instructions contained in a telegraphic despatch from the plaintiffs, merchants in New York, which he received between two and three o'clock in the afternoon, he called at the defendant's place of business in Boston, and not finding him there, followed him to his house, where he had an interview with him, and stated to him the plaintiff's offer to buy three hundred thousand pounds of copper, at twenty-four and a quarter cents per pound, on a credit of nine months, with satisfactory paper, and deliverable on board a vessel in Boston bound for New York, the seller to pay freight to New York, and the buyer to pay the insurance; that the defendant asked if the steamer, which had that day arrived in New York, brought intelligence of any advance in the price of copper in Europe; to which the broker replied, "None that I know of;" and the defendant, after a moment's hesitation, said that he would sell to the plaintiffs two hundred thousand pounds of copper on the terms proposed, reserving the right to add one hundred thousand on the next day if he should then elect to do so; that the broker urged him to sell the whole of the three hundred thousand pounds then, saying that the purchase was made for exportation, and would take that quantity out of this market; but the defendant said he would not do differently from what he had proposed; and the broker then said, "Well, if that is the ultimatum, it is a sale," and, returning to his office, communicated to the plaintiffs by telegraph what he had done, informing them that he should write the particulars by the next mail; which he did; and made a memorandum in his books of the transaction, according to his usual custom.

This memorandum was on a page of a book headed, "Boston, December, 1856," and was in the following terms:—

"9th. W. W. Goddard to T. B. Coddington & Co. 200,000 pounds Chill pig copper, 24 1/4 a 9 mos. from delivery, f. o. b. packet here for N. Y., seller paying freight, and buyer paying insurance to N. Y. To be 96 per cent pure copper, and paper satisfactory to seller."

The broker testified that in this memorandum the figures denoting the quantity were written in pencil, in order to facilitate alteration in case the defendant should, as he had a right to do, elect to deliver a larger quantity. No sale note or letter relating to the sale or entry was sent by the broker to the defendant.

The plaintiffs admitted that, before sending their telegraphic despatch to the broker on the 9th of December, they had received intelligence by the steamer, which arrived that morning in New York, of an advance of a penny a pound in the price of copper in Europe; that this intelligence would have been of material importance to the defendant in determining whether to sell upon the terms proposed; and that if it had been known to him he would not have agreed to sell his copper upon those terms; and that they did not communicate it to the defendant or to the broker until after the completion of the bargain. The defendant conceded that the broker, at the time of his interview with him, was ignorant of the arrival in New York of intelligence of an advance in the price of copper; and did not contend that the broker had any fraudulent design or purpose in making the entry in his books, or fraudulently omitted in the entry any of the terms of the bargain agreed upon. But the defendant did contend that by reason of the broker's answer that no such intelligence had arrived to his knowledge, and of the omission of the plaintiffs to communicate that intelligence to the defendant, the bargain made by him with the broker as the agent of the plaintiffs was not binding upon him. And this objection was reserved for the determination of the full court, the parties agreeing that if for this reason the action could not be maintained, the verdict should be set aside and a nonsuit entered.

The defendant, being called as a witness, testified that in his interview with the broker he said that he would sell to the plaintiffs two hundred thousand pounds of copper in case no intelligence had been received by the steamer of any advance in the price of the article in Europe, reserving the right to add one hundred thousand pounds the next day on the same terms at his option. And he contended that, if there was any verbal contract for the sale of two hundred thousand pounds of copper, it was upon this condition, and upon the further condition that the copper, if sold and delivered, should be exported by the plaintiffs, and therefore the plaintiffs could not recover.

The defendant also contended that the entry in the broker's books was not a sufficient memorandum in writing to take the case out of the statute of frauds; because no authority was shown in the broker to sign the memorandum in his behalf or in behalf of the plaintiffs; because it was not intended by the broker, when he made it, as a complete and final statement of the bargain made; because it did not state all the material terms of the bargain; because it was not signed as required by the statute; and because the broker was not authorized by the defendant to make the bargain so entered by him.

But the judge ruled that if Canterbury was a merchandise broker, and that was known to the parties, and they were dealing with him in this transaction in his capacity of broker, and made a contract through him for the purchase and sale of two hundred thousand pounds of

copper, this gave him authority to bind them both by making a memorandum of the contract in writing, and signing it in their behalf respectively; that the memorandum in his book was sufficient in form to bind the parties, if he had authority to make and sign it for them; that if he did, in fact, make the entry in his book as and for a complete note or memorandum of the contract of sale made by the parties through him, such memorandum was conclusive evidence of the terms of the contract, and was to be considered and treated in all respects as if it was a written contract signed by the parties themselves; that it was in its terms a perfect and complete statement of a contract, and capable of a clear and intelligible exposition, and therefore parol evidence was inadmissible to contradict or vary the terms of it; and that even if the defendant did in his verbal contract with Canterbury make the sale upon such conditions as he contended, he could not avail himself of either of those conditions, because they were not contained or expressed in the memorandum. To these rulings the defendant alleged exceptions.

C. A. Welch and E. Bangs, for plaintiffs.
C. B. Goodrich and O. G. Peabody, for defendant.

BIGELOW, C. J. We can see nothing in the facts disclosed at the trial, which shows any misrepresentation or concealment in procuring the assent of the defendant to the contract of sale set out in the declaration. Assuming the rule of law to be, as stated by the counsel for the defendant, that a contract, made by an agent in behalf of a vendee, his principal, into which the vendor was induced to enter by a representation, which was false within the knowledge of the principal, but not so within that of the agent, would be void on the ground of fraud, we do not think the evidence brings the case at bar within this principle. The broker did not make any representation or statement in behalf of the plaintiffs or as their agent. He was not asked concerning their knowledge of any fact or circumstance bearing on the contract which he was endeavoring to negotiate with the defendant. It is true that he was interrogated concerning a material fact, but the question was addressed to him individually and sought to draw out only his own personal knowledge, and not that of his principals upon the subject to which it related. Clearly it was so understood between the parties. The answer given to it, which the defendant received at the time as satisfactory, was expressly confined to the broker's own individual information, and did not either affirm or deny any fact absolutely, or import, either directly or by implication, any knowledge of it on the part of the plaintiffs. This answer was strictly true, and did not tend in any degree to deceive or mislead the defendant. It is not a case, therefore, where an agent made any absolute representation of a material fact which he believed to be true, though it was in fact false and known to be so by his principals. Such would have been the aspect of the

case, if he had stated to the defendant, in answer to his inquiry, that the steamer which had that day arrived in New York had brought no intelligence of any advance in copper. Then the cases in which the authority of *Cornfoot v. Powke*, 6 M. & W. 358, has been questioned and denied, would have been applicable. *Fuller v. Wilson*, 2 Gale & Dav. 460, 3 Gale & Dav. 570, 3 Ad. & El. N. S. 58, 68, 1009; *Fitzsimmons v. Joslin*, 21 Verm. 129. But, as the case stands, upon the proof there was no affirmation or denial by the agent of the existence of this fact or even of the knowledge of his principals concerning it. There was nothing more than a statement that no such fact was known to him. This is admitted to have been true; clearly then there was no misrepresentation or concealment by which the contract can be avoided. There can be no doubt that the broker, if he acted as the agent of both parties in completing the contract of sale, was empowered to do all that was necessary to make the bargain valid and binding in law. For this purpose he had authority to make the requisite memorandum to satisfy the statute of frauds. Rev. Sts. c. 74, § 4. It is not denied that this memorandum may well be made in the book of a broker. Indeed, such entry may be resorted to as the original evidence of the contract, even when bought and sold notes of the bargain, differing from each other, have been delivered to the parties. *Sievwright v. Archibald*, 17 Ad. & El. N. S. 102, 109.

But it is objected that the memorandum made by the broker in the present case was insufficient to take the case out of the operation of the statute, because it does not show who were the vendor and vendee of the merchandise. This would be a fatal objection if it was well founded; for although a memorandum of this nature may be very brief, it must nevertheless show with reasonable certainty who were the parties to the contract, and the terms of the sale, so that they may appear from the writing itself. But in the present case the entry is perfectly intelligible and free from doubt. If it is read with reference to the book in which it is made, as an entry by a broker in the regular course of his business as an agent of third parties for the purchase and sale of goods, it clearly indicates a sale from defendant to the plaintiffs. It is susceptible of no other interpretation.

It is also objected that the memorandum is deficient, because it does not state the amount for which insurance was to be procured, nor for whose benefit, and because it contains no stipulation concerning the mode or place in which the assaying of the copper was to be had, in order to ascertain its purity. The answer to these objections is that the memorandum states with accuracy the terms of the contract as testified to by the broker, and that there was no proof at the trial that there was any agreement made concerning the particulars of the bargain which are now alleged to be omitted.

Nor does it affect the validity of the memorandum, that the broker did not include in it the stipulation made by the defend-

ant, that he should have the right to add to the sale one hundred thousand pounds of copper the next day. This was a wholly separate and independent agreement, which in no way affected the sale actually made, and which could not be properly entered in the book of the broker, unless it had ripened into a sale by the election of the defendant on the next day to sell the additional quantity to the plaintiffs. But he made no such election, and there was therefore no contract as to that portion of the copper of which the broker was empowered to make a memorandum.

The remaining objection to the sufficiency of the entry in the book as a memorandum within the statute is that it was not duly signed by the broker or the parties. We know of no case in which it has been held that the signature of the name of the agent through whom the contract is negotiated should appear in the writing. It is sufficient if the names of the parties to be charged are properly inserted, either by themselves or by some persons duly authorized to authenticate the document. Brokers and auctioneers are deemed to be the agents of both parties, and by virtue of their employment stand in such relation to their principals that they can sign the names of the parties to a contract of sale effected through their agency. Such authority is implied from the necessity of the case; because without it they could not complete a contract of sale so as to make it legally binding on the parties. Nor is it at all material that the names should be written at the bottom of the memorandum. It is sufficient if the names of the principals are inserted in such form and manner as to indicate that it is their contract, by which one agrees to sell and the other to buy the goods or merchandise specified, upon the terms therein expressed. It is the substance, and not the form, of the memorandum, which the law regards. The great purpose of the statute is answered, if the names of the parties and the terms of the contract of sale are authenticated by written evidence, and do not rest in parol proof. *Penniman v. Hartshorn*, 13 Mass. 87; *Hawkins v. Chace*, 19 Pick. 502, 505; *Fessenden v. Mussey*, 11 Cush. 127; *Morton v. Dean*, 13 Met. 385; *Salmon Falls Manuf. Co. v. Goddard*, 14 How. 446.

The only other exception taken to the ruling of the court presents a question of some difficulty. To understand it, it is necessary to recur to the positions assumed by the respective parties at the trial. The plaintiffs contended and offered evidence to show that the sale was an absolute one, and was made upon the terms set out in the written memorandum. The defendant, on the other hand, insisted and endeavored to prove that the contract of sale was a conditional one, and was not to take effect, if intelligence had been received by the steamer of an advance in the price of copper, nor unless the plaintiffs should agree to export it, if the sale and delivery were completed. In this state of the case, one of the points urged by the defendant was that the broker had no authority to bind him by the memorandum which was offered in evidence. Among

the instructions given to the jury, they were told that if the defendant did, in his verbal contract entered into with Canterbury, make the sale on the conditions above stated, he could not avail himself of either of them, because they were not contained in the written memorandum made by the broker. This instruction was strictly accurate as applied to the contract, if it was made by the authorized agent of both the parties. But upon the issue whether the broker was authorized to sign the memorandum offered in proof as the agent of the defendant, it shuts him out from the benefit of testimony which has a direct and material bearing. Upon the facts as they appear in the report of the case, the broker was not the general agent of the defendant. He had no authority to bind him, except such as was derived from the verbal contract into which he entered for the sale of the copper. He was in the strictest sense a special agent for a special and single object, and could not bind the defendant beyond the limits conferred by the precise terms of the agreement to which he assented. He was his agent only to sign a memorandum which contained the whole contract, with the terms and conditions annexed to it by him. A broker, from the very nature of his employment, has only a limited authority, when it appears, as it does in the present case, that he had no relation to a party, other than what is derived from a single contract of sale. When he applies to a vendor to negotiate a sale, he is not his agent. He does not become so until the vendor enters into the agreement of sale. It is from this agreement that he derives his authority, and it must necessarily be limited by its terms and conditions. He is then the special agent of the vendor to act in conformity with the contract to which his principal has agreed, but no further, and he cannot be regarded as his agent, unless he complies with the terms of his special authority as derived from the contract. In short, a broker is authorized to sign only that contract into which the vendor has entered, not another and different contract. If he omits to include in the memorandum special exceptions and conditions to the bargain, he signs a contract which he has no authority to make, and the party relying upon it must fail, because it is shown that the broker was not the agent of the vendor to sign that contract. It would seem to follow as a necessary consequence that evidence of the verbal agreement into which the defendant entered for the sale of the copper was competent and material on the question of the extent of his authority to bind the defendant.

Nor does the admission of this evidence for this purpose at all contravene the rule that parol proof is incompetent to vary or control a written contract. It is offered for a wholly different purpose. It hears solely on a preliminary inquiry. The object is not to explain or alter a contract, but to show that no contract was ever entered into, because the person who executed it had no authority to make it. The authority of an agent may always be shown by parol; but the contracts into

which he enters within the scope of his authority, when reduced to writing, can be proved only by the writing itself.

The necessity of admitting evidence of the verbal contract entered into with a broker, in cases where his authority is drawn in question, is quite obvious. If such proof were incompetent, a broker

who had entered into negotiations with a person might make a memorandum of a contract wholly different from that which he was authorized to sign, and thereby effectually preclude all proof that no such contract was ever made. *Allen v. Plnk*, 4 M. & W. 144; *Pitts v. Beckett*, 13 M. & W. 743, 750. New trial granted.

COE v. TOUGIL.

(22 N. E. Rep. 550, 116 N. Y. 273.)

Court of Appeals of New York, Second Division. Oct. 8, 1885.

Appeal from supreme court, general term, third department, entered upon an order made June 30, 1886, which affirmed a judgment in favor of the defendant, entered upon a verdict.

This action was replevin, brought to recover the possession of personal property to which the plaintiff claims to have taken title, by purchase from the defendant, by virtue of the following written memorandum, to-wit:

"HUDSON, N. Y., Feby. 18th, 1885.

"Mr. E. Frank Coe, bought of William Tough,	
22 Thomas horse-rakes, \$21.....	\$ 462
2 Thomas hay tedders, 40.....	80
12 Tiger horse rakes, 21.....	252
1 Rowell leather top phaeton.....	75
1 Babcock leather top phaeton.....	120
1 two-seat standing top Eng. spring wagon	90
2 Columbus leather top side-bar buggies,	
117.50.....	235
1 Brockway end-spring leather top buggy..	85
1 Brockway side-spring open buggy.....	49
1 Waterloo end-spring rubber-top buggy...	72
	<hr/>
	\$1,520
10 tons E. Frank Coe's phosphate, 25.....	280
	<hr/>
	\$1,800

"The above goods are in my warerooms No. 22 Columbia St., Varick street, at store-room of Hudson Agricultural Society, and are well insured.

"HUDSON, N. Y. Feby. 18, 1885.

"E. Frank Coe—Dear Sir: In order to liquidate and secure you in the payment of your account as now due, I will propose to do as follows:

Bill of sale of goods inclosed.....	\$1,520
10 tons E. Frank Coe's phosphate.....	280
Cash or customer's note in a few days.....	500
Customer's notes or cash.....	220
	<hr/>
	\$2,500

"Balance your account to date, \$1,975.

"Yours, truly, Wm. Tough."

It appears that defendant was indebted to the plaintiff \$2,000. That on February 18, 1885, the collecting agent of the latter went to the defendant's place to collect the debt, or obtain security for its payment. That the defendant proposed to sell to the plaintiff, and the agent offered to purchase property on account of the debt. Thereupon the defendant drew the first-mentioned paper, and handed it to the agent, who then suggested that the defendant also give him a note to the plaintiff, stating what had transpired between them. The defendant wrote and subscribed the other paper, which was put in the envelope in which the other had been placed. The defendant on this occasion paid to the agent \$25, to apply on the debt, thus reducing it to \$1,975. The agent, having advised the plaintiff what he had done, returned to the defendant's place on the 21st of February,

taking with him a draft chattel mortgage, which the plaintiff had caused to be drawn, and informed the defendant that if he preferred he might execute it. But the defendant declined to do that. And thereupon the agent requested a delivery of the property, to which the defendant assented, and promised to furnish a room on the premises in which it might be placed, and gave him the key to it. The agent said that was satisfactory. The defendant said he would not have time to do it that time; and it was then understood that the agent would come again on Monday, the 24th, when the goods would be separated and received by him. For reason of which the defendant was advised on Monday, the agent did not go that day, but did the next day, when the defendant refused to deliver the property. The property was taken upon the requisition in this action, and delivered by the sheriff to the plaintiff. The trial court directed a verdict for the defendant.

Henry D. Hotchkiss, for appellant. *R. E. Andrews* and *L. F. Longley*, for respondents.

BRADLEY, J., (*after stating the facts as above.*) The first question presented is whether there was a valid contract made for the sale of the property by the defendant to plaintiff, and, if so, the further question will arise whether it was an executed one, so as to pass the title to the plaintiff, or was executory merely. As no part of the property was delivered to or received by the plaintiff, and none of the purchase money paid, as required by the statute of frauds, the sale was void, unless a note or memorandum of the contract was made in writing, and subscribed by the defendant. 2 Rev. St. p. 136, § 3. The form of the memorandum as drawn was, "E. Frank Coe bought of William Tough," followed by a list of the articles of property in question, with prices added. This paper was not at the end of it subscribed by the defendant, so that, standing alone, whatever view may be taken of its terms, it was not effectual as a contract of sale. *James v. Patten*, 6 N. Y. 9. But it is contended that the note or letter written on the same occasion by the defendant, subscribed by him, and addressed to the plaintiff, may be taken in connection with the first-mentioned memorandum, and the signature to the one treated as subscribed to both, each constituting part of the same instrument. To permit this to be done, so as to relieve it from the operation of the statute, the two papers must have been so physically united, or such reference made by one of them to the other, that they may be construed together as one instrument without the aid of oral evidence. *Baptist Church v. Bigelow*, 16 Wend. 28; *Wright v. Weeks*, 25 N. Y. 154; *Drake v. Seaman*, 97 N. Y. 230, affirming 27 Hun, 63; *Stone v. Browning*, 68 N. Y. 598. The two papers by their date purport to have been made at the same time; they are in the handwriting of the defendant;

relate to the same subject; and the reference to the paper designated as a "bill of sale" in the one embraces in figures certain amounts corresponding with those in the other. They sufficiently referred to the same transaction to permit them to be construed together, and to be given such effect as they were entitled to. *Tallman v. Franklin*, 14 N. Y. 584; *Peabody v. Speyers*, 56 N. Y. 230; *Peck v. Vandemark*, 99 N. Y. 29, 1 N. E. Rep. 41. The more difficult question arises upon the consideration of the construction and effect which may be given to those papers. It has been held that a memorandum, in the form of that here designated as a bill of sale, with payment receipted, did not constitute a contract of sale, so as to exclude parol evidence of warranty, but was a mere receipt. *Filkins v. Whyland*, 24 N. Y. 338. While presumptively, at least, a receipted bill in that form will not have the character of a contract of sale, the effect, when no receipt is added, may be otherwise. Then it may be such a contract, or the written evidence of it, within the intention of the parties, and entitled to such effect. *Terry v. Wheeler*, 25 N. Y. 520; *Bonestee v. Fluck*, 41 Barb. 435. That paper, standing alone, not being subscribed by the defendant, had no validity, and in connection with the other it must be treated as referred to for the purpose indicated by the terms of the latter, by which the defendant says that, "in order to liquidate and secure you [plaintiff] in the payment of your account as now due, I will propose to do as follows: Bill of sale inclosed, \$1,520;" and then adds another item of property, with two items of cash or notes to make up the amount of \$2,520; and, after stating the balance of the plaintiff's account at \$1,975, subscribes his name. In aid of the construction of the instrument, reference may be had to the extrinsic circumstances attending the transaction between the defendant and the plaintiff's agent. The latter called upon the defendant to obtain payment, or security for its payment, of the debt due his principal from the defendant. The interview resulted in an offer of the defendant to sell, and of the agent to purchase, some personal property, on account of the debt; and, for the purpose of doing so, the bill of sale, so called, was drawn by the defendant, and handed to the agent unsigned. The note or letter addressed to the plaintiff was written upon the suggestion of the agent that the defendant put on paper a statement to be taken to the plaintiff of what had transpired between them. The amount of the prices designated for the articles of property, with that of the proposed cash or notes, was purposely made to exceed the debt, with a view to enable the plaintiff to realize from it the full amount of his account against the defendant. It is not important whether the purpose of the contemplated sale was to pay or secure the payment of the debt. The apparent design, as indicated by the oral evidence of the transaction, was a sale and purchase, and the so-

called "bill of sale" was drawn, delivered, and received for that purpose. That was not accomplished by it. It is, however, contended that the paper afterwards written, addressed to the plaintiff, and signed by the defendant, was effectual to give to the former the effect of a bill of sale subscribed by the defendant; and that it was not embraced within the executory character of the proposition expressed in the other, but that only the payment or delivery of the cash or notes there mentioned was dependent upon the future action of the defendant. The intention of parties to a written instrument must be derived from it, although its construction may be aided by the light of extrinsic circumstances. When this alleged bill of sale was handed to the plaintiff's agent, it was ineffectual for any purpose, whatever may have been the design of the parties. It does not appear that the other paper was then in contemplation, and its effect must be ascertained from its terms as they may be construed. In its relation to the former, it may be assumed that reference was made to the articles of property there mentioned. But it is difficult to distinguish the application of the offer or proposition of the defendant to any one from any other portion of the means mentioned for the payment or security of the debt. It was to "liquidate and secure" it as stated. The defendant proposed to do what he had not already done in that respect. He had neither transferred any of the personal property or notes, and had made no contract to that effect. They altogether came within the purpose expressed, and his proposition or promise to accomplish it was in form executory. If the paper called a "bill of sale" had been independently valid, a different view may have been taken upon construction of the writings. It would therefore seem that the support of the plaintiff's claim of title requires the conclusion that the offer or promise of the defendant to sell to him the property was or became effectual for that purpose. It is a rule, as relates to personal property, that when, by a valid agreement, one party unconditionally agrees to sell to another, who agrees to purchase, and nothing remains to be done to complete the sale, the contract will be treated as an executed one, and title will pass, although no delivery or payment is made. *Olyphant v. Baker*, 5 Denio, 379; *Terry v. Wheeler*, 25 N. Y. 520. In the present case the proposition or promise of the defendant to sell the property was by its terms and import made with a view to a subsequent acceptance by the plaintiff. There cannot, therefore, be said to have been any concurrent undertaking on the part of the latter to purchase. This proposition, when made, seems to have had no consideration for its support. It was a mere offer of a debtor to sell goods to his creditor in payment or security of the debt due the latter, founded upon no new consideration, but resting solely in the purpose, so manifested, of the debtor to pay the debt or secure its pay-

ment in that manner. The conclusion would seem, for that reason, to follow that a subsequent acceptance would not be effectual to create a valid contract of sale between the parties. *Cooke v. Oxley*, 3 Term R. 653; *Burnet v. Bisco*, 4 Johns. 235; *Railroad Co. v. Brinckerhoff*, 21 Wend. 139; *Railroad Co. v. Dane*, 43 N. Y. 240; *Plank-Road Co. v. Snediker*, 18 Barb. 317. In that respect this case differs from those determined in *Burrell v. Root*, 40 N. Y. 496; *Justice v. Lang*, 42

N. Y. 493, 52 N. Y. 323; *Mason v. Decker*, 72 N. Y. 595. In those cases the offers and promises of the defendants had the support of consideration, arising out of mutuality of agreement or produced in some other manner. If these views are correct, there was no valid contract made by the defendant for the sale of the property in question to the plaintiff, to support his claim of title. The judgment should be affirmed. All concur, except PARKER, J., not sitting.

COMER v. CUNNINGHAM.

(77 N. Y. 391.)

Court of Appeals of New York. 1879.

Replevin for forty-five bales of cotton, brought by plaintiff as surviving member of the firm of Bates & Comer, commission merchants at Savannah, Ga. It was originally brought against James B. Cunningham, of the firm of James B. Cunningham & Co. Cunningham having died, his administratrix was substituted. The facts appear in the opinion. Judgment for defendant.

Erastus Cook, for appellant. Benjamin G. Hitchings, for respondent.

RAPALLO, J. The forty-five bales of cotton claimed by the plaintiff in this action were part of a lot of sixty bales which were on the 18th of November, 1870, shipped from Savannah, Georgia, to the firm of James B. Cunningham & Co. of New York, by F. S. Williams, a business correspondent of that firm, who was in the habit of shipping cotton to them and drawing against it for advances thereon.

A bill of lading of the cotton on board the steamer San Salvador, with a sight draft attached thereto, drawn by Williams upon Cunningham & Co., for \$4,500, payable to the order of Bryan & Hunter of Savannah, and indorsed by them, were presented to Cunningham & Co., at New York, by the agents of Bryan & Hunter, on the 21st of November, 1870, and Cunningham & Co. thereupon paid the draft and received the bill of lading in the usual course of business. The payment of the draft was made as an advance upon the cotton on the faith of the bill of lading. In the bill of lading Williams was named as the shipper of the cotton. It was deliverable to order and the bill of lading was duly indorsed. Cunningham & Co. had no knowledge of any claim of any person on the cotton, and upon the uncontroverted evidence they stand in the position of bona fide purchasers of the cotton, or lenders thereon in good faith. The defendant is the representative of Cunningham & Co.

Cunningham & Co. obtained possession of the cotton under the bill of lading and put it in store, where it remained until the 25th of November, when the forty-five bales in question were replevied in this action by Bates & Comer of Savannah.

The grounds upon which they claim to be entitled to take the cotton are, that the sixty bales shipped by Williams as above stated were part of a lot of one hundred and seventeen bales sold by the firm of Bates & Comer (of whom the plaintiff is survivor) to Williams, at Savannah, in November, 1870, for cash. The price of the whole lot was \$8,676.20. The plaintiff testified that the one hundred and seventeen bales were delivered to Williams on the 18th of November, 1870, and that on the next day, Saturday the 19th, Williams gave to plaintiff two checks on Bryan & Hunter; one for \$6,000, which was paid, and one for \$2,676.20, which was not paid. It appears that the sixty bales shipped to Cunningham & Co. were on the 18th of

November delivered by the sellers by direction of Williams, at the compress, being the place where cotton was pressed by the steamers, preparatory to shipment, and that they were on the same day laden on board the steamer and the bill of lading before mentioned was issued to Williams.

He thereupon drew the \$4,500 draft on Cunningham & Co., and presented the same with the bill of lading to Bryan & Hunter, who discounted the draft, and against the proceeds of this discount and other moneys in their hands, Williams drew the before-mentioned checks on Bryan & Hunter for \$6,000 and \$2,676.20 in favor of the plaintiff's firm, for the purpose of paying for the one hundred and seventeen bales, and plaintiff's firm on the next day collected the \$6,000 check as before stated. Williams testifies that the check for \$2,676.20 was dated some days ahead, and also that he informed plaintiff of the shipment at the time, but as these facts are controverted they are not taken into consideration.

No condition appears to have been attached by the parties to the delivery of the cotton on the 18th of November, nor is it alleged that Williams obtained possession of it by means of any fraud. It was voluntarily and absolutely delivered by the vendors in the usual course of business, and no question would arise as to the title of Williams or of Cunningham & Co., but for a statute of the state of Georgia, upon which the plaintiff relies to maintain this action.

This statute provides that "cotton, rice and other products sold by planters and commission merchants on cash sale shall not be considered as the property of the buyer, or the ownership given up, until the same shall be fully paid for, although it may have been delivered into the possession of the buyer."

It is not claimed on the part of the plaintiff that this statute has any force, *ex proprio vigore*, in this state, but the claim made is, that this statute being the law of the state where the parties resided and the property was, and where the contract was made and to be performed, it entered into the terms of the contract, and became a part of it, to the same extent as if its essential provisions had been written into it.

Assuming this position to be correct, the questions arise, first, what was the nature and effect of the dealing between the vendors and Williams, as construed by including the provisions of this statute as part of the contract, and secondly, what are the rights of a bona fide purchaser from Williams.

The plaintiff contends that the effect of incorporating the statute into the contract was to make the sale to Williams a conditional sale; but I apprehend that this is not an accurate view. The sale was a present, absolute sale; not executory nor depending upon any contingency. The obligation of the buyer to pay was absolute, and the property was at his risk. If it had been destroyed or lost on the voyage, his obligation to pay would not have been discharged, notwithstanding that as between him and his vendors

the title had not passed. The statute did not purport to affect any of these rights, or to attach any condition to the contract of sale. It simply made the delivery conditional, and if written into the contract would affect nothing but the delivery. The property in that case stood in precisely the same condition after its delivery to Williams at Savannah as if the transaction had taken place in this state, and the vendor on a cash sale had expressly attached to the delivery a condition that the title should not pass until payment of the price. Such transactions are of common occurrence in this state, and the rights of the vendor and vendee and of bona fide purchasers from the vendee are well settled by the adjudications of our courts. Where goods are sold to be paid for in cash or by notes on delivery, if delivery is made without demand of the notes or cash the presumption is that the condition is waived, and a complete title vests in the purchaser; but this presumption may be rebutted by proof of acts or declarations and circumstances showing an intention that the delivery shall not be considered complete until performance of the condition, and the question of intention is one of fact. But after actual delivery, although as between the parties to the sale such delivery be conditional, a bona fide purchaser from the vendee obtains a perfect title (*Smith v. Lynes*, 5 N. Y. 41; *Fleeman v. McKean*, 25 Barb. 474; *Beavers v. Lane*, 6 Duer, 238), though a voluntary assignee of the purchaser does not. *Haggerty v. Palmer*, 6 Johns. Ch. 438. The statute of Georgia having no operation here as law, its only effect can be to place the parties in the same position as if it had been stipulated at the time of the delivery to Williams that such delivery should be conditional upon payment, and we must apply to the case the law of this state which protects a bona fide purchaser from one to whom goods have been conditionally delivered, against the claims of the original vendor. *Rawls v. Deshler*, 3 Keyes, 572, is very much in point. *Deshler* sold a quantity of corn to *Griffin* and gave him an order on the elevator to deliver the corn to him "subject to my order till paid for." This delivery was clearly conditional. The Georgia statute was actually incorporated into the contract, and neither *Griffin* nor his execution creditor or voluntary assignee could have resisted successfully a claim of the vendor to retake it. Yet this court held that *Griffin* having shipped the corn and drawn against it, the drawees having paid the draft on the faith of the bill of lading, were protected as bona fide purchasers, and also under the factor's act.

In *Wait v. Green*, 36 N. Y. 556, the vendor of a horse delivered it and took from the purchaser a note, at foot of which was a memorandum signed by the vendee: "Given for one bay horse. The said Mrs. Comins (the vendor) holds the said horse as her property until the above note is paid." This court held that a bona fide purchaser from the vendee obtained a good title. This case is supposed to be in conflict with *Herring v. Hoppock*, 15 N. Y. 409; *Ballard v. Burgett*, 40 id. 314, and

Austin v. Dye, 46 id. 500. If the transaction is to be regarded as a conditional sale, the case is in conflict with the two last cited cases in 40 and 46 N. Y., but it can well be treated as a case only of conditional delivery. In *Ballard v. Burgett* it was held that where the sale was conditional, no title passed to the vendee, because there was no sale until the condition was performed, and the so-called vendee was a mere bailee with a contract for a future sale. That the property while in his hands was at the risk of the vendor, and the so-called vendee was not liable for the price. That he had no title to the property and could convey none, even to a bona fide purchaser; that there was no sale, and he had a mere possession, and that the finding of the referee that the agreement was that the property was to remain the property of the plaintiff till the \$180 were paid, was incompatible with the finding of a sale, and the true construction of the contract was that the oxen were delivered under an agreement that when the party receiving them should pay \$180, the party delivering them would sell the oxen. *Wait v. Green* was distinguished, and it was held that under the circumstances of that case if the horse had died before payment of the note such death would have been no defense to the note, and that was a conclusive circumstance showing that the condition expressed in the note was a mere security for the price. Whereas in the case at bar had the oxen died no action could have been maintained for the purchase-money. The cases holding that where there is a sale and a conditional delivery a bona fide purchaser from the vendee acquires a good title discharged of the lien for the purchase-money are cited, but they are not attempted to be overruled nor are they questioned. In *Austin v. Dye*, 46 N. Y. 500, the principle of this decision is clearly stated, and is, that one having possession of personal property as bailee, with an executory and conditional agreement for its purchase, the condition not having been performed, can give no title to a purchaser though the latter acts in good faith and parts with value without notice of the want of title. In that case the alleged vendee was to pay hire for the oxen until he should pay a specified sum in a specified manner in lumber, and then he was to become the owner. Until then there was no sale, and they were at the risk of the bailor, who received hire for their use. The sale was executory as that in *Ballard v. Burgett* was construed to be. In *Herring v. Hoppock*, 15 N. Y. 409, and *Strong v. Taylor*, 2 Hill, 326, the question of the rights of a bona fide purchaser did not arise and it is therefore immaterial to consider whether those were cases of conditional sale or conditional delivery. In the present case it cannot be pretended that the sale was executory or conditional. It was an absolute unconditional sale, and the greater part of the purchase-money, much more than sufficient to cover the price of the bales received by the defendant's firm, had actually been paid. There is no feature, favorable to the plaintiff, by which it can be distinguished from

Smith v. Lynes, 5 N. Y. 41, and the cases there referred to, and that case and Rawls v. Deshler, 3 Keyes, 572, establish that a condition that the title shall not pass until payment, when attached to a delivery upon an actual completed contract of sale, is available only as against the vendee and persons claiming under him, other than bona fide purchasers without notice.

This view renders it unnecessary to examine that branch of the defense which rests upon the factor's act. The case falls literally within the provisions of the act, but it has been said in numerous cases that

the first section of the act applies only when the shipment has been made with the consent of the owner, in the name of another person. There is no adjudicated case which rests upon that proposition, and it may be an open question whether under the circumstances of the present case the statute would not be a protection, but as the ground already discussed is sufficient to decide the case, time will not be consumed in that inquiry.

The judgment should be affirmed.

All concur.

Judgment affirmed.



COMMERCIAL NAT. BANK v. GILLETTE.

(30 Ind. 268.)

Supreme Court of Indiana. May Term, 1883.

J. M. Vanfleet, for appellant. J. H. Baker and J. A. S. Mitchell, for appellee.

ELLIOTT, J. The Elkhart Car Company, by a written contract, sold to the appellant 510 car wheels, constituting a part of 1,100 wheels; at the time of the sale the wheels were in one common mass, and there was no separation nor any designation of the wheels sold to the appellant; after the execution of the contract the entire lot of wheels was seized upon executions issued at the suit of appellee, and this action was brought for the possession of those sold.

The contention of appellee is that appellant acquired no title, because the articles sold were not designated or separated from the common lot of which they formed a part, and this contention prevailed in the court below.

There is much strife in the American cases upon this question, but none in the English. The weight of the former is, perhaps, with the theory of appellant, but the text-writers are, so far as we have examined, all with the English decisions. Our own cases are in harmony with the long established rule of the common law. In the case of *Bricker v. Hughes*, 4 Ind. 146, the English rule was approved and enforced. In *Murphy v. State*, 1 Ind. 366, the court said: "To render a sale of goods valid, the specific, individual goods must be agreed on by the parties. It is not enough * * * that they are to be taken from some specified larger stock, because there still remains something to be done to designate the portion sold, which portion, before the sale can be completed, must be separated from the mass." This doctrine found approval in *Scott v. King*, 12 Ind. 203, and there are other cases recognizing it as the correct one, among them *Mollit v. Green*, 9 Ind. 198; *Indianapolis, etc., R. W. Co. v. Maguire*, 62 Ind. 140; *Bertelson v. Bower*, 81 Ind. 512; *Lester v. East*, 49 Ind. 588, vide opinion, p. 594. The rule which our court has adopted is upheld by the American cases of *Hutchinson v. Hunter*, 7 Pa. St. 140; *Haldeman v. Duncan*, 51 Pa. St. 66; *Fuller v. Bean*, 34 N. H. 290; *Ockington v. Ritchey*, 41 N. H. 275; *Morrison v. Woodley*, 84 Ill. 192; *Woods v. McGee*, 7 Ohio, 467; *McLaughlin v. Piattl*, 27 Cal. 463; *Courtright v. Leonard*, 11 Iowa, 32; *Ropes v. Lane*, 9 Allen, 502; *Ferguson v. Northern Bank*, 14 Bush, 555 (29 Am. R. 418.) In Michigan, the rule seems not to be definitely settled, but in

a late case it was said: "To the elaborate argument made for the defence to show that there can be neither a sale nor a pledge of property without in some manner specially distinguishing it, we fully assent, and we have no purpose to qualify or weaken the authority of *Anderson v. Brennehan*, 44 Mich. 198." *Merchants', etc., Bank v. Hibbard*, 48 Mich. 118, 11 N. W. Rep. 834; S. C., 42 Am. R. 465.

The civil law rule is the same as that of the common law, and our great lawyers have given it unhesitating approval. 2 Kent, Com. 639; *Story Sales*, section 296.

The American cases which have departed from the long settled rule, are built on the cases of *Kimberly v. Patchin*, 19 N. Y. 330, and *Pleasants v. Pendleton*, 6 Rand. 473, and these cases proceed upon the theory that commercial interests demand a modification of the rule. In our judgment, commercial interests are best promoted by a rigid adherence to the rule which the sages of the law have so long and so strongly approved. The rule secures real transactions and actual sales, and thus checks the wild spirit of speculation. It prevents, in no small measure, the making of mere wagering contracts; it puts business on a stable basis, and makes it essential that there should be real, and not sham, transfers of property; it makes titles secure, protects creditors and purchasers and represses fraud. If it were granted that the rule does somewhat interfere with the freedom of business transfers, still the good it produces far outweighs this inconvenience. But we do not believe it does interfere with actual business transfers, for common experience informs us that real sales are seldom, if ever, made without a specific designation of the thing bought. The rule may interfere with dealers in "margins," makers of "corners," and framers of "options," and to affirm that it does do this is to give it no faint praise. In principle the rule is sound, and in practical operation salutary.

The efforts made by the courts that have departed from it to make exceptions, to manufacture distinctions and point out differences in order to escape disastrous consequences, afford strong evidence of the wisdom of the rule. The line of decisions in some of the states, where a departure has been taken, is a devious and tortuous one, and this is to be expected when once sound principle is turned from and new rules sought and adopted which have no support in fundamental principles.

We have no disposition to depart from the rule which has so long prevailed in this state and elsewhere.

Judgment affirmed.

Petition for rehearing overruled.



COMMONWEALTH v. FLEMING.

(18 Atl. Rep. 622, 130 Pa. St. 138.)

Supreme Court of Pennsylvania. Nov. 4, 1889.

Error to court of quarter sessions, Mercer county.

The plaintiff in error, Joseph Fleming, being a wholesale liquor dealer, licensed and carrying on business in Allegheny county, sold and sent from his place of business, C. O. D., to Mercer county, where he had no license, liquors ordered by persons in the latter county. For this he was, at the court of quarter sessions of Mercer county, indicted, tried, convicted, and sentenced for selling liquor therein without a license. He now brings error.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

George Shiras, Jr., and William S. Pier, for plaintiff in error. *G. W. McBride, Dist. Atty., J. A. Stranahan, and S. H. Miller,* for the Commonwealth.

GREEN, J. In the case of *Garbracht v. Com.*, 96 Pa. St. 449, which was an indictment for selling liquor without license, we held that "the place of sale is the point at which goods ordered or purchased are set apart and delivered to the purchaser, or to a common carrier, who, for the purposes of delivery, represents him." In that case the order for the liquor was solicited and obtained by the defendant in the county of Mercer, but was sent to his principal, who was a liquor dealer in the county of Erie. The order was executed by the principal, who, in the county of Erie, at his place of business, separated or set apart from his general stock the liquor ordered, and delivered it to a common carrier to be forwarded to its destination in Mercer county. We decided that this was no violation of the law prohibiting sales without license, although neither the defendant, who was a traveling agent, nor his principal held any license for the sale of liquor in Mercer county. This decision was not changed in the least upon a subsequent trial of the same defendant on a different state of facts, as reported in 1 Penny. 471. In the case now under consideration the liquor was sold upon orders sent by mail by the purchasers, living in Mercer county, to the defendant, who is a wholesale liquor dealer in Allegheny county. The goods were set apart at the defendant's place of business in Allegheny county, and were there delivered to a common carrier, consigned to the purchaser at his address in Mercer county, and by the carrier transported to Mercer county, and there delivered to the purchaser, who paid the expense of transportation. Upon these facts alone, the decision of this court in the case of *Garbracht*, supra, is directly and distinctly applicable, and requires us to reverse the judgment of the court below, unless there are other facts

in the case which distinguish it from that of *Garbracht*.

It is claimed, and it was so held by the court below, that, because the goods were marked "C. O. D.," the sale was not complete until the delivery was made; and as that took place in Mercer county, where the defendant's license was inoperative, he was without license as to such sales, and became subject to the penalty of the criminal law. The argument by which this conclusion was reached was simply that the payment of the price was a condition precedent to the delivery, and hence there was no delivery until payment, and no title passed until delivery. The legal and criminal inference was, the sale was made in Mercer, and not in Allegheny. This reasoning ignores certain facts which require consideration. The orders were sent by the purchasers, in Mercer, by mail to the seller, in Allegheny, and in the orders the purchasers requested the defendant to send the goods C. O. D. The well-known meaning of such an order is that the price of the goods is to be collected by the carrier at the time of the delivery. The purchaser, for his own convenience, requests the seller to send him the goods, with authority in the carrier to receive the money for them. This method of payment is the choice of the purchaser, under such an order; and it is beyond question that, so far as the purchaser is concerned, the carrier is his agent for the receipt and transmission of the money. If the seller accedes to such a request by the purchaser, he certainly authorizes the purchaser to pay the money to the carrier, and the purchaser is relieved of all liabilities to the seller for the price of the goods if he pays the price to the carrier. The liability for the price is transferred from the seller to the carrier; and whether the carrier receives the price or not, at the time of delivery, he is liable to the seller for the price if he does deliver. Substantially, therefore, if the delivery is made by the carrier, and he chooses to give credit to the purchaser for the payment of the price, the transaction is complete, so far as the seller is concerned, and the purchaser may hold the goods. Of course, if the seller were himself delivering the goods in parcels upon condition that on delivery of the last parcel the price of the whole should be paid, it would be a fraud on the seller if the purchaser, after getting all the parcels, should refuse to perform the condition upon which he obtained them, and in such circumstances the seller would be entitled to recover the goods. This was the case in *Henderson v. Lauck*, 21 Pa. St. 359. The court below, in that case, expressly charged that if the seller relied on the promise of the purchaser to pay, and delivered the goods absolutely, the right to the property was changed, although the conditions were never performed; but if he relied, not on the promise, but on actual payment at the delivery of the last load, he might reclaim the goods if the money was not paid. The case at bar is entirely different. So far

as the seller is concerned, he is satisfied to take the responsibility of the carrier for the price, in place of that of the seller. He authorizes the purchaser absolutely to pay the price to the carrier; and, if he does so, undoubtedly the purchaser is relieved of all responsibility for the price, whether the carrier ever pays it to the seller or not. But the carrier is also authorized to deliver the goods. If he does so, and receives the price, he is of course liable for it to the seller. But he is equally liable for the price if he chooses to deliver the goods without receiving the price. It cannot be questioned that the purchaser would be liable also; but, as he had received the goods from one who was authorized to deliver them, his right to hold them even as against the seller is undoubted. In other words, the direction embodied in the letters "C. O. D.," placed upon a package committed to a carrier, is an order to the carrier to collect the money for the package at the time of its delivery. It is a part of the undertaking of the carrier with the consignor, a violation of which imposes upon the carrier the obligation to pay the price of the article delivered, to the consignor. We have been referred to no authority, and have been unable to discover any, for the proposition that in such a case, after actual, absolute delivery to the purchaser by the carrier without payment of the price, the seller could reclaim the goods from the purchaser as upon violation of a condition precedent.

If, now, we pause to consider the actual contract relation between the seller and purchaser, where the purchaser orders the goods to be sent to him C. O. D., the matter becomes still more clear. Upon such an order, if it is accepted by the seller, it becomes the duty of the seller to deliver the goods to the carrier, with instruction to the carrier to collect the price at the time of delivery to the purchaser. In such a case it is the duty of the purchaser to receive the goods from the carrier, and, at the time of receiving them, to pay the price to the carrier. This is the whole of the contract, so far as the seller and the purchaser are concerned. It is at once apparent that when the seller has delivered the goods to the carrier, with the instruction to collect the price on delivery to the purchaser, he has performed his whole duty under the contract; he has nothing more to do. If the purchaser fail to perform his part of the contract, the seller's right of action is complete; and he may recover the price of the goods from the purchaser, where the purchaser takes, or refuses to take, the goods from the carrier. Hence it follows that the passage of the title to the purchaser is not essential to the legal completeness of the contract of sale. It is, in fact, no more than the ordinary case of a contract of sale, wherein the seller tenders delivery at the time and place of delivery agreed upon, but the purchaser refuses performance. In such case it is perfectly familiar law that the purchaser is legally liable to pay the price of the goods

although, in point of fact, he has never had them. The order to pay on delivery is merely a superadded term of the contract; but it is a term to be performed by the purchaser, and has no other effect upon the contract than any other term affecting the *factum* of delivery. It must be performed by the purchaser, just as the obligation to receive the goods at a particular time or a particular place. Its non-performance is a breach by the purchaser, and not by the seller, and therefore cannot affect the right of the seller to regard the contract of sale as complete, and completely performed on his part, without any regard to the question whether the title to the goods has passed to the purchaser as upon an actual reception of the goods by him. If this be so, the case of the commonwealth falls to the ground, even upon the most critical consideration of the contract between the parties, regarded as a contract for civil purposes only. The duties which lie intermediate between those of the seller and those of the purchaser are those only which pertain to, and are to be performed by, the carrier. These, as we have before seen, are the ordinary duties of carriage and delivery, with the additional duty of receiving the price from the purchaser, and transmitting it to the seller. The only decided case to which we have been referred which presents the effect of an order C. O. D. to a carrier is *Higgins v. Murray*, 73 N. Y. 252. There the defendant employed the plaintiff to manufacture for him a set of circus tents. When they were finished, the plaintiff shipped them to the defendant C. O. D., and they were destroyed by fire on the route. It was held that the defendant, who was the purchaser, should bear the loss; that the plaintiff had a lien on the tents for the value of his labor and materials, and his retaining his lien by shipping them C. O. D. was not inconsistent with, and did not affect, his right to enforce the defendant's liability. In the course of the opinion, Chief Justice CHURCH said: "Suppose, in this case, that the defendant had refused to accept a delivery of the tent, his liability would have been the same, although the title was not in him. The plaintiff had a lien upon the article for the value of his labor and materials, which was good as long as he retained possession. * * * Retaining the lien was not inconsistent with his right to enforce the liability for which this action was brought. That liability was complete when the request to ship was made by the defendant, and was not affected by complying with the request, nor by retaining the lien the same as when the request was made. As the article was shipped at the request of, and for the benefit of, the defendant, (assuming that it was done in accordance with the directions,) it follows that it was at his risk, and could not impair the right of the plaintiff to recover for the amount due him upon the performance of his contract. * * * As before stated, the point as to who had the title is not decisive. It may be admitted

that the plaintiff retained the title as security for the debt, and yet the defendant was liable for the debt in a proper personal action." It seems to us this reasoning is perfectly sound. Practically, it was ruled that the effect of the order C. O. D. was simply the retention of the seller's lien, and that such retention of lien is not inconsistent with a right of recovery for the price of the article, though, in point of fact, it is not delivered to the purchaser. In other words, the literal state of the title is not decisive of the question of liability of the purchaser, and he may be compelled to pay for the article, though he never received it into his actual possession. The chief justice propounds the very question suggested, heretofore, of a refusal by the purchaser to accept the article, and holds that his liability would be the same, though the title was not in him.

In *Hutchinson on Carriers*, at section 389, the writer thus states the position and duty of the carrier: "The carrier who accepts the goods with such instructions [C. O. D.] undertakes that they shall not be delivered unless the condition of payment be complied with, and becomes the agent of the shipper of the goods to receive such payment. He therefore undertakes, in addition to his duties as carrier, to collect for the consignor the price of his goods." And again, in section 390: "When the goods are so received, the carrier is held to a strict compliance with such instructions; and, if the goods are delivered without an exaction from the consignee of the amount which the carrier is instructed to collect, he becomes liable to the consignor for it." This is certainly a correct statement of the position and liability of the carrier. He becomes subject to an added duty,—that of collection; and, if he fails to perform it, he is liable to the seller for the price of the goods. We have searched in vain for any text-writer's statement, or any decision, to the effect that in such case no title passes to the purchaser. We feel well assured none such can be found. But, if this be so, the whole theory that the title does not pass if the money is not paid fails, and the true legal *status* of the parties results that the seller has a remedy for the price of his goods against the carrier. In other words, an order from a seller to a carrier to collect on delivery, accepted by the carrier, creates a contract between the seller and the carrier, for a breach of which by the carrier the seller may recover the price from him. So far as the seller and purchaser are concerned, the latter is liable, whether he takes the goods from the carrier or not, and the order itself is a mere provision for the retention of the seller's lien. While, if the goods are not delivered to the purchaser by the carrier, the title does not pass, that circumstance does not affect the character of the transaction as a sale; and the right of the seller to recover the price from the purchaser, if he refuse to take them, is as complete as if he had taken them, and not paid for them.

Thus far we have regarded the transactions between the parties in its aspect as a civil contract only; but, when viewed in its aspect as the source of a criminal prosecution, the transaction becomes much more clear of doubt. It is manifest that, when the purchaser ordered the goods to be sent to him C. O. D., he constituted the carrier his agent, both to receive the goods from the seller, and to transmit the price to the seller. When, therefore, the goods were delivered to the carrier at Pittsburgh for the purpose of transportation, the duty of the seller was performed, as we have already seen, so far as he and the purchaser were concerned, and as between them the transaction was complete. The duty of transportation devolved upon the carrier, and for this he was, in one sense, the agent of the seller, as well as of the purchaser; but, as it was to be at the expense of the purchaser, the delivery to the carrier was a delivery to the purchaser; and this was ruled in *Garbrach's Case*. The injunction to the carrier to collect the money on delivery imposed an additional duty on the carrier, which the carrier was, of course, bound to discharge. This arrangement was a matter of convenience, both to the purchaser and the seller, relative to the payment and transmission of the price; but that is all. To convert this entirely innocent and purely civil convention, respecting the mode of collecting the price of the goods, into a crime, is, in our judgment, a grave perversion of the criminal law, to which we cannot assent. As a matter of course, there is an utter absence of any criminal intent in the case. The defendant had a license. The sale was made at his place of business, and both the sale and delivery were completed within the territory covered by the license. If, now, a criminal character is to be given to the transaction, it must be done by means of a technical inference that the title did not pass until the money was paid; and thus that the place of sale, which in point of fact was in Allegheny county, was changed to Mercer county, where no sale was made. Even granting that, in order to conserve the vendor's lien, such a technical inference would be justified for the purposes of a civil contract, it by no means follows that the plain facts of the case must be clothed with a criminal consequence on that account. So far as the criminal law is concerned, it is only an actual sale without license that is prohibited. But there was no such sale, because all the essential facts which constituted the sale transpired in Allegheny county, where the defendant's license was operative. The carrier, being the agent of the purchaser to receive the goods, does receive them from the seller in Allegheny county, and the delivery to him for the purpose of transportation was a delivery to the purchaser. This is the legal, and certainly the common, understanding of a sale. The statute, being criminal, must be strictly construed; and only those acts which are plainly within its meaning,

according to the common understanding of men, can be regarded as prohibited criminal acts. We cannot consider, therefore, that a mere undertaking on the part of the carrier to collect the price of the goods at the time of his delivery to the purchaser, though the payment of the price be a condition of the delivery, can suffice to convert the seller's delivery to the carrier for transportation and collection into a crime. We therefore hold that the sales made by the defendant upon orders, C. O. D., received from the purchasers were not in violation of the criminal statute against sales without license, and the conviction and sentence in the court below must be set aside. The judgment of the court of quarter sessions is reversed, and the defendant is discharged from his recognizance upon this indictment.

WILLIAMS, J., delivered a dissenting opinion.

COMMONWEALTH, to Use of ALLEGHENY COUNTY et al., v. MILLER.

(18 Atl. Rep. 938, 131 Pa. St. 118.)

Supreme Court of Pennsylvania. Jan. 6, 1890.

Appeal from court of common pleas, Allegheny county.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, MCCOLLUM and MITCHELL, JJ.

John S. Ferguson, for appellant. *John Rebman, Jr.*, and *William Yost*, for the Commonwealth.

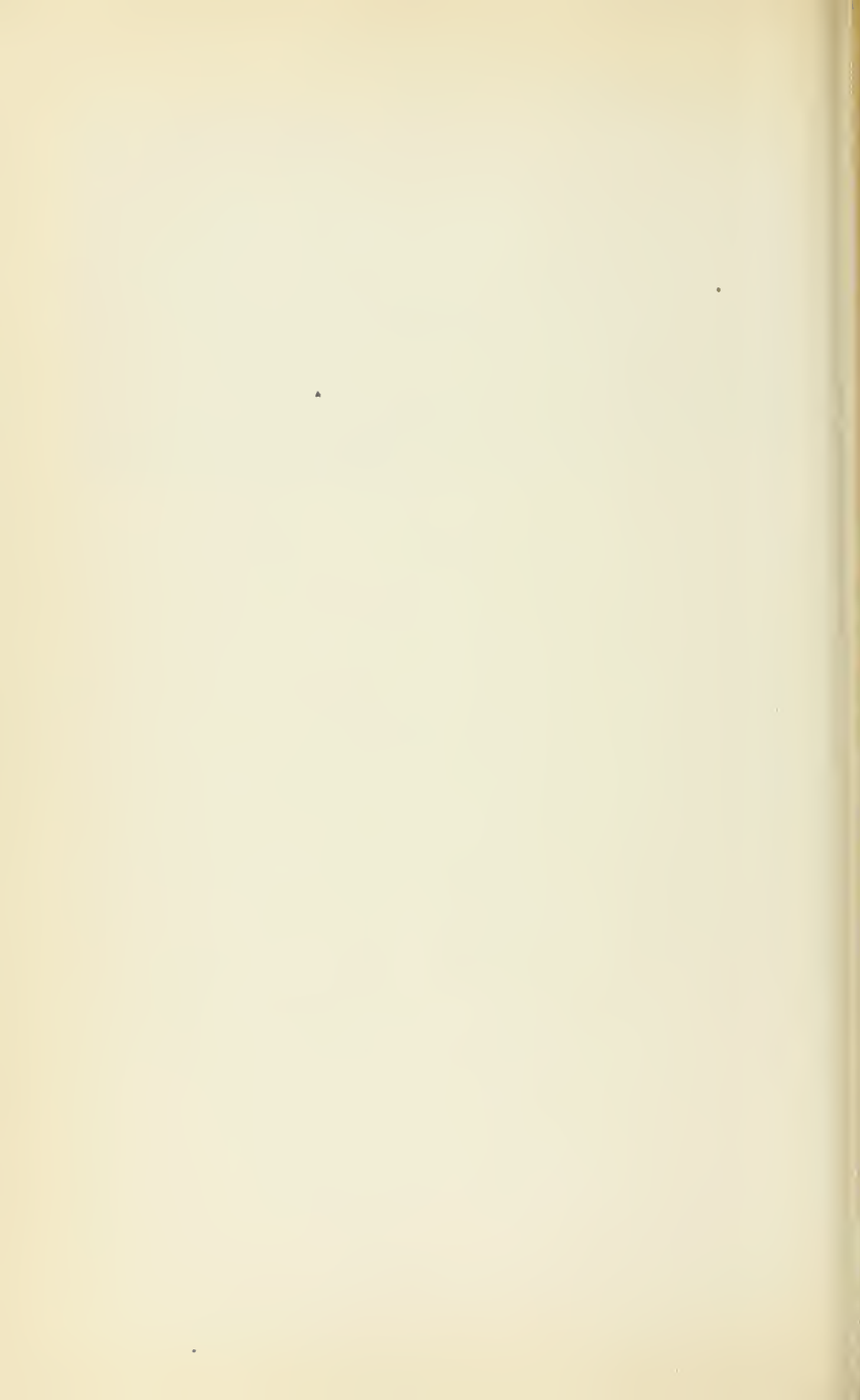
CLARK, J. The defendant is the proprietor of a restaurant in the city of Pittsburgh. His business consists, in part, in furnishing meals to transient and regular patrons, who pay for the same daily or by the meal, according to the ordinary usage in that business. From the facts set forth in the case stated it appears that on the 31st of January, 1889, William McKay and George Spence called at this restaurant and ordered meals, which were served to them in the usual manner. Among other food furnished by the defendant on this occasion was a small quantity of what appeared to be butter, but which in fact was oleomargarine, an article of manufacture and sale which is prohibited by the act of May 21, 1885, P. L. 22, entitled "An act for the protection of the public health, and to prevent adulteration of dairy products, and fraud in the sale thereof." P. L. 22. It is admitted that this oleomargarine was furnished for food, as an imitation of butter, and that it was designed to take the place of butter in the meals thus served. McKay and Spence, having partaken of the food served to them, paid each 50 cents for their meals, "including said small dish of oleomargarine," which, however, for some reason they did not eat, but carried the same away, presumably for examination. This suit is brought to recover the penalty provided in the third section of the act, for the manufacture or sale of the prohibited article, and the single question for our determination is whether or not, under the facts stated, there was a sale of the oleomargarine, within the meaning of the act referred to. The purpose of the act is expressed in the title. It is to prevent the adulteration of dairy products, and fraud in the sale thereof, and to protect the public health. It is plain that the exact legislative intent was to prevent the sale, and thereby prevent the use of these adulterations and admixtures as articles of food. It was the use, as food, and the frauds perpetrated upon the public in the sale, which was the mischief to be remedied; and the statute, of course, must be construed with reference to the old law, the mischief, and the remedy. That the food furnished to McKay and Spence, or so much of it as they saw fit to appropriate, was sold to them, cannot be reasonably questioned. When it was set before them, it was theirs to all intents

and purposes, to eat all, or a part, as they chose, subject only to the *restaurant's* right to receive the price, which it is admitted was promptly paid. They might not eat all of the article set before them, but they had an undoubted right to do so; and, even assuming that the meal is the portion of food taken, in the sense stated, the transaction must be regarded as a sale wholly within the purport and meaning of the statute. It is certain that the oleomargarine composed a part of the meal, the price of which was paid, and was embraced in the transaction as an integral part thereof. If an unlicensed keeper of a restaurant may set before his guests a bottle of wine or other intoxicating liquor, charging a regular price for the same, with other articles of food furnished, with liberty to take much or little of the liquor as the guest may choose, or, failing to drink it with his meal, permit him to take it away with him, then the liquor laws of the commonwealth are of no avail, and the license to sell liquor is wholly unnecessary. When the liquor is thus furnished and paid for, it is in legal effect a sale, for the very act has been done which it is the policy of the law to prevent, and which it characterizes as a crime, viz., furnishing intoxicating liquors at a price which is paid. So, in this case, the oleomargarine was furnished to the person named as food, and the price was paid. As the learned judge of the court below well said, it was not given away, and the fact that it was not sold separately, but with other articles, for a gross sum, would not make it less a sale. It therefore comes within the letter of the law, and it is also within its spirit. If the use of such articles is injurious, it would seem to be especially within the spirit of the act to prohibit public caterers from selling them to their guests as part of an ordinary meal. Penal statutes are to be strictly construed, but both the letter and the spirit of the act of 1885 cover this case, and we think the judgment was properly entered. Judgment affirmed.

PAXSON, C. J., (*dissenting*.) I am unwilling to be held responsible for this judgment, and therefore dissent. I am opposed to extending penal laws beyond their plain and obvious meaning. I am of opinion that the act of 21st May, 1885, (P. L. 22.), prohibiting the sale of the article of food known as "oleomargarine," was intended to apply only to dealers, or persons engaged in the sale thereof in the line of their business. When the legislature used the word "sale," it is fair to assume that it was employed in the sense in which it is popularly understood. If it was the intention not only to prohibit sales of oleomargarine, but also its use as an article of food, or in the preparation of food, by proprietors of eating-houses, restaurants, and hotels, it was easy to have said so in express terms. As the act stands, there is nothing to warn the defendant that he violated it by placing oleomargarine on his table as an ar-

ticle of food. I am unable to see how the legal or the popular meaning of the word "sale" will support this judgment. A sale is the transfer of the title to property at an agreed price. Story, Sales, § 1; Creveling v. Wood, 95 Pa. St. 152. I find nothing in the facts, as set forth in the case stated, to justify the conclusion that there was a sale of the oleomargarine. The two individuals referred to entered the defendant's place of business, and ordered a meal. It was furnished, but oleomargarine formed no part of it. It is true, there was some of that article on the table. They might have partaken of it, but they did not. When they left they carried the oleomargarine away with them. This, in my opinion, they had no right to do. A guest at a hotel may satisfy his appetite when he goes to the table. He may partake of anything that is placed before him, but, after filling his stomach, he may not also fill his pockets, and carry away the food he can-

not eat. This I understand to be the rule as applicable to hotels and eating-houses in this country, and if there is anything in this case to take it out of its operation it does not appear in the case stated. The illustration of the bottle of wine, referred to in the opinion of the court, does not appear to me a happy one. Surely, if the proprietor of a hotel places a bottle of wine before his guests, who do not partake thereof, it cannot be said that it is a sale of the wine, nor has the guest the right to carry it away. He might as well carry off the table furniture. It is quite possible, under our construction of the act of 1885, (see *Powell v. Com.*, 114 Pa. St. 265, 7 Atl. Rep. 913,) the legislature may have the power to prohibit the use of oleomargarine as an article of food in hotels and eating-houses, and punish a landlord who places it before his guests; but this has not yet been done, and I would not extend a highly penal law by implication.



CONNER v. HENDERSON.

(15 Mass. 319.)

Supreme Judicial Court of Massachusetts. Essex, Nov. Term, 1818.

This was an action of the case in assumpsit, alleging that the defendant undertook to sell and deliver to the plaintiff eighty-nine casks of lime of good quality; but in fact delivered him eighty-nine casks of lime of little value, not merchantable. There was a second count much like the first; and a third count for money had and received. Trial on the general issue, before Putnam J. at the sittings here after the last November term.—The plaintiff produced the defendant's bill of parcels of 89 casks of lime to the plaintiff at 10s. amounting to 148 dollars 33 cents. It was proved that the casks were branded by one D. Jenks, Jr., an inspector of lime, and there was satisfactory evidence that the contents of the casks were of no value, being a mixture of sand and stones, and wholly unfit for use as lime.

It was admitted by the plaintiff, that he had sold and charged to his customers about thirty casks, which had not been paid for, except two which were sold and paid for at two dollars per cask, and the plaintiff and his customers then supposing the casks to contain good lime.

There was no evidence of a special warranty of the defendant that the lime was good; nor any evidence that he knew it was bad. The defendant was master of a coasting vessel, and had received the casks of one G. Sevey at Thomastown, to carry on freight to Boston and to sell on Sevey's account. It did not appear how ever that the defendant disclosed his principal to the plaintiff; nor had this latter returned the casks, which he had not sold as aforesaid.

The judge instructed the jury, that if from the evidence they believed the defendant had not practised any fraud, they must find a verdict for him upon the two first counts; because the delivery of the casks with the inspector's brand, together with a bill of the same, did not amount to a warranty of the contents, of which the defendant might be ignorant;—that to charge him upon those counts, they must find fraud or warranty on his part. But that in respect to the count for money had and received, it was recoverable, where the money had been received by the

defendant by mistake, or where the consideration had failed, although no fraud had been practised by him; and if they should believe, from the evidence, that the plaintiff intended to buy, and the defendant to sell, 89 casks of lime, and not 89 casks without lime; and that the casks, which he delivered did not contain lime but stones and stuff of no value; that the consideration of the contract had failed, although the defendant had no bad intentions; and the plaintiff might recover the money he had paid upon the contract, and consider it as rescinded, notwithstanding he had not redelivered the casks before he brought his action, he being accountable to the defendant for the same.

The jury found a verdict for the defendant upon the two first counts, and for the plaintiff upon the money count; on the ground above stated by the judge. And if upon the facts, the plaintiff was entitled, in the opinion of the court, to recover upon either of the counts, judgment was to be entered upon the verdict; otherwise it was to be set aside, and the plaintiff to become nonsuit.

Cummings, for plaintiff. Phinney, for defendant.

PER CURIAM. The evidence reported will not maintain the action on either of the two first counts. There was no express warranty respecting the quality of the article.—Neither can the plaintiff recover on his count for money had and received. If he would have rescinded the contract, and so have entitled himself to a return of the money paid; it was necessary that he put the defendant in the same situation he was in before the delivery of the article. This was settled in the case of *Kimball vs. Cunningham*, 4 Mass. 502, and although the principal subject of the contract in the present case may be presumed, from the evidence reported, to have been absolutely of no value, and so the returning of it would have been but an idle act; yet the casks were of some value, and should have been restored, if the plaintiff would treat the sale as a nullity, and demand his money, as paid without consideration.

We think, however, that an action may be framed, in which the plaintiff may recover, on the evidence reported. He may therefore file a new declaration, on which a trial may be had; but he cannot have his costs arising prior to the present time,

COOKE v. MILLARD.

(65 N. Y. 352.)

Commission of Appeals of New York. 1875.

Action to recover the price of certain lumber sold and delivered. The referee found that plaintiffs were copartners and wholesale lumber merchants, and proprietors of a planing-mill, at Whitehall, N. Y., and defendants were partners and lumber merchants, at New Hamburg, on the Hudson. The course of business is, that the lumber is shipped from Whitehall by canal to Troy, and thence to New Hamburg by the Hudson river. On the 5th day of Sept., 1865, the defendants desiring to purchase certain kinds of lumber, were shown by the plaintiff the lumber then in their yard at Whitehall. This was of the desired quality, but needed to be dressed and cut into the different sizes which they wished. There was much more lumber in the yard shown to the defendants than was requisite for their purposes. The defendants thereupon orally gave to the plaintiffs an order for certain quantities and sizes of lumber, at specified prices, amounting in the whole to \$918.22. A memorandum of the order so agreed to was made by the plaintiffs, but was not subscribed by any one. No particular lumber was selected or set apart to fill the order, nor was any part of it then in condition to be accepted or delivered. The defendants told the plaintiffs that Percival, a forwarder at Whitehall, would send a boat to take the lumber, when notified that it was ready to be delivered. Percival, during the same season, and prior to Sept. 5, had taken up a boat for the defendants, and shipped a part of a load of lumber from the plaintiffs' dock, making up the residue from his own yard. He had frequently shipped lumber for the defendants. By the course of trade, a boat could not be obtained to carry a part of a load of lumber from Whitehall to New Hamburg, except for the price of a full load. To avoid paying such full price, arrangements had to be made to fill out the load. The defendants knew of this when they made the order of Sept. 5. The order only amounted to one-half a boat-load. Percival then had a pile of lumber (seventeen thousand six hundred and seventy-one feet of culls) to ship to the defendants, which was no part of the lumber to be dressed by plaintiffs. The lumber ordered on Sept. 5 was to be taken from the lots examined by the defendants, and the lumber dressed and piled on the plaintiffs' dock, was all taken from the lumber shown. After the oral order defendants went into the lumber yard with the plaintiffs' foreman, Martin, and pointed out to him some of the piles from which they desired the lumber to be manufactured, and directed plaintiffs to put the lumber, when ready, on plaintiffs' dock and to notify Percival; and told plaintiffs that when this was done, Percival, who was also a lumber dealer, would take up a boat and ship the lumber, and make out the load from his yard. Subsequently,

the 15th of Sept., the lumber having been prepared and dressed, according to the oral agreement, it was piled upon the dock of the plaintiffs at Whitehall, along the front of the planing-mill, and was, on the 16th of that month, measured by plaintiffs, and was in all respects ready for delivery by them, according to the oral agreement.

The plaintiffs, on the same day, gave notice to Percival that the lumber was ready for delivery, and requested him to send a boat and take it away. Percival had not been notified that he was to ship the lumber, and paid no attention to the notice given him by plaintiffs. On the other hand, the plaintiffs did not ascertain that Percival did not know of the arrangement, which the defendants had told them they would make with Percival as to shipping the lumber, until after the fire hereinafter mentioned. On the next day, Sunday, the lumber being still on the dock, as it was at the time Percival was notified, was consumed by an accidental fire, with the planing-mill and much other property. Judgment for defendant.

Martin W. Cooke, for appellants.
Thompson & Weeks, for respondents.

DWIGHT, C. No exceptions were taken in this cause, except to the conclusions of law derived by the referee from the facts as found in the report. There are but two questions to be considered: One is, whether the contract is within the statute of frauds; the other is, if it be held that it is within the statute, were the acts, done by the parties, sufficient to comply with its terms, so as to make the contract enforceable in a court of justice?

In order to determine whether the contract is within the statute, it is important briefly to state the exact acts which the plaintiffs were to perform.

The contract was plainly executory in its nature. There were no specific articles upon which the minds of the buyer and seller met, so that it could be affirmed that a title passed at the time of the contract. The seller was to select from the mass of lumber in his yard, certain portions that would comply with the buyer's order. The purposes of the parties could not even be accomplished by the process of selection. The lumber must be put in a condition to answer the order. It must be dressed and cut into required sizes. The contract called for distinct parcels of surface pine boards, clapboards and matched ceiling. Part of the lumber was surfaced, and a portion of it still in the rough. The clapboards were manufactured from stuff one and a quarter-inch thick. It had to be split, surfaced and rabbeted. The order for the various items was a single one, there being fifteen thousand four hundred and forty-one feet of the surface pine, ten thousand one hundred and forty-four feet of clapboards, and eight thousand feet of matched ceiling. The surface boards and the ceiling were in existence, and only needed dressing to comply with the order. Whether the clapboards can be deemed to have been in

existence may be more doubtful. If a part of the order is within the statute of frauds, and a portion of it without it, the whole transaction must be deemed to be within it, as an entire contract cannot, in this case, be divided or apportioned. *Cooke v. Tombs*, 2 *Anst.* 420; *Chater v. Beckett*, 7 *T. R.* 201; *Mechem v. Wallace*, 7 *A. & E.* 49; *Thomas v. Williams*, 10 *B. & C.* 664; *Loomis v. Newhall*, 15 *Pick.* 151. I think it clear that the contract was in its nature entire. It was in evidence that the intention was to buy enough, in connection with what Percival had on hand, to make up a boat-load. This could only be accomplished by using the entire amount of the order. Accordingly even if the contract for the clapboards was not a sale, it cannot be separated from the rest of the order, and the cases above cited are applicable.

The question is thus reduced to the following proposition: Is a contract which is, in form, one of sale of lumber then in existence for a fixed price, where the seller agrees to put it into a state of fitness to fill the order of the purchaser, his work being included in the price, in fact a contract for work and labor and not one of sale, and accordingly not within the statute of frauds?

The New York statute is made applicable to the "sale of any goods, chattels or things in action," for the price of \$50 or more. The words "goods and chattels" are, literally taken, probably more comprehensive than the expressions in the English statute, "goods, wares and merchandise." It will be assumed however in this discussion, that they are equivalent.

There are at least three distinct views as to the meaning of the words in the statute. These may be called, for the sake of convenience, the English, the Massachusetts and the New York rules, as representing the decisions in the respective courts.

The English rule lays especial stress upon the point, whether the articles bargained for can be regarded as goods capable of sale by the professed seller at the time of delivery, without any reference to the inquiry whether they were in existence at the time of the contract or not. If a manufacturer is to produce an article which at the time of the delivery could be the subject of sale by him, the case is within the statute of frauds. The rule excludes all cases where work is done upon the goods of another, or even materials supplied or added to the goods of another. Thus if a carriage-maker should repair my carriage, both furnishing labor and supplying materials, it would be a contract for work and labor, as the whole result of his efforts would not produce a chattel which could be the subject of sale by him. If on the other hand, by the contract he lays out work or materials, or both, so as to produce a chattel which he could sell to me, the contract is within the statute. This conclusion has been reached only after great discussion and much fluctuation of opinion, but must now be regarded as settled. The leading case upon

this point is *Lee v. Griffin*, 1 *Best & Smith*, 272; *Benj. Sales*, 77. The action was there brought by a dentist to recover £21 sterling for two sets of artificial teeth, made for a deceased lady of whose estate the defendant was executor. The court held this to be the sale of a chattel within the statute of frauds. *Blackburn, J.*, stated the principle of the decision in a clear manner: "If the contract be such that it will result in the sale of a chattel, then it constitutes a sale, but if the work and labor be bestowed in such a manner as that the result would not be anything which could properly be said to be the subject of sale, the action is for work and labor."

The Massachusetts rule, as applicable to goods manufactured or modified after the bargain for them is made, mainly regards the point whether the products can, at the time stipulated for delivery, be regarded as "goods, wares and merchandise," in the sense of being generally marketable commodities made by the manufacturer. In that respect it agrees with the English rule. The test is not the non-existence of the commodity at the time of the bargain. It is rather whether the manufacturer produces the article in the general course of his business or as the result of a special order. *Goddard v. Binney*, 115 *Mass.* 450, 15 *Am. Rep.* 112. In this very recent case, the result of their decisions is stated in the following terms: "A contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser and upon his special order, and not for the general market, the case is not within the statute." Under this rule it was held in *Gardner v. Joy*, 9 *Metc.* 177, that a contract to buy a certain number of boxes of candles at a fixed price per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale. On the other hand in *Goddard v. Binney*, supra, the contract with a carriage manufacturer was that he should make a buggy for the person ordering it, that the color of the lining should be drab, and the outside seat of cane, and have on it the monogram and initials of the party for whom it was made. This was held not to be a contract of sale within the statute. See also *Mixer v. Howarth*, 21 *Pick.* 205, 32 *Am. Dec.* 256; *Lamb v. Crafts*, 12 *Metc.* 353, *Spencer v. Cone*, 1 *Id.* 283.

The New York rule is still different. It is held here by a long course of decisions that an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, such as flour from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale. The New York rule lays stress on the word "sale." There must be a sale at the time the contract is made. The latest

and most authoritative expression of the rule is found in a recent case in this court, *Parsons v. Loucks*, 48 N. Y. 17, 19, 8 Am. Rep. 517. The contrast between *Parsons v. Loucks*, in this state, on the one hand, and *Lee v. Griffin*, supra, in England, on the other, is that in the former case the word sale refers to the time of entering into the contract, while in the latter, reference is had to the time of delivery, as contemplated by the parties. If at that time it is a chattel it is enough, according to the English rule. Other cases in this state agreeing with *Parsons v. Loucks* are *Crookshank v. Burrell*, 18 Johns. 58, 9 Am. Dec. 187; *Sewall v. Fitch*, 8 Cow. 215; *Robertson v. Vaughn*, 5 Sandf. 1; *Parker v. Schenck*, 28 Barb. 38. These cases are based on certain old decisions in England, such as *Towers v. Osborne*, 1 Strange, 506, and *Clayton v. Andrews*, 4 Burr. 2101, which have been wholly discarded in that country.

The case at bar does not fall within the rule in *Parsons v. Loucks*. The facts of that case were that a manufacturer agreed to make for the other party to the contract, two tons of book paper. The paper was not in existence, and so far as appears, not even the rags, "except so far as such existence may be argued from the fact that matter is indestructible." So in *Sewall v. Fitch*, supra, the nails which were the subject of the contract were not then wrought out, but were to be made and delivered at a future day.

Nothing of this kind is found in the present case. The lumber, with the possible exception of the clapboards, was all in existence when the contract was made. It only needed to be prepared for the purchaser—dressed and put in a condition to fill his order. The court accordingly is not hampered in the disposition of this cause by authority, but may proceed upon principle.

Were this subject now open to full discussion upon principle, no more convenient and easily understood rule could be adopted than that enunciated in *Lee v. Griffin*. It is at once so philosophical and so readily comprehensible, that it is a matter of surprise that it should have been first announced at so late a stage in the discussion of the statute. It is too late to adopt it in full in this state. So far as authoritative decisions have gone, they must be respected, even at the expense of sound principle. The court however in view of the present state of the law, should plant itself, so far as it is not precluded from doing so by authority, upon some clearly intelligible ground, and introduce no more nice and perplexing distinctions. I think that the true rule to be applied in this state, is that when the chattel is in existence, so as not to be governed by *Parsons v. Loucks*, supra, the contract should be deemed to be one of sale, even though it may have been ordered from a seller who is to do some work upon it to adapt it to the uses of the purchaser. Such a rule makes but a single distinction, and that is between existing and non-existing chattels. There will still be border cases where it will be

difficult to draw the line, and to discover whether the chattels are in existence or not. The mass of the cases will however readily be classified. If, on further discussion, the rule in *Lee v. Griffin* should be found most desirable as applicable to both kinds of transactions, a proper case will be presented for the consideration of the legislature.

The view that this case is one of sale is sustained by *Smith v. Central R. Co.*, 1 Keyes, 180, and by *Downs v. Ross*, 23 Wend. 270.

In the first of these cases there was a contract for the sale and delivery of a quantity of wood, to be cut from trees standing on the plaintiff's land. The court held that it could not be treated as an agreement for work and labor in manufacturing fire-wood out of standing trees. The cases already cited were distinguished in the fact that no change in the thing sold and to be delivered was contemplated, and that the transaction could be regarded as a sale in perfect consistency with the cases which hold that where the substance of the contract consists in the act of converting materials into a new and wholly different article, it is an agreement for work and labor. It was further considered that the case of *Towers v. Osborne*, 1 Strange, 506, where an agreement for the manufacture of a chariot was a contract for work and labor, was extreme in its nature, and was not to be carried any further. Page 200. The cases of *Garbutt v. Watson*, 5 B. & Ald. 613, and *Smith v. Surman*, 9 B. & C. 561, were cited with approval. In *Garbutt v. Watson* a sale of flour by a miller was held within the statute, although not ground when the bargain was made.

In *Downs v. Ross* there was a contract for the sale of seven hundred and fifty bushels of wheat, two hundred and fifty of the quantity being in a granary, and the residue unthreshed, but which the vendor agreed to get ready and deliver. The court held the contract to be within the statute of frauds, notwithstanding that the act of threshing was to be done by the vendor. The rule that governed the court was that if the thing sold exist at the time in *solido*, the mere fact that something remains to be done to put it in a marketable condition will not take the contract out of the operation of the statute. Page 272. This proposition is in marked contrast to the view expressed by Cowen, J., in a dissenting opinion. His theory was that where the article which forms the subject of sale is understood by the parties to be defective in any particular which demands the unskilful labor of the vendor in order to satisfy the bargain, it is a contract for work and labor, and not of sale. The two theories (where the goods exist at the time of sale) have nowhere been more tersely and distinctly stated than in the conflicting opinions of Bronson and Cowen, J.J., in this case. See also *Courtright v. Stewart*, 19 Barb. 455.

The fallacy in the proposition of Cowen, J., is in assuming that there is any "work and labor" done for the vendee. All the work and labor is done on the vendor's

property to put it in a condition to enable him to sell it. His compensation for it is found in the price of the goods sold. It is a juggle of words to call this "a mixed contract of sale and work and labor." When the goods leave the vendor's hands and pass over to the vendee they pass as chattels under an executed contract of sale. While any thing remained to be done the contract was executory. There is abundance of authority for maintaining that a contract in its origin executory may, by the performance of acts under its terms, by one of the parties, become in the end executed. *Rohde v. Thwaites*, 6 B. & C. 388; *Benj. Sales*, chap. 5, and cases cited.

The case of *Donovan v. Willson*, 26 Barb. 138, and *Parker v. Scheack*, 28 id. 38, are to be upheld as falling within the principle of *Parsons v. Loucks*, supra. Both of these cases concerned articles not in existence, but to be produced by the manufacturer; in the one case beer was to be manufactured, and in the other a brass pump. So in *Passaic Manuf. Co. v. Hoffman*, 3 Daly, 495, the contract was for the manufacture and delivery of fifty warps. None of these were in existence when the order was received. While the case appears to fall within the rule of *Parsons v. Loucks*, the eminent judge who wrote an elaborate opinion expressing the views of the court would seem to rely upon the Massachusetts rule rather than our own. Whatever view might be entertained of the soundness of that distinction it is now too late to adopt it here, and the case cannot be sustained on that ground.

The only case in our reports appearing to stand in the way of the conclusion arrived at in this cause is *Mead v. Case*, 33 Barb. 202. The court in that case recognized the distinction herein upheld. The only doubt about the case is whether the court correctly applied the rule to the facts. These were that several pieces of marble put together in the form of a monument were standing in the yard of a marble-cutter. That person agreed with a buyer to polish, letter and finish the article as a monument, and to dispose of it for an entire price—\$200. The court held that there was no monument in existence at the time of the bargain. There were pieces of stone in the similitude of a monument, and that was all.

It is unnecessary to quarrel with this case. If unsound, it is only a case of a misapplication of an established rule. If sound, it is a so-called "border case," showing the refinements which are likely to arise in applying to various transactions the rule adopted in *Sewall v. Fitch*, and kindred cases. It is proper however to say that the notion that such an arrangement of marble placed in a cemetery over a grave cannot be regarded as a monument, in the absence of an inscription, seems highly strained. Then there could not be a memorial church without an inscription. Then it could not have been said of Sir Christopher Wren, in his relation to one of his great architectural productions, "*Si quæris monumentum, circumspecte*." It would seem to be enough

if the monument reminds the passer-by of him whom it is intended to commemorate, and this might be by tradition, inscriptions on adjoining or neighboring objects, or otherwise.

In the view of these principles, the defendants had the right to set up the statute of frauds. I think that this was so even as to the clapboards. Although not strictly in existence as clapboards, they fall within the rule in *Smith v. Central R. Co.* They were no more new products than was the wood in that case. There was simply to be gone through with a process of dividing and adapting existing materials to the plaintiffs' use. It would be difficult to distinguish between splitting planks into clapboards, and trees into wood. No especial skill is required, as all the work is done by machinery in general use, and readily managed by any producers of ordinary intelligence. The case bears no resemblance to that of *Parsons v. Loucks*, where the product was to be created from materials in no respect existing in the form of paper. The cases would have been more analogous had the contract in that case been to divide large sheets of paper into small ones, or to make packages of envelopes from existing paper. In *Gilman v. Hill*, 36 N. H. 311, it was held that a contract for sheep pelts to be taken from sheep was a contract for things in existence, and a sale.

The next inquiry is, whether there have been sufficient acts done on the part of the buyers to comply with the statute. In order to properly solve this question, it is necessary to look more closely into the nature of the contract. As has been already suggested, the contract was in its origin executory. It called for selection on the part of the sellers from a mass of materials. At the time of the bargain there was no sale. There was at most only an agreement to sell. The plaintiffs however lay much stress on the fact that after the oral bargain and after the defendants had inspected the lumber, they gave directions, also oral, to the plaintiffs to place the lumber after it had been made ready for delivery upon the dock and to give notice to Percival. They urge that the subsequent compliance with these directions by the plaintiffs satisfy the terms of the statute.

It will be observed that all of these directions were given while the contract was still wholly executory, and before any act of selection had been performed by the plaintiffs. It will thus be necessary to consider whether these directions are sufficient to turn the executory contract of sale into an executed one, independent of the statute of frauds, and afterward to inquire whether there was any sufficient evidence of "acceptance and receipt" of the goods to take the case out of the statute. These questions are quite distinct in their nature and governed by different considerations: (1.) If the contract had been for goods less than \$50 in value, or for more than that amount, and ordered by the defendants in writing, it would still have been executory in its nature, and

would have passed no specific goods. It would have been an agreement to sell and not a sale. The case would not have fallen within such authorities as *Crofoot v. Bennett*, 2 N. Y. 258, and *Kimberly v. Patchin*, 19 id. 330, 75 Am. Dec. 334. Since the goods could not have been identified at all, except by the act of the seller in selecting such as would comply with the order, nor could the purposes of the contract have been performed except by the labor of the plaintiffs in adapting the goods to the defendants' use, the case falls within a rule laid down by Mr. Blackburn in his work on sales (pp. 151, 152): "Where, by the agreement, the vendor is to do any thing to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or as it is some times worded, into a deliverable state, the performance of these things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property." *Acraman v. Morrice*, 8 C. B. 449; *Gillett v. Hill*, 2 C. & M. 530; *Campbell v. Mersey Docks*, 14 C. B. (N. S.) 412.

Proceeding on the view that this was an executory contract, it might still pass into the class of executed sales by acts "of subsequent appropriation." In other words, if the subsequent acts of the seller, combined with evidence of intention on the part of the buyer, show that specific articles have been set apart in performance of the contract, there may be an executed sale and the property in the goods may pass to the purchaser. *Blackburn Sales*, 128; *Benj. Sales*, chap. 5; *Fragano v. Long*, 4 B. & C. 219; *Rohde v. Thwaites*, 6 id. 388; *Aldridge v. Johnson*, 7 E. & B. 885; *Calcutta, etc., Company v. De Mattos*, 33 L. J. (Q. B.) 214, in *Exch. Cham.* This doctrine requires the assent of both parties, though it is held that it is not necessary that such assent should be given by the buyer subsequently to the appropriation by the vendor. It is enough that the minds of both parties acted upon the subject and assented to the selection. The vendor may be vested with an implied authority by the vendee to make the selection and thus to vest the title in him. *Browne v. Hare*, 3 H. & N. 484; *S. C.*, 4 id. 822. This doctrine would be applicable to existing chattels where a mere selection from a mass of the same kind was requisite. On the other hand, if the goods are to be manufactured according to an order, it would seem that the mind of the purchaser after the manufacture was complete, should act upon the question whether the goods had complied with the contract. See *Mucklow v. Mangles*, 1 Taunt. 318; *Bishop v. Crawshaw*, 3 B. & C. 415; *Atkinson v. Bell*, 8 id. 277. This point may be illustrated by the case of a sale by sample, where the seller agrees to select from a mass of products certain items corresponding with the sample, and forward them to a purchaser. The act of selection by the vendor will not pass the title, for the plain and satisfactory reason, that the purchaser has still remaining a right to determine whether the selected goods correspond with the

sample. *Jenner v. Smith*, L. R., 4 C. P. 270. In this case the plaintiff at a fair, orally contracted to sell to the defendant two pockets of hops, and also two other pockets to correspond with a sample, which were lying in a warehouse in London, and which he was to forward. On his return to London, he selected two out of three pockets which he had there, and directed them to be marked to "wait the buyer's order." The buyer did no act to show his acceptance of the goods. The court held that the appropriation was neither originally authorized nor subsequently assented to by the buyer, and that the property did not pass by the contract. *Brett, J.*, put in a strong form the objection to the view that the buyer could have impliedly assented to the appropriation by the seller. It was urged, he said, "that there was evidence that by agreement between the parties, the purchaser gave authority to the seller to select two pockets for him. If he did so, he gave up his power to object to the weighing and to the goods not corresponding with the sample; for he could not give such authority and reserve his right to object, and indeed it has not been contended that he gave up those rights. That seems to me to be conclusive to show that the defendant never gave the plaintiff authority to make the selection so as to bind him. Under the circumstances therefore it is impossible to say that the property passed." Page 278. The same general principle was maintained in *Kein v. Tupper*, 52 N. Y. 550, where it was held that the act of the vendor putting the goods in a state to be delivered did not pass the title, so long as the acceptance of the vendee, provided for under the terms of the contract, had not been obtained.

The result is, that if this sale, executory as it was in its nature, had not fallen within the statute of frauds, there would have been no sufficient appropriation by the vendor to pass the title. The transaction, so far as it went, was even at common law an agreement to sell and not an actual sale.

(2.) But even if it be assumed that this would have been an executed contract of sale in its own nature, without reference to the statute of frauds, was there "an acceptance and a receipt" of the goods, or a part of them, by the buyer, so as to satisfy the statute?

The acceptance and receipt are both necessary. The contract is not valid unless the buyer does both. These are two distinct things. There may be an actual receipt without an acceptance, and an acceptance without a receipt. The receipt of the goods is the act of taking possession of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often an evidence of an acceptance, but it is not the same thing. Indeed the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not. *Blackb. Sales*, 106; see *Brand v. Focht*, 3 Keyes, 409; *Stone v. Browning*, 51 N. Y. 211.

There are some dicta, of various judges, cited by the plaintiffs to the effect that acceptance and receipt are equivalent. Per Crompton, J., and Cockburn, Ch. B., in *Castle v. Swoode*, 6 H. & N. 832; per Erle, C. J., in *Marvin v. Wallis*, 6 E. & B. 726. These remarks cannot be regarded as of any weight, being contrary to the decided current of authority. Indeed a late and approved writer says: "It may be confidently assumed however that the construction which attributes distinct meaning to the two expressions, 'acceptance' and 'actual receipt,' is now too firmly settled to be treated as an open question, and this is plainly to be inferred from the opinions delivered in *Smith v. Hudson*," 6 B. & S. 436; *Benj. Sales*.

It cannot be conceded that there was any acceptance in the present case by reason of the acts and words occurring between the parties after the parol contract and before the goods were prepared for delivery. There could be no acceptance without the assent of the buyers to the articles in their changed condition, and as adapted to their use. If the case had been one of specific goods to be selected from a mass without any preparation to be made, and nothing to be done by the vendor but merely to select, the matter would have presented a very different aspect. This distinction is well pointed out by Willes, J., in *Bog Lead Min. Co. v. Montague*, 10 C. B. (N. S.) 481. In this case the question turned upon the meaning of the word "acceptance," in another statute, but the court proceeded on the analogies supposed to be derived from the construction of the same word in the statute of frauds. The question was as to what was necessary to constitute an "acceptance" of shares in a mining company, under 19 and 20 Victoria, chap. 47. The court having likened the case to that of a sale of chattels, said: "It may be that in the case of a contract for the purchase of unascertained property to answer a particular description, no acceptance can be properly said to take place before the purchaser has had an opportunity of rejection. In such a case, the offer to purchase is subject not only to the assent or dissent of the seller, but also to the condition that the property to be delivered by him shall answer the stipulated description. A right of inspection to ascertain whether such condition has been complied with is in the contemplation of both parties to such a contract; and no complete and final acceptance, so as irrevocably to vest the property in the buyer, can take place before he has exercised or waived that right. In order to constitute such a final and complete acceptance, the assent of the buyer should follow, not precede, that of the seller. But where the contract is for a specific, ascertained chattel, the reasoning is altogether different. Equally, where the offer to sell and deliver has been first made by the seller and afterwards assented to by the buyer, and where the offer to buy and accept has been first made by the buyer and afterward assented to by the seller, the contract is complete by the assent of both parties, and it

is a contract the expression of which testifies that the seller has agreed to sell and deliver, and the buyer to buy and accept the chattel." Pages 489, 490.

This view is confirmed by *Maberley v. Sheppard*, 10 Bing. 99. That was an action for goods sold and delivered, and it was proven that the defendant ordered a wagon to be made for him by the plaintiff, and, during the progress of the work, furnished the iron work and sent it to the plaintiff, and sent a man to help the plaintiff in fitting the iron to the wagon, and bought a tilt and sent it to the plaintiff to be put on the wagon. It was insisted, on these facts, that the defendants had exercised such a dominion over the goods sold as amounted to an acceptance. The court, per Tindal, Ch. J., held that the plaintiff had been rightly nonsuited, because the acts of the defendant had not been done after the wagon was finished and capable of delivery, but merely while it was in progress, so that it still remained in the plaintiff's yard for further work until it was finished. The court added: "If the wagon had been completed and ready for delivery and the defendant had then sent a workman of his own to perform any additional work upon it, such conduct on the part of the defendant might have amounted to an acceptance." See also *Benj. Sales*, chap. 4, and cases cited.

The plaintiffs, in the case at bar, rely much upon the decision in *Morton v. Tibbett*, 15 Ad. & El. (N. S.) 428. They maintain that this case clearly establishes that there may be an acceptance and receipt of goods by a purchaser, within the statute of frauds, although he has had no opportunity of examining them, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract.

The expressions in *Morton v. Tibbett* are not to be pressed any further than the facts of the case require. The buyer of wheat by sample had sent a carrier to a place named in a verbal contract between him and the seller on August 25. The wheat was received on board of one of the carrier's lighters for conveyance by canal to Wisbeach, where it arrived on the 28th. In the mean time it had been resold by the buyer, by the same sample, and was returned by the second purchaser because found to be of short weight. The defendant then wrote to the plaintiff on the 30th, also rejecting it for short weight. An action was brought for goods bargained and sold. There was a verdict for plaintiff, with leave to move for a nonsuit. The question for the appellate court was, whether there was any evidence that the defendant had accepted and received the goods so as to render him liable as buyer. The court held that the acceptance under the statute was not an act subsequent to the receipt of the goods, but must precede, or at least be contemporaneous with it; and that there might be an acceptance to satisfy the statute, though the purchaser might on other grounds disaffirm the contract.

Morton v. Tibbett decides no more than

this, viz., that there may be a conditional acceptance. It is as if the purchaser had said: "I take these goods on the supposition that they comply with the contract. I am not bound to decide that point at this moment. If, on examination, they do not correspond with the sample, I shall still return them under my common-law right, growing out of the very nature of the contract, to declare it void, because our minds never met on its subject matter—non in hæc foedera veni." It is not necessary to decide whether this distinction is sound. It is enough to say that it is intelligible. The case, in no respect, decides that there can be an acceptance under the statute of frauds without a clear and distinct intent, or that unfinished articles can be presumed to be accepted before they are finished. The act of acceptance was clear and unequivocal. There was a distinct case of intermeddling with the goods in the exercise of an act of ownership—a fact entirely wanting in the case at bar. The proof of acceptance was the act of resale before examination. The point of the decision is, that this was such an exercise of dominion over the goods as is inconsistent with a continuance of the rights of property in the vendor, and therefore evidence to justify a jury in finding acceptance as well as actual receipt by the buyer. *Hunt v. Hecht*, 8 Exch. 814.

Even when interpreted in this way, *Morton v. Tibbett* cannot be regarded as absolutely settled law in England. See *Coombs v. Bristol & Exeter Ry. Co.*, 3 H. & N. 510; *Castle v. Swower*, 6 id. 828. The court of queen's bench recognizes it, while the court of exchequer has not received it with favor. Later cases distinctly hold that the acceptance must take place after an opportunity by the vendee to exercise an option, or after the doing of some act waiving it. *Bramwell, B.*, said in *Coombs v. Bristol & Exeter Ry. Co.*: "The cases establish that there can be no acceptance where there can be no opportunity for rejecting." All the cases were reviewed in *Smith v. Hudson*, 6 Best & Smith, 431, A. D. 1865, where *Hunt v. Hecht* was approved. The two last cited cases disclose a principle applicable to the case at bar.

In *Hunt v. Hecht* the defendant went to the plaintiff's warehouse and there inspected a heap of ox bones, mixed with others inferior in quality. The defendant verbally agreed to purchase those of the better quality, which were to be separated from the rest, and ordered them to be sent to his wharfinger. The bags were received on the 9th, and examined next day by the defendant, and he at once refused to accept them. There was held to be no acceptance. The case was put upon the ground that no acceptance was possible till after separation, and there was no pretense of an acceptance after that time. *Martin, B.*, said that an acceptance, to satisfy the statute, must be something more than a mere receipt. It means some act done after the vendee has exercised or had the means of exercising his right of rejection.

In *Smith v. Hudson*, supra, barley was

sold on November 3, 1863, by sample, by an oral contract. On the 7th it was taken by the seller to a railway station, where he had delivered grain to the purchaser on several prior dealings, and where it was his custom to receive it from other sellers. The barley was left at the freight-house of the railway, consigned to the order of the purchaser. It was the custom of the trade for the buyer to compare the sample with the bulk as delivered, and if the examination was not satisfactory, to reject it. This right continued in the present case, notwithstanding the delivery of the grain to the railway company. On the 9th the purchaser became bankrupt, and on the 11th the seller notified the station-master not to deliver the barley to the purchaser or his assignees. The court held that there was no acceptance sufficient to satisfy the statute. The most that could be said was, that the delivery to the company, considered as an agent of the buyer, was a receipt. It could not be claimed that it was an acceptance, the carrier having no implied authority to accept. The buyer had a right to see whether the bulk was according to the sample, and until he had exercised that right there was no acceptance. *Opinion of Cockburn, Ch. J.*, 446; see also *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461; *Halterline v. Rice*, 62 Barb. 593, *Edwards v. Grand Trunk Ry. Co.*, 48 Me. 379; S. C., 54 id. 111.

The case at bar only differs from these cases in the immaterial fact that the defendants, after the verbal contract was made, gave verbal directions as to the disposition which should be made of the goods after they were put into a condition ready for delivery. All that subsequently passed between them was mere words, and had not the slightest tendency to show a waiver of the right to examine the goods to see if they corresponded with the contract. Whatever effect these words might have had in indicating an acceptance, if the goods had been specific and ascertained at the time of the directions (see *Cusack v. Robinson*, 1 Best & Smith, 299), they were without significance under the circumstances, as the meeting of the minds of the parties upon the subject to be settled was necessary. *Shepherd v. Pressey*, 32 N. H. 57. In this case the effect of subsequent engagements by the buyer was passed upon as to their tendency to show a receipt of the goods by him. The court said: "As mere words constituting a part of the original contract do not constitute an acceptance, so we are of opinion that mere words after words used, looking to the future, to acts afterward done by the buyer toward carrying out the contract, do not constitute an acceptance or prove the actual receipt required by the statute." The case was stronger than that under discussion, as the goods were specific and fully set apart for the purchaser at the time of the subsequent conversations. No distinction is perceived between future acts to be done by the buyer and by the seller, as both equally derive their force from the buyer's assent.

I see no reason in the case at bar to hold

that the defendants received the goods, independent of the matter of acceptance. There was no evidence that Percival became their agent for this purpose. The most that can be said is that they promised the plaintiffs that they would make Percival their agent. This promise being oral and connected with the sale, is not binding. They did not in fact communicate with him, nor did he assume any dominion or control over the property. The promissory representations of the plain-

tiffs are clearly within the rule in *Shepherd v. Pressey*, *supra*.

The whole case falls within the doctrine in *Shindler v. Houston*, 1 N. Y. 261; 49 Am. Dec. 396, there being no sufficient act of the parties amounting to transfer of the possession of the lumber to the buyer and acceptance by him.

The judgment of the court below should be affirmed.

ALL EN CLERK.

Judgment affirmed.



COON v. SPAULDING et al.

(10 N. W. Rep. 183, 47 Mich. 162.)

Supreme Court of Michigan. Oct. 26, 1881.

Error to Wayne.

F. A. Baker, for plaintiff in error. S. R. Harris and Henry M. Cheever, for defendants in error

MARSTON, C. J. As stated in the brief of counsel for plaintiff in error, the main question in this case is, whether the plaintiffs below, defendants in error, went to Coon's to press the hay contracted for within a reasonable time after the contract was made. The following is the written contract sued upon. "Dearborn, Mich., September 25, 1879. Received from Spaulding & Rogers \$50 to apply on the purchase of hay, estimated at 100 tons more or less, to be delivered at Fisher's station, at \$10 per ton, including board for men and teams, fuel for engine and men to pitch the hay to the press. Hay to be paid for as delivered, and to be delivered in a reasonable time after being pressed. \$50. Joseph Coon." November 22, 1879, Spaulding & Rogers were at Mr. Coon's place ready to press the hay, but Mr. Coon declined to let them have it.

It will be noticed that the contract is silent as to who shall press the hay and also as to when it shall be pressed, and assuming that Spaulding & Rogers were to press the hay whether they were ready and offered to do it within a reasonable time will depend upon the admissibility and weight to be given certain oral testimony offered by them.

The plaintiffs below offered evidence, viz., the testimony of Rogers one of the plaintiffs, tending to show, that they were ready to commence pressing the hay at the time the contract was entered into, but that Mr. Coon was not ready and requested them to wait for three weeks until he could get certain fall work done. The plaintiffs also introduced a letterpress copy of a letter mailed November 10th to the defendant properly addressed postage prepaid, with their card in the envelope, and a request to return in five days if not called for, but which was not returned, which letter was as follows: "Wayne, Mich., November 10, 1879. Joseph Coon, Esq., Dearborn, Mich.—Dear Sir: We have been waiting to hear from you about hay, and let us know when it will be convenient to press your hay. We are now pressing and loading at Plymouth, and expect to finish the present job this week, and shall then be prepared to come to your place next, reaching there some time next week. Hoping this will prove satisfactory we remain yours truly, Spaulding & Rogers." To this they received no reply. There was no further or other communication between them, until they went to press the hay November 22d as already stated. And first was this evidence admissible? Counsel for plaintiff in error insists it was not for two reasons: viz.: that the conversation about waiting three

weeks until Mr. Coon should get his fall work done, took place at the time the contract was entered into, having been talked over immediately before and after the contract was signed, and that it was therefore merged in the written agreement. And the contract being one which the statute of frauds required to be in writing, could not be modified by a subsequent oral agreement. The position taken by counsel for plaintiff in error as to the time the conversation took place is undoubtedly correct. On cross-examination Mr. Rogers testified that "before the contract was signed he and Mr. Coon had talked about the time the plaintiffs should come to press the hay, that Mr. Coon said he should be busy for three weeks, and they could have the hay any time after that, which the witness understood meant a reasonable time after three weeks; that no time was fixed within which the plaintiff should come. Question. That is there was no time agreed upon? Answer. No, sir; but the last thing I said to him was 'if you get ready before we do let us know.'" This witness further testified that he did not see Mr. Coon from the day the contract was signed until the day he moved the machine there and demanded the hay, November 22d; and that all he did in the mean time was to write the letter of November 10th above given.

The case therefore seems to come clearly within the decision in *Strange v. Wilson*, 17 Mich. 342, and the reasoning in that case applies with full force here. The substance of all the testimony is set forth in the bill of exceptions, and we are unable to find any testimony fairly tending to show that there was any subsequent oral modification of the contract even admitting such to have been admissible. It was therefore 45 days after the contract was made before the letter of November 10th was written specifying that the following week the plaintiffs would be ready to proceed with the work on their part. The oral evidence being admissible the delay was greater than in the ordinary course of business could fairly have been required, or understood by the parties to enable the plaintiffs to enter upon the work. It exceeded any possible time required by reason or necessity, and considering the time of year, and that the defendant had to draw and deliver the hay at a place named after it was pressed, it is not to be presumed that so long a delay was contemplated. *Phoenix Ins. Co. v. Allen*, 11 Mich. 510; *Druse v. Wheeler*, 26 Mich. 195, 22 Mich. 441.

The judgment must be reversed with costs and a new trial ordered.

GRAVES and COOLEY, JJ., concurred.

CAMPBELL, J. I agree in the conclusion that there should be a new trial, and I also agree in the construction of the contract when taken by itself, that is explained by the chief justice. But I think there was evidence of subsequent dealings sufficient to make the question of reasonable time proper to go to the jury.



COPLAY IRON CO., Limited, v. POPE et al.

(15 N. E. Rep. 335, 108 N. Y. 232.)

Court of Appeals of New York. Jan. 17, 1888.

Appeal from general term, court of common pleas, city and county of New York, entered upon an order made April 20, 1885, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

The other facts fully appear in the following statement by EARL, J.:

This action was brought to recover the price of 500 tons of pig-iron sold and delivered by the plaintiff to the defendants. In their answer, by way of counter-claim, the defendants allege that they are dealers in iron, and are not engaged as manufacturers or consumers thereof; that on or about the eighth day of December, 1879, the plaintiff sold and agreed to deliver to them 900 tons of No. 1 extra foundry pig-iron of the Coplay Iron Company, Limited, make, at the price of \$27 per ton, that it agreed to deliver and ship the iron on board the cars at its furnace as and when ordered by the defendants; that they paid it the full price of the iron; that No. 1 extra was a grade of pig-iron of certain well-known quality in the market; that they purchased the iron to sell again to their customers, which was well known to the plaintiff; that, relying upon plaintiff's promise and agreement, they sold to E. P. Allis & Co., one of their customers in Milwaukee, 500 tons of the iron at and for the agreed price of \$34 per ton, to be delivered at the furnace of the Coplay Iron Company, Limited, and for which E. P. Allis & Co. fully paid them; that they ordered the plaintiff to ship the iron, and thereupon it made a shipment of iron upon the contract which it claimed and pretended was No. 1 extra iron, which in fact was not No. 1 extra iron, but a grade of iron of inferior quality, and of less value, than No. 1 extra iron, or the quality it agreed to deliver, and it delivered to them therefore a bill of lading, in which the same was described as No. 1 extra iron; that they sold the iron to their customers as No. 1 extra iron; that they did not examine the iron, and had no opportunity to examine the same; that they relied upon the promise and agreement and bills of lading, and 500 tons of the iron were forwarded to their customers without examining the same; that on or about the thirty-first day of July, 1880, as soon as the iron arrived at Milwaukee, and they had inspected the same, E. P. Allis & Co. notified these defendants that the 500 tons of iron sold and delivered by these defendants to them was not No. 1 extra iron, but was of a quality or grade greatly inferior thereto, and entirely unfit for use as No. 1 extra iron, and they refused to accept the iron, and demanded of these defendants the return of the purchase price paid by them therefor, with interest, and the cost of transporting the same from the furnace of the Coplay Iron Company, Limited, to Milwaukee, and storage expenses; that these defendants forthwith duly notified the plaintiff of the inferior quality of the iron, and the claim made by these defendants' customers, and

requested plaintiff to examine the iron, and notified it that they would hold it responsible for all damages they might sustain by reason of its failure to deliver the iron required by the contract; that the iron so delivered, or agreed to be delivered, by the plaintiff to defendants, was not No. 1 extra iron, but iron of a quality greatly inferior thereto, and not of the standard or quality of No. 1 extra iron, and wholly unsuitable for use in defendants' customers' business; that it was not No. 1 extra Coplay iron; that defendants' customers refused to accept, and have not accepted, the iron, and it remains subject to the plaintiff's order, and these defendants have not accepted the same; that defendants have sustained damages by reason of the inferior quality of the iron, and the breach of the plaintiff's agreement as to the quality thereof, and its refusal to deliver the iron purchased of it, and of its refusal to return the money so received, defendants demanded that the complaint be dismissed, and that they have judgment for the amount of their damages.

The case was brought to trial, and a jury was impeached to try the same. Counsel for the plaintiff then moved the court for judgment upon the grounds—"First, that there is no defense set up to the cause of action set forth in the complaint; second, that the facts set up by way of counter-claim are not only not sufficient to constitute a cause of action, but show affirmatively that there is no liability whatever on the part of this plaintiff to the defendants." The defendants conceded that the plaintiff's claim set forth in its complaint was admitted by the answer, and they then offered to prove the counter-claim set up in the answer. Plaintiff's counsel admitted, for the purposes of his motion, that all the allegations in the answer were proved. The court thereupon directed a verdict for the plaintiff, to which direction defendants' counsel excepted.

Wm. W. Niles, for appellants. Chas. B. Alexander and George A. Strong, for respondent.

EARL, J., (after stating the facts.) We must assume that the sale of iron alleged in the defendants' counter-claim was an executory sale, as that is the fair and just inference from the facts alleged. The plaintiff was a manufacturer of iron, and the contract of sale was made on the eighth day of December, 1879. It covered 900 tons of iron, and it was to be delivered in the future, as and when the defendants ordered it to make delivery. There is no allegation that the plaintiff, at the time of this sale, had the identical 900 tons of iron on hand, or that that quantity was separated from other iron. It would be against all experience, and certainly against the usual course of business, to suppose that the manufacturer had the iron on hand, and that upon its purchase by the defendants it was separated and set apart and stored for them. It is unreasonable to suppose—and as all the facts were submitted to the court, neither party asking to have them submitted to the

jury, the court had the right to draw the inference—that the iron was to be there—after manufactured, weighed, designated, and delivered, and thus this was an executory contract of sale. In such a case, the fact of payment has very little significance. It is sometimes a controlling fact to show that the sale was not executory, and was completely executed. It is always evidence upon that question, but in a case like this is not important. The price of property purchased may be paid, and yet the contract of sale in every sense be executory.

Treating this, then, as an executory contract of sale, the defendants are not in a position to complain of the quality of the iron, because they never offered to return it, and never gave the plaintiff notice or opportunity to take it back. They must

therefore be conclusively presumed to have acquiesced in the quality of the iron. *Hargons v. Stone*, 5 N. Y. 73; *Reed v. Randall*, 29 N. Y. 358; *McCormick v. Sarson*, 45 N. Y. 265; *Dutchess Co. v. Harding*, 49 N. Y. 323; *Manufacturing Co. v. Allen*, 53 N. Y. 515. Here there was no collateral warranty or agreement as to the quality of the iron. The representation as to the kind and quality of iron was part of the contract of sale itself, descriptive simply of the article to be delivered in the future; and clearly, within the cases cited, an acceptance of the property by the defendants, without any offer to return the same at any time, deprives them of any right to make complaint of its inferior quality. The judgment should be affirmed, with costs. All concur, except ANDREWS, J., not voting.

Ex parte CRAWCOUR.

In re ROBERTSON.

(9 Ch. Div. 419.)

Court of Appeal. June 27, 1878.

This was an appeal from a decision of Mr. Registrar Hazlitt, acting as chief judge in bankruptcy.

On the 29th of November, 1877, an agreement in writing was entered into between W. A. Robertson, a trader, of the one part, and Lewin Crawcour & Co., upholsterers, of the other part, which contained the following provisions:—

(1.) "That Lewin Crawcour & Co. thereby let to Robertson, and he thereby hired of them, the several articles of furniture and effects belonging to them mentioned in the schedule thereto, and which were admitted by Robertson to be of the value of £63 4s. 10d., adding thereto 5 per cent. on the said value less the amount of first instalment.

(2.) "The said articles of furniture and effects are hired by W. A. Robertson upon the following terms and conditions:—

(3.) "W. A. Robertson is to pay to Lewin Crawcour & Co. the sum of £10 on the signing hereof, £5 on the 4th of January next, and £5 on the 4th day of each succeeding calendar month during the continuance of this agreement, and is also on the signing hereof to deposit with Lewin Crawcour & Co. promissory notes for the total amount of the instalments to be paid hereunder, such promissory notes being given as collateral security, and entirely without prejudice to the title of Lewin Crawcour & Co. in or to the said furniture and effects, and of all rights reserved to them by this agreement, and subject to this stipulation, that, in case of the goods being seized and removed by Lewin Crawcour & Co. under clause 5, the whole of such promissory notes, or so many of them as shall then be current, shall after such seizure and removal be given up on demand to W. A. Robertson, and shall from and after such seizure and removal become absolutely void.

(4.) "W. A. Robertson is to keep the rent of the premises in which the said furniture and effects are placed regularly and punctually paid, and not to part with possession of, remove, or otherwise deal with the said goods, or any part thereof, nor to part with the possession of, or assign his interest in, the house or premises wherein the said goods may be, without the consent in writing of Lewin Crawcour & Co. being first obtained.

(5.) "In the event of non-payment of any of the above notes on the days upon which they respectively become due, or of the breach of any of the conditions herein expressed to be performed by W. A. Robertson, or in case the said furniture and effects, or any part thereof shall be seized or taken in execution under any process of any court either of law or of equity, Lewin Crawcour & Co. may by themselves, or others, their servants or agents, enter into any house or place where the said articles of furniture or any of them shall then be, and seize, remove, and retake possession of the same, as in their

first and former estate, notwithstanding any payments made by W. A. Robertson, and Robertson shall be barred from commencing or maintaining any action of trespass or otherwise by reason of such taking possession as aforesaid, or of the temporary possession of the premises wherein the said goods may be, for such time as may be reasonably occupied in such removal, or for the recovery of any part of the moneys paid under this agreement, which, upon such default or breach as aforesaid, it is hereby agreed are to be absolutely forfeited to Lewin Crawcour & Co.

(6.) "Upon payment by W. A. Robertson to Lewin Crawcour & Co. of the full sum of £65 17s. 10d. by the instalments aforesaid the agreement shall be deemed completed, and shall thenceforth close and determine, and the said furniture and effects shall become and be the property of W. A. Robertson; but until the whole of the said sum shall have been paid the said articles of furniture and effects shall remain the sole and absolute property of Lewin Crawcour & Co., and are only let on hire to W. A. Robertson, who hereby agrees to take all proper care of the same during the hiring, and, in case of damage by fire or otherwise, W. A. Robertson will bear the loss or risk."

The articles mentioned in the schedule to the agreement consisted of ordinary household furniture. Soon after the execution of the agreement they were delivered at Robertson's private residence. On the 9th of January, 1878, Robertson filed a liquidation petition, under which a trustee was appointed, who, on the 26th of February, took possession of the furniture comprised in the agreement of the 29th of November, 1877, which was still in debtor's house, and remained in possession of it until the 19th of March, 1878, when Lewin Crawcour & Co. took possession of it. The instalments of rent due in February and March had not been paid. On the 22nd of March the trustee obtained from the court of bankruptcy an injunction restraining Lewin Crawcour & Co. from removing the furniture, and the injunction was continued from time to time. On the 30th of March the trustee gave notice of an application to the court for an order declaring that the furniture formed part of the property of the debtor divisible among his creditors, and belonged to the trustee. This application was heard on the 24th of May, 1878. On behalf of the trustee it was contended that the hiring agreement was void as against him, because it had not been registered under the bills of sale act, 1854; and, moreover, that he was entitled to the furniture as being, at the commencement of the liquidation, in the order and disposition of the debtor, with the consent of the true owners. On the latter point a number of affidavits were filed by Lewin Crawcour & Co. to prove that there is a notorious custom of letting furniture upon terms similar to those of the agreement of the 29th of November, 1877, and it was said that this custom excluded the operation of the reputed ownership clause. These affidavits were answered by a number of affidavits

filed on behalf of the trustee, which denied the existence, or at any rate the notoriety, of any such custom. The registrar held that the agreement ought to have been registered as a bill of sale, and that, by reason of its non-registration, it was void as against the trustee; and on this ground, without going into the question of order and disposition, he made the order asked for, granting a perpetual injunction to restrain Lewin Crawcour & Co. from interfering with the furniture. Lewin Crawcour & Co. appealed.

Winslow, Q. C., and Finlay Knight, for appellants. Yate Lee, for trustee.

JESSEL, M. R.:—I cannot concur in the ground of the registrar's decision. Whether it can be supported on other grounds will be a matter for discussion at a future time. The registrar rested the title of the trustee simply on this, that the agreement was a bill of sale, and that it was void as against the trustee because it was not registered. It appears to me that the agreement was not a bill of sale by Robertson, who is the person by whom a bill of sale must have been executed if it is to be hit by the bills of sale act. Robertson never had any property in the goods. Crawcour & Co., to whom they originally belonged, agreed to let them on hire to Robertson at a rent to be paid by instalments, with this further provision, that, until all the instalments had been paid, the property should remain in Crawcour & Co., and that, if any instalment should not be paid when it became due, they should be at liberty to retake possession of their own goods, and the instalments already paid should be forfeited to them. That does not make the document a bill of sale executed by Robertson, or a license given by him to take posses-

sion of personal chattels as security for a debt. It is simply one of the terms of the letting for hire and conditional sale of the goods by Crawcour & Co. to him. When the liquidation petition was filed, some instalments of the rent being overdue, Crawcour & Co. attempted to take possession of their goods. It appears to me that they were entitled to do so, and that there was no reason for granting the injunction.

JAMES, L. J.:—I am of the same opinion.

BRETT, L. J.:—It is said that this agreement contains a license by Robertson to Crawcour & Co. to take possession of his goods, and that it therefore amounts to a bill of sale within sect. 7 of the bills of sale act. The only way, however, in which Robertson could have any interest in the goods or any right to deal with them was by virtue of the agreement itself. It is said that the agreement passed the property in the goods to Robertson, and that by it he at the same time mortgaged the goods to Crawcour & Co., and gave them a license to seize them. The sole question therefore is, whether the property in the goods passed to Robertson. In my opinion the property did not pass by the agreement. To hold that it did would be clearly contrary to the expressed intention of the parties. Nor do I think that the property passed by the delivery of the goods, which was made in accordance with the agreement. In my opinion the property could not pass until all the instalments had been paid, and that has not been done yet.

The appeal was allowed, with costs fixed at £20, and the case was referred back to the registrar to try the question of reputed ownership.

CROFOOT v. BENNETT.

(2 N. Y. 258.)

Court of Appeals of New York. Dec. Term, 1848.

Sylvester Crofoot sued Bennett in the supreme court in trespass for taking a quantity of brick. On the trial before Willard, J., at the Washington circuit in 1847, it appeared that Horace Crofoot, on the 2d of September, 1846, in consideration of a previous indebtedness to and a new advance by the defendant, transferred to him by writing all the brick in two kilns previously burnt in Crofoot's yard, supposed to be forty-five thousand, and forty-three thousand to be taken out of a new kiln which he was then putting up. It was stated in the writing that the defendant had paid for the brick, and that they were to be good merchantable brick. On the next day the defendant went to the yard for the purpose of having all the brick delivered to him, and on that occasion the brick already burnt, as well as those unburnt, were pointed out to the defendant by Horace Crofoot, and the defendant took possession of the premises where the brick were and gave directions about them; but none of those in the unburnt kiln were counted out or marked, or set apart from the residue. Horace Crofoot agreed with the defendant to burn the unfinished kiln, which he accordingly did. On the 6th of October following Horace Crofoot executed to the plaintiff, who was his brother, a bill of sale of all the bricks in such new kiln. On the 8th of the same month the defendant opened the kiln and took therefrom and carried away the quantity which had been purchased by him out of that kiln, and for that taking the plaintiff brought this action. Justice Willard held that these facts made out a good delivery to the defendant on the 2d and 3d days of September of the bricks in question; that as against him the plaintiff had no title, and that the defense was made out. The defendant had a verdict, which the supreme court refused to set aside on bill of exceptions, and the plaintiff, after judgment in the defendant's favor, appealed to this court.

A. T. Wilson, for appellant. J. Parry, for respondent.

STRONG, J. It is said in the opinion of the supreme court, that the title to the unburnt brick passed to the defendant on the 3d of September, before they had been separated from the mass in the new kiln, or burnt. In this I think they were wrong. Chancellor Kent says that when the goods sold are mingled with others, they must be ascertained, designated and separated from the mass, before the property can pass. It is a fundamental principle pervading everywhere the doctrine of sales of chattels, that if goods be sold while mingled with others, by number, weight or measure, the sale is incomplete, and the title continues with the seller, until the bargained property be separated and identified. (2 Kent's Com. 496.) These rules are fully supported by the authori-

ties cited by the chancellor. The reason is, that the sale cannot apply to any article until it is clearly designated, and its identity thus ascertained. In the case under consideration, it could not be said with certainty that any particular brick belonged to the defendant until they had been separated from the mass. If some of those in an unfinished state had been spoiled in the burning, or had been stolen, they could not have been considered as the property of the defendant, and the loss would not have fallen upon him. But if the goods sold are clearly identified, then, although it may be necessary to number, weigh or measure them, in order to ascertain what would be the price of the whole at a rate agreed upon between the parties, the title will pass. If a flock of sheep is sold at so much the head, and it is agreed that they shall be counted after the sale in order to determine the entire price of the whole, the sale is valid and complete. But if a given number out of the whole are sold, no title is acquired by the purchaser until they are separated, and their identity thus ascertained and determined. The distinction in all these cases does not depend so much upon what is to be done, as upon the object which is to be effected by it. If that is specification, the property is not changed; if it is merely to ascertain the total value at designated rates, the change of title is effected. In this case, the judge who tried the cause did not decide directly that the defendant had acquired a title to the bricks which he took before they had been separated. The question was, however, distinctly raised by the plaintiff's counsel, and was in effect decided against him. Although the judge erred in that, the judgment will not, therefore, be reversed if in legal intendment the error could not in any manner have prejudiced the plaintiff. It could not have had that effect if the plaintiff must still have failed in the suit had the point been decided in his favor.

If the counsel for the plaintiff had insisted that the question of delivery of the brick should have been submitted to the jury as one of fact, there was enough in the evidence to have called upon the judge to adopt that course; but this position was not taken by the counsel; on the contrary, he called upon the judge to decide it as a question of law, upon facts which were not controverted, and, assuming those facts to be true, the judge decided that point correctly. The delivery was not simply of the specific bricks eventually taken by the plaintiff, but of the whole with the privilege of selection. The formal delivery of the yard must have been designed by the parties to carry with it the possession of the bricks, or it would have been a mere idle ceremony. The defendant then took possession of the whole, and gave directions about burning those which were yet in an unfinished state. It made no difference that such directions were given to one who had an interest in a portion of them, and had previously owned the whole. If one sells an article, and delivers it, the delivery would be none the less effectual because the vendor happened to be employed to

perform some additional work upon it, even at his own expense. And surely, goods may be delivered by one to another having an interest in them, although the prior possessor may not part with all his title to the whole. Under these circumstances, trespass would not lie at the suit of the vendor, or his subsequent vendee. The goods being in the possession of another, the vendee took his title with an implied, if not a positive, notice of the rights of the possessor, to which the interest acquired by him was subordinate. In order to maintain trespass, it is necessary that the plaintiff should have the actual possession of the property, or, an absolute title to it, which gives the right

of possession. In this case, while the actual possession was in the defendant, it does not appear that any possession whatever had been delivered to the plaintiff; neither had he the absolute property in any of the brick until the defendant had exercised his right of selection. The defendant had, therefore, made out a full defense to the plaintiff's action, as was correctly decided by the judge; and although he may have placed the decision on different and possibly insufficient grounds, yet, as the judgment was right, it should not be disturbed.

JEWETT, C. J., and BRONSON, J., dissented.

CROSS et al. v. PETERS.

(1 Greenl. 376.)

Supreme Judicial Court of Maine. Nov. Term,
1821.

Replevin for a pipe of brandy and divers other goods. The defendant pleaded that the property of the goods was in one William Parker, traversing the property of the plaintiff, on which traverse issue was taken. It was admitted at the trial of this issue that the property of the goods was originally in the plaintiff, and so continued unless altered by a sale to Parker; they having been attached as his property by the defendant, who was a deputy sheriff, by virtue of writs in his hands at the suit of Gustavus Holm and of Benjamin T. Chase.

To prove the debt of Holm & Chase the defendant called Parker as a witness, who was objected to by the plaintiff's counsel as being interested, and also as having committed a fraud in obtaining the goods improperly from the plaintiffs for the express purpose of having them attached at the suit of Holm and Chase. But the judge who presided at the trial of the cause admitted him to testify, it appearing that he had not paid the plaintiffs for the property.

Parker testified that on the tenth or eleventh day of March last he called at the plaintiff's store, and purchased the goods replevied on a credit of four months, which he took away on the eleventh of March, giving no note, and receiving no bill of them at that time, though one of the plaintiffs was present at the delivery, but too busy to write one, or to receive a note. He said that the plaintiffs and two other merchants offered him other goods on credit, which he declined purchasing; and that he stopped payment on the same eleventh day of March.

On his cross examination he testified that he had given sundry notes to the Cumberland Bank and to the Bank of Portland, amounting to \$1904.05, a note to John Williams for \$900, and another to Benjamin T. Chase for \$315, all of which were indorsed by Holm, but none of them were payable on the 11th March. He further testified, and it was proved by other witnesses, that on the day and two days preceding his failure he went to eight different stores in the same town and purchased sundry articles of merchandize, all on credit, and for which he was still indebted; but which he said he purchased with no other view than to trade upon as usual, and that he did not know that Holm knew of these purchases. It was proved that Parker had all said goods carried to his shop on the 10th and 11th days of March; that on the afternoon of the 11th which was Saturday, at the urgent request of Holm, to which he made some objections, he gave a note to said Holm for \$215.70, this being the amount, as ascertained by a hasty estimation, which Holm had indorsed for him on the notes aforesaid, none of which were then payable;—that at the same time he took up the note he had given to B. T. Chase

for \$315, which was indorsed by Holm, and was not payable, giving instead of it his own note, without an indorser, and payable on demand;—that he took no discharge, or bond of indemnity from Holm;—that Holm & Chase, the same afternoon, on obtaining said notes payable on demand, immediately sued out writs against Parker, and attached the whole property in his possession, of which the goods replevied were a part;—that after Chase had given up the note indorsed by Holm, and taken Parker's own note in its stead, he said to Holm that his own attachment ought to be laid on the goods first, because he had thus exonerated him from his liability as indorser, to which Holm assented;—and that Parker had been transacting business at a loss before this time, and on one occasion appeared disturbed when a person entered his shop after the goods were removed thither, and found him offering ten under its value.

The counsel for the plaintiffs hereupon contended, 1st that there was sufficient evidence of a conspiracy between Holm and Parker to procure the goods for the express purpose of their attachment by Holm, for which cause the contract of sale was void, as being a fraud on the creditors, and they might well reclaim the goods:—2d that if the jury were not satisfied of the conspiracy, yet if they believed from the evidence that Parker, when he bargained for and received the goods, well knew that he was insolvent, and meant not honestly to pay according to the terms of the contract, and thereby imposed on the plaintiffs, the contract was void for that imposition.

But the judge instructed the jury that though at the time of making the purchases from the plaintiffs and others it appeared that Parker was insolvent, yet his insolvency, unattended by any misrepresentations or falsehood in obtaining the credit, would not render the sale void; and that unless they believed that he obtained such credit with a fraudulent intent and secret agreement or understanding with Holm that the goods should be attached by him to secure his debt, the plaintiffs could not maintain the action; but that if they believed that the goods were purchased with such intention and understanding, their verdict ought to be for the plaintiffs. The jury thereupon returned a verdict for the plaintiffs, which was to be set aside and a new trial granted if the judge's instructions were erroneous, or if Parker was improperly admitted as a witness.

Todd, for plaintiffs. E. Whitman, for defendant. Longfellow, in reply.

MELLEN, C. J. afterwards delivered the opinion of the court, as follows:

Two questions are presented for consideration; one, as to the admission of Parker as a witness;—the other as to the opinion delivered by the presiding justice to the jury.

As to the first question, the objection seems unfounded.—The case finds that the goods the witness purchased have not been paid for:—He therefore stands entire-

ly indifferent. He is liable to the plaintiffs for the price of the goods, if they do not succeed in this action; and will remain liable to Holm if they do succeed. Let this cause be decided either way, one of the witnesses debts must be cancelled and the other will remain due and unpaid. To this point may be cited the case of *Bean v. Bean*, 12 Mass. 20. The objection as to interest, therefore fails. But it is urged that he is inadmissible on the ground of his connection with the alleged fraud. In the case in 4 Mass. 392, (*Bliss v. Thompson*), cited by the plaintiffs' counsel, such an objection is considered as of no importance.

As to the other point reserved, the presiding justice instructed the jury that unless they should be satisfied that the goods replevied were purchased by Parker pursuant to some secret agreement or understanding between him and Holm, so that they might be attached by Holm for his indemnity, they ought to find in favour of the defendant. It is now necessary to examine and determine whether that instruction was correct. If not, the verdict must be set aside and a new trial granted. As it appears by the report of the case that no arts or devices were practiced, nor any false representations or pretences whatever were made by Parker at the time of purchasing the goods on credit, or at any other time by means of which he obtained the credit; and as the jury have found that there was no such concert or secret agreement or understanding between Parker and Holm; and as it does not appear that Parker knew, at the time, that he was insolvent, though in fact he was so; the simple inquiry is this: "If a man doing business as a trader and in good credit (though insolvent at the time, but not aware of that fact) obtains goods on credit in the town where he lives and is known, without practising any artifice or making any false representations or pretences, or in fact any representations or pretences at all;—and removes these goods to his own store openly: Can such vendor, upon learning the insolvency and circumstances of the purchaser, reclaim the goods in the possession of the purchaser or maintain replevin for them against the attaching officer, on the principle of his legal right to rescind the bargain?"—This seems a clear and fair statement of the question.

If in the present case the plaintiffs had a right to rescind the contract of sale, it must be on the ground of fraud on the part of Parker the purchaser; and though in many instances contracts may be avoided by reason of the fraudulent conduct of one of the parties: and the party attempted to be charged may for that cause be excused from the performance of his contract;—yet in cases of the kind under consideration, where a vendor claims the right of rescinding a contract of sale which has been carried into effect and executed on his part by a delivery of the articles sold, it would seem that his right to rescind must be founded on such a fraud on the part of the vendee as would render him liable to an indictment; or if not, would at least subject him to an action of

deceit: or in other words, that a vendor has not a legal right to rescind a contract of sale and reclaim the goods sold, unless such fraud was practised in making the contract, that if the vendor did not rescind it, he would recover damages against the vendee for the injury sustained by that fraud.—But without advancing any direct opinion as to the correctness of this principle, it appears to us to be clear that it would require as much proof of fraud and false representation to maintain an action against a vendee in the above circumstances, as an action against a third person, by whose fraudulent and false representations the vendor was induced to give credit to the vendee.—Artifice, misrepresentation, falsehood and fraud constitute the foundation of all such prosecutions.

It may not be useless to examine the subject in both points of view.

In the case we have stated, would an indictment lie against the purchaser?

1. Cheating, at common law, was an indictable offence; but to constitute the offence two things were necessary. First, the act must be of such a nature as to affect the public. Secondly, it must be such against which common prudence could not have guarded. 1 Hawk. P. C. ch. 71. *Rex v. Wheatly*, 2 Burr. 1125.

2. The statute of 33 Hen. 8, ch. 1, made it an offence to obtain money, goods, etc. by a false token. Though this statute in some respects altered the common law, it did not affect those cases against which common prudence would be a sufficient security.

3. The statute of 30 Geo. 2, ch. 1, goes still further and makes it an indictable offence to obtain money, goods, etc. upon a false pretence. Before this last statute was enacted it was not an offence to obtain money, goods, etc. by a false pretence, unless false tokens were used. See *Anon.*, 6 Mod. 105. *Queen v. Macarty*, Id. 301. *Queen v. Orbell*, Id. 42. *Queen v. Dixon*, Id. 61. *King v. City of Chester*, 5 Mod. 11. *Queen v. Grantham*, 11 Mod. 222. *Reg. v. Jones*, 2 Ld. Raym. 1013.

This statute was never in force in Massachusetts, as we are informed by *Parsons C. J.* in the case of *Commonwealth v. Warren*, 6 Mass. 72. But the Stat. 1815, ch. 136, contains similar provisions, and therefore those decisions which we meet with in the English books upon the Stat. Geo. 2, are applicable to the statute of 1815.

In the case of *Young in error v. Rex*, 3 D. & E. 98, it is decided that to bring a case within the act of Geo. 2, there must be false pretences or stories, and misrepresentations, deceiving and intended to deceive the person with whom the offender is dealing, and fraudulently contrived for that purpose.—*Buller J.* says, "Barely asking another for a sum of money, is not sufficient; but some pretence must be used, and this pretence must be false, and the intent is necessary to constitute the crime."—The case of *Rex v. Lara*, 6 D. & E. 565, shews the nature of those false tokens and pretences which are necessary to support an indictment.—*Lara* pretended that he wished to purchase certain lottery tickets to a large amount. He did so, and paid for them by a draft on a certain

banker with whom he said he had funds, though at the time he knew he had not.—The court decided that the indictment could not be maintained. *Ld. Kenyon* observed that *Lara* used nothing but his own assertion to gain credit,—“that he sat down and drew a check on a banker; but it would be ridiculous to call that a false token;—that it left his credit just where it was before. What the defendant did was highly reprehensible and immoral; but as he used no false tokens to accomplish his designs, judgment must be arrested.”

Hawk. B. 1, ch. 71, sect. 2, says that “the deceitful receiving money from one man to another’s use upon a false pretence of having a message and order to that purpose, is not punishable by criminal prosecution, because it is accompanied by no manner of artful contrivance; but wholly depends on a bare, naked lie.”

The above-cited case of *Commonwealth v. Warren* was decided before the act of Massachusetts for the punishment of perjury was passed. Had it been in force at the time of the trial, *Warren* would probably have been convicted, as he used several false pretences to obtain credit by means of which his fraud was successful. The case further shews that if another person had been connected with him in the fraud, the offence would have amounted to a conspiracy without any false pretences; and might have been charged and punished as such.—This distinction it is of importance to notice, as it may have a bearing on the main question reserved in this cause; and for that reason it may under this head be also remarked that where two or more conspire to do an unlawful act, or a lawful act for an unlawful purpose, it is a crime; and the gist of the conspiracy is the unlawful confederacy. *Commonwealth v. Judd & al. 2 Mass. 329. Commonwealth v. Tibbetts & al. 2 Mass. 536.*

Our next inquiry is whether, in the case stated, an action of deceit, or an action on the case in nature of deceit, would lie for damages occasioned by the fraud.—Our law books must answer the question.

Some of the cases relating to this point are founded upon an alleged fraud and deceit on the part of the vendor; others on the part of the vendee.—Those which are grounded upon an express warranty do not come within the range of our present view. In *Medina v. Stoughton 1 Ld. Raym. 523*, it is settled that possession is a warranty of the implied kind, that the goods belong to the seller; for possession is a colour of title, and an action lies upon a bare affirmation of the possessor that the goods are his own. *Roberts on frauds 523.*—“An action upon the case lies for a deceit when a man does any deceit to the damage of another. *Com. Dig. Action on the case for deceit A. 1.*” “Fraud without damage or damage without fraud gives no cause of action—both must concur.” *Baily v. Merrell, 3 Bulst. 95. Roberts 523.* “No action lies against a man for his declaring that a certain person would have given him a certain sum for his farm; though no such offer was ever made.—It is a mere ground of estimation

with which no prudent man should be satisfied;”—but a declaration of the fact that the rent was so much, when it was not, whereby a purchaser is deceived, will support an action. See *Roberts 523*, and the cases there cited. Many other cases of false or fraudulent representations on the part of the vendor might be stated, shewing the principles on which actions for deceit may be maintained against them;—but these are sufficient. It is much more to our present purpose to examine those cases in which actions have been supported against vendees or receivers of money, for fraud and deceit on their part, and the facts necessary to support such actions. In the case of *Bullington v. Gerrish, 15 Mass. 156*, *Walker* was guilty of gross fraud, and stated a series of falsehoods well calculated to gain him credit, by inspiring confidence in his responsibility;—and by means of this fraud and false pretence, he succeeded in obtaining credit to a large amount. In *Badger v. Plimney, 15 Mass. 359*, *Rand*, the minor, obtained credit by falsely affirming that he was of full age; and this affirmation was pointedly made, too, in reply to the inquiries of *Badger*. *Putnam, J.* in giving the opinion of the court says, “the goods were delivered to the plaintiff *Rand* because he undertook to pay for them and declared he was of full age. The basis of this contract has failed from the fault if not the fraud of the infant; and the fraud which induced the contract, furnishes the ground for the impeachment of it. Thus in the case of *Bullington v. Gerrish*, where one purchased goods on credit by means of false representations, it was holden the vendor had not parted with his property, but might maintain replevin against the attaching officer.”

In the case before mentioned of *Com. v. Warren*, the court observed that the man defrauded should seek his remedy by action. In that instance false and fraudulent representations had been made. In the important case of *Pasley v. Freeman, 3 D. & E. 51*, *Buller J.* observes, “The fraud is that the defendant procured the plaintiff to sell goods on credit to one whom they would not otherwise have trusted, by asserting that which they knew to be false. Here then is the fraud and the means by which it was committed;—the assertion alone is not sufficient: but the plaintiff must go on and prove that it was false and that the defendant knew it to be so.” The action of *Pasley v. Freeman* was maintained upon the principle that the defendant had been guilty of that fraud and misrepresentation to induce the plaintiff to sell goods on credit to *Falch*, which would have maintained the action against *Falch* if he had himself been guilty of the fraud and falsehood.—*Buller J.* concludes with observing that “if a man will wickedly assert that which he knows to be false and thereby draw his neighbor into a heavy loss he is liable in damages.” *Ashhurst J.* in delivering his opinion says “In order to make it actionable it must be averred that the defendant intending to deceive and defraud the plaintiffs, did deceitfully encourage and persuade them to do the act and for that

purpose made the false affirmation, in consequence of which they did act." "If A. send his servant to buy a house, who buys it and pays for it, and the seller affirms to A. that he was not paid, whereby A. pays him; an action lies. So if a man affirm himself to be of full age, when he is an infant, and thereby procure money to be lent on mortgage." See Com. Dig. action on the case for deceit A. 10. and the authorities there cited; also *Bean v. Bean*, 12 Mass. 20. Numerous other instances of similar imposition and falsehood might be collected and stated; but it is not necessary, as they are all founded on the same principle, viz. that the money, goods or credit had been obtained by means of false and fraudulent assertions of the defendant. We have not been able to find a single instance in which an action of this kind has been supported, except where the party charged had succeeded in his plan by false assertions and fraudulent misrepresentations. In *Chitty on Pleading* are a number of forms of declarations in actions of deceit—one for selling goods as and for a larger quantity than there was;—one for selling a piece of land as containing more acres than it did contain;—one for misrepresenting the value or profits of a certain trade;—one for representing himself as authorized by a third person to do a certain act or receive a certain sum of money; and one for personating the plaintiff. In each of these forms there is a strong averment that the defendant made a direct, false and fraudulent representation of facts, with an intent to accomplish his object and defraud the plaintiff; and that by means thereof he had succeeded.

We have thus taken a brief review of some of the general principles of law applicable to indictments for frauds and deceits, and to actions on the case brought by the party injured against him who commits the fraud; whether he is the vendee of the goods or his artful and fraudulent friend. It appears by the precedents to which we have alluded, that in case for a fraudulent purchase or obtainment of money, the declaration must contain an allegation that the plaintiff was imposed upon by artifice and false declarations—calculated and intended to deceive; and in all the cases which we have cited, the prosecution on civil action was maintained or defeated, according as the proof appeared on trial touching the false and fraudulent representations alleged to have been made by the party charged; he knowing them to be false and deceptive.—Judging, then, from legal forms and decided cases, it seems to be settled that deceptive assurances and false representations fraudulently made are essential to the support of an indictment or civil action for a fraud committed in the manner above supposed; and of course, that such proof is equally necessary to the support of an action of replevin by the vendor who claims the right of rescinding the sale he has made on the ground of fraud in the vendee. Let us for a moment look at the facts in the case at bar.—Parker, it turns out, was insolvent when he purchased the goods, but there is no proof that he was

apprized of the fact;—he bought the goods on credit in usual form, refusing the offer of further credit from the plaintiffs;—he made no professions or promises;—no representations or assertions; practised no other art than obtaining the credit without disclosing his insolvency; a fact, which it does not appear that he himself knew. These facts are essentially different from those appearing in the cases we have collected and stated; in which it is declared not only that there must have been assertions and representations made—but they must also have been false; and to complete the proof the defendant must have known them to be false. Under these circumstances we are not aware of any legal principles on which an indictment could be sustained or an action for deceit against Parker; and we do not perceive how it is competent for the plaintiffs to rescind the contract they have made and reclaim the goods in this action, unless upon the ground of concealment, which has been also urged by the counsel for the plaintiffs, and which we will presently consider.—As the jury have decided that no secret understanding existed between Parker and Holm of a fraudulent nature relating to this property, we do not see why the rule of law is not applicable in this instance, *melior est conditio defendentis*. The plaintiffs may have been guilty of negligence or want of due care; but as it regards the question before the court the defendant and he whom he represents seem not liable even to that imputation.

But it is contended by the counsel for the plaintiffs that a vendor may rescind a contract of sale on account of fraud in the vendee by concealment of the truth as well as by false assertions and misrepresentations; that the consequences are the same and of course the law is the same. Before answering this argument, it is natural to inquire wherein this concealment consisted.—It is stated by the counsel for the plaintiff that it was the duty of Parker, as an honest man, to have disclosed his insolvency to the plaintiffs at the time he applied to purchase the property. The first reply to be given, is, that it does not appear in the case that he knew he was insolvent.—He might be suspicious of it, and he might not be; on that point we have no information. It does not appear, then, that he concealed any facts which he was bound to disclose.—If the principles of law respecting this part of the cause were to be carried to the same extent by the court as they have been in the argument of the counsel, all confidence in dealing would be destroyed, and perfect confusion, as to the title of personal property, would be the consequence.—The vendee would never feel safe in purchasing, nor any other person safe in purchasing of him, lest the creditor should afterwards discover that the vendee, when he purchased, was actually insolvent, and that those who afterwards bought of him knew of the insolvency; and then should come forward, with a sweeping claim of the property he had sold, on the principle of rescinding the sale for a fraudulent concealment.—But sup-

posing that Parker did know of his own insolvency at the time of his contract: we are perfectly satisfied that the sale is not void on the ground of fraud because he did not disclose the fact.

It is true, the fraudulent concealment by the vender of a secret defect in an article sold by him, wholly unknown to the vendee, may be the foundation of an action for damages by him against the vender, and perhaps authorize the vendee to rescind the contract on discovery of the fraud; because the law implies a warranty that the goods or articles sold are of a merchantable quality. *Gillb. Evid.* 187. *Roberts* 523. But we apprehend no case can be found by which it has been settled that the law implies anything like a warranty on the part of a purchaser that he is a man of property, and sound as to his pecuniary concerns.—In the commerce and intercourse of mankind, such an implication was never understood to exist.

It is also true that in the case of policies of assurance the concealment of the truth is nearly allied to misrepresentation. If the fact be material, it avoids the policy. But it is not on the ground of fraud in the concealment that the contract is void; because if the concealment be the effect of accident or mistake, negligence or inadvertence, it is equally fatal to the policy as if it were intentional and fraudulent.—See *Marshall*, 347, and cases there cited. But it will be difficult to find a case where a policy was declared void, because the

assured, when the policy was effected, was insolvent and yet concealed that fact:—still the reasoning of the plaintiffs' counsel seems to lead to the conclusion that the policy would in such a case be void because the assured was insolvent and unable to pay the note he had given for the premium.—We apprehend no conclusion can be drawn from these principles of the law of insurance unfavourable to those on which we place the decision of this cause.

We have before stated that there might be a conspiracy between two or more to obtain goods or money from another without any false pretences, etc. and which would be punishable as a crime. In reference to this principle of law the jury were instructed that if they believed such conspiracy or secret arrangement existed between Parker and Holm, though there were no false pretences or representations, they ought to find a verdict for the plaintiffs, but not otherwise.

It is to be lamented, if the plaintiffs have lost their property by reposing confidence where it was not deserved; but this is not a circumstance for our consideration in the decision of the cause.

On the whole, after much thought and the most careful examination, we are satisfied with the correctness of the instructions which were given to the jury; that the motion for a new trial must be overruled, and that there be an entry of judgment according to the verdict.



CUNNINGHAM v. ASHBROOK et al.

(20 Mo. 553.)

Supreme Court of Missouri. March Term, 1855.

Action by one Cunningham against Ashbrook and others for the price of certain hogs. Judgment of nonsuit, and plaintiff brings error.

At the trial, before a jury, it appeared that defendants were engaged in slaughtering and packing hogs for themselves, and also slaughtering for other packers. They had an arrangement with one McAllister and one Whitaker, who were packers, that each should have one-third of all the hogs slaughtered by them, defendants attending to the buying and the slaughtering, for the sale of the offal. Plaintiff's hogs were bought by a person who bought hogs for defendants, and occasionally for the other two packers, and who testified that in buying these hogs he did not know who would take them. The hogs were taken to defendants' slaughter house, and there killed, and defendants notified plaintiff to call next day at the packing house of McAllister, who would take the hogs, to see them weighed and get his pay. That night, however, the slaughter house and the hogs were destroyed by fire. It was in evidence that it was customary for hogs to be weighed at the packing house, in the presence of the seller, who then received his pay, and one witness testified that by custom the seller's ownership continued till the hogs were weighed. The lower court gave the following instruction: "If the hogs were sold by net weight, to be ascertained by weighing the hogs after they were slaughtered and cleaned, and not to be paid for until so weighed, and the hogs were destroyed by an accidental fire before they were weighed, then the loss falls upon the seller, unless he shows that the parties intended the sale to be absolute and complete before the weighing."

Glover & Richardson, (with whom was D. C. Woods,) for plaintiff in error. J. A. Kasson, for defendants in error.

LEONARD, J. The only things essential to a valid sale of personal property at common law were, a proper subject, a price, and the consent of the contracting parties, and when these concurred, the sale was complete, and the title passed without anything more. (2 Black. Com. 447; *Bloxam v. Sanders*, 4 Barn. & Cres. 941.) The term sale, however, in its largest sense, may include every agreement for the transferring of ownership, whether immediate or to be completed afterwards, and goods, in reference to the disposition of them by sale, may be considered as existing separately and ready for immediate delivery, or as a part of a larger mass from which they must be separated by counting, weighing or measuring, or as goods to be hereafter procured and supplied to the buyer, or to be manufactured for his use. Goods of the first sort are the only proper subjects of a common law sale, which is strictly a transaction oper-

ating as a present transfer of ownership, and does not include executory contracts for the future sale and delivery of personal property, although there are some apparently anomalous cases in our books in which transactions in reference to goods to be separated from a mass seem to have been treated, where there had been a constructive delivery, as valid sales, producing a present change of property.

The general rule, however, is otherwise, and all the different sorts of goods to which we have referred, except the first, are, under our law, the proper subjects only of executory agreements—contracts for the future sale and delivery of them.

The Roman law, however, it is said, dealt differently with this subject. In that system of jurisprudence (*Bell on Contract of Sale*, 9,) "a sale was not an immediate transmutation of property, but a contract of mutual and personal engagements for the transference of the thing on the one hand and the payment of the price on the other, without regard to the time of performance on either part, that being left to be regulated by the agreement of the parties, the seller being bound to deliver the thing in property to the buyer at the time agreed on, and the buyer to pay the price in the manner settled between them. The distinction was carefully observed between the direct right of property (*jus in re*) conferred by delivery, and the indirect right (*jus ad rem*) to demand of the seller delivery of the thing sold. There thus arose out of the contract the double relation of debtor and creditor, as to the thing sold and the price to be paid for it. Corresponding with these relations, two actions were given, both personal and direct; one for the thing sold, the other for the price due. The claim for the price being absolute on delivery or tender of the thing and the demand for the thing conditional, provided it had not in the meantime perished without fault of the seller." Thus, it is seen, a Roman sale was applicable to all the possible circumstances in which goods to be transferred could be found, and the respective engagements of buyer and seller (under such a transaction,) were specifically enforced by the appropriate actions.

Although at common law consent alone was sufficient to constitute a valid sale, the statute of fraud has now intervened and other formalities are prescribed, which must be observed or what was before a valid transfer of property is now of no validity. The statute, beginning where the common law stopped, requires some one of these solemnities to be added to the transaction before it shall be considered as complete, so as to effect a change of ownership; and the matter here relied upon, as the statute evidence of the completion of the contract, was the change of possession. This provision of the statute implies it is said a delivery of the thing sold on the part of the debtor, and an acceptance of it by the buyer, with an intention on the one side to part with, and on the other to accept the ownership of it; and it is not enough that the mere natural, actual, corporeal possession should

be changed, but there must be a change of the civil possession, which is a holding of the thing with the design of keeping it as owner; and this brings us to an examination of the instruction complained of, and which resulted in non-suiting the plaintiff.

The proof given shows (or, at least, conduces to show, which, for the present purpose, is the same thing,) that the thing sold had been delivered in point of fact to the buyer, and the true question in the case, (indeed the only one that could be raised,) was, whether this change of actual possession was also a change of the civil possession; or in other words, whether the hogs were delivered and received by the parties respectively, with the intention of changing the ownership. If the facts were so, the sale was perfect, the title passed, and the loss fell upon the new owner.

It is to be remarked that this is the sale of a specific commodity, the whole drove, and not of a part, to be ascertained by counting out the required number, and therefore, the title passed as soon as the bargain was completed by the delivery. It was not a transaction in relation to the sale of part of a mass, which could not take effect as a present sale, immediately changing the property, until the separation was actually made; and it is possible some confusion may have arisen here by not clearly distinguishing between the sale of a specific commodity, clearly separated and distinguished from all others, as a specific drove of stock, and of an indefinite commodity, as a hundred barrels of corn out of the party's crib, or a hundred mules out of his drove, when the seller is bound to separate and identify the particular part sold, before it can pass in property to the purchaser.

Nor is there any objection to the validity of this transaction as a present sale, growing out of the supposed uncertainty as to the price. Although there is no sale until the price is settled between the parties, yet it is settled, within the meaning of this rule, when the terms of it are so fixed that the sum to be paid can be ascertained without further reference to the parties themselves; and, indeed, by the common law, the price is fixed within this rule, even when it appears that parties have agreed that it shall be the reasonable worth of the thing sold, leaving it to the tribunals to ascertain the amount, if they cannot agree upon it themselves. (Bell on Sales, 18-20; *Accebal v. Levy*, 10 Bing. 382.)

This, then, was a present agreement between these parties for the sale of a specific commodity for a price settled between them, so as to be capable of future ascertainment, without further reference to themselves, and we repeat, immediately passed the title to the buyer, if the ceremony of delivery required by the statute of frauds was complied with, and there having been a delivery in fact, the whole question was, as before remarked, with what intention that delivery was made, whether merely that the hogs might be weighed, neither party being bound in the meantime by what had passed between

them, or as the formal completion of the bargain to bind the parties and vest the ownership in the purchaser.

We come now to an examination of the instruction complained of, the substance of which is, that if the hogs were sold by net weight, to be ascertained by weighing after they were slaughtered and cleaned, then the presumption that the sale was completed by the delivery is met and repelled, and the loss falls on the plaintiff, as owner, unless he shows that the parties intended the sale to be complete upon the delivery. The jury would, no doubt, have so understood the direction, when they came to apply it to the case, and such, too, we suppose, was the meaning of the court; but we do not concur in this view of the law. Certainly, this circumstance was proper for the jury upon the question of the intention of the parties in changing the actual possession, and might have afforded a very proper topic of comment to counsel, in arguing the question of fact before them; but we do not think any well considered case has gone the length of declaring that it changed the strong natural presumption to be derived from the actual delivery of the property, and imposed upon the other party the necessity of showing that "the parties intended the sale to be absolute and complete before the weighing," and we feel well assured that there is no principle upon which this position can be maintained. We find it frequently repeated in the books, that when anything remains to be done by the seller, such as counting, weighing or measuring, the title does not pass; and this is certainly correct, when this operation is necessary in order to separate the goods from a larger mass, of which they are a part; but that is not this case, and we think that by keeping the distinction between a specific and an indefinite commodity in view, most of the cases upon this subject can be explained, and their apparent conflict reconciled. It is also certainly true that, in determining the question as to the purpose of the parties in changing the actual possession, the fact that the price is to be subsequently ascertained by reference to the net weight, and then paid, is proper to go to the jury; but possession is so much of the essence of property, as it is that alone which enables us to enjoy a thing as property, and the natural connection between property and possession, especially in movables, is so strong, that the presumption arising from a change of actual possession, that it was intended also as a change of the property, is not, in our view, overcome, as a matter of law, by the fact here relied upon, that the thing bargained for was to be paid for by weight, to be ascertained after the delivery.

We shall content ourselves by a reference to a few cases which we consider directly in point, in support of the position we have taken. *Scott v. Wells*, (6 Watts & Serg. 368,) was a case of the sale of a raft of lumber at twelve dollars per thousand feet, to be ascertained by measurement. There had been a delivery, and the raft being lost by a freshet, the question was,

whether the property passed so as to cast the loss upon the buyer. The court below instructed the jury that "parties may make a sale of goods so as to pass the property by the actual delivery thereof, without first fixing the quantity upon which the price is to be computed," and the supreme court approved of the direction, Judge Gibson remarking, "that a sale is imperfect only when it is left open for the addition of terms necessary to complete it, or where it is defective in some indispensable ingredient, which cannot be supplied from extrinsic sources. But when possession is delivered pursuant to a contract which contains no provision for additional terms, the parties evince, in a way, not to be mistaken, that they suppose the bargain to be consummated."

Macomber v. Parker, (13 Pick. 182,) was a sale of a quantity of brick in a kiln at a certain rate per thousand, to be ascertained by counting, and the court, in delivering its opinion, says: "It is true the bricks were to be counted, but that was to be done to enable the parties to come to a settlement of their accounts, and not for the purpose of completing the sale. Taking the whole of Hunting's testimony together, this we think is the reasonable inference to be drawn from it. If the bricks had been actually delivered, there could have been no question that the sale would have been complete, notwithstanding the bricks were to be afterwards counted. The general principle is, that when an operation of weight, measurement, counting or the like, remains to be performed in order to ascertain the price, the quantity or the particular commodity to be delivered, and to put it in a deliverable state, the contract is incomplete, until such operation is performed. (Brown on Sales, 44.) But where the goods or commodities are actually delivered, that shows the intent of the parties to complete the sale by the delivery, and the weighing, or measuring or counting afterwards would not be considered as any part of the contract of sale, but would be taken to refer to the adjustment of the final settlement as to the price. The sale would be as complete as a sale upon credit before the actual payment of the price. Nothing can be found in any of the numerous cases on this point, which militates against this position."

The remarks of the same court in *Riddle v. Varnum*, (20 Pick. 283-4,) to which we have been referred by the counsel for the respondents are not intended to conflict with what had been previously determined, but expressly affirm that decision.

It is true the court say that "the party

affirming the sale must satisfy the jury that it was intended to be an absolute transfer, and all that remained to be done was merely for the purpose of ascertaining the price of the articles sold at the sale agreed upon." And of this there can be no doubt, but yet that is a matter for the jury, and it is not intimated in this case that when there is an actual delivery, the jury cannot be allowed to infer such intention without some additional evidence.

These questions generally arise when the thing sold has perished, and the contest is upon whom the loss shall fall, and it may not be improper here to remark that, notwithstanding the marked difference between a Roman and common law sale, in other particulars, when a loss occurs, it falls upon the same person under either system. Under our law, the maxim is that the owner bears the loss, a rule, it would seem, of universal application, *res perit domino*. Under the Roman law, the debtor of a specific thing was not answerable for its loss, when it perished in his hands without fault, and when there had been a purchase of a specific commodity, although the property was not changed until delivery, the seller, by the bargain, became debtor to the buyer of the particular thing bought, and so not liable if it perished without fault.

We repeat what we have before said, it is a question for the jury. If the delivery were for the purpose of passing the property, it had that effect although the price was to be afterwards ascertained and paid according to net weight, and there is no rule of law that, under such circumstances, the presumption arising from the delivery is met and repelled, and that other evidence becomes necessary in order to make out a *prima facie* case of a present sale. The seller has a right, notwithstanding the bargain, to retain his property till he is paid, unless he agrees to allow the purchaser a credit (the bargain for an immediate transfer of property implying a present payment of the price,) and hence, when there is no understanding as to the time of payment other than what is implied in the postponement of it until the quantity of the thing sold is ascertained in the manner indicated in the contract, this circumstance is certainly entitled to consideration with the jury, in determining the character of the delivery, which, if intended to pass the thing in property, deprives the seller of his security upon it for the price, at the same time that it throws upon the buyer the future risk. The judgment is reversed, and the cause remanded.

CUSACK et al. v. ROBINSON.

(1 Best & S. 299.)

Queen's Bench, Trinity Term. May 25, 1861.

Declaration for goods sold and delivered, and goods bargained and sold. Plea, never indebted. At the trial before Blackburn, J., at the Liverpool winter assizes in 1860, it appeared that the defendant, who was a London merchant, on the 24th October, 1860, at Liverpool called on the plaintiffs, who are importers of Canadian produce, and said he wanted to buy from 150 to 200 firkins of Canadian butter. He then went with one of the plaintiffs to their cellar, where he was shewn a lot of 156 firkins of butter, "ex Bohemian," belonging to the plaintiffs, which he then had the opportunity of inspecting, and in fact he did open and inspect six of the firkins in that lot. After that examination, they went to another cellar to see other butter, which however did not suit the defendant. At a later period of the same day the plaintiffs and the defendant made a verbal agreement by which the defendant agreed to buy that specific lot of 156 firkins at 78s. per cwt. When the price had been agreed on, the defendant took a card on which his name and address in London were written, "Edmund Robinson, 1 Wellington Street, London Bridge, London," and wrote on it "156 firkins butter to be delivered at Fenning's Wharf, Tooley Street." He gave this to the plaintiffs, and at the same time said that his agents, Messrs. Clibborn, at Liverpool, would give directions how the goods were to be forwarded to Fenning's Wharf. The plaintiffs by Clibborn's directions delivered the butter to Pickford's carts to be forwarded to the defendant at Fenning's Wharf. The plaintiffs sent an invoice dated the 25th October, 1860, to the address on the defendant's card. They received in answer a letter purporting to come from a clerk in the defendant's office, acknowledging the receipt of the invoice, and stating that on the defendant's return he would no doubt attend to it. There was no evidence that the writer of this letter had any authority to sign a memorandum of a contract. On the 27th October the plaintiffs in Liverpool received a telegram from the defendant in London, in effect asserting that the butters had been sold by the plaintiffs subject to a warranty that was equal to a sample, but that they were not equal to sample, and therefore would be returned. The plaintiffs replied by telegram that there was no such warranty, and they must be kept. A clerk at Fenning's Wharf proved that Messrs. Fennings stored goods for their customers, and had a butter warehouse; that the defendant had used the warehouse for fifteen years, and was in the habit of keeping his butters there till he sold them. On the 26th October Pickford & Co. had delivered a part of the 156 firkins in question at the warehouse, and delivered the residue on the morning of the 27th October. The witness could not say whether any one came to inspect them or not, but he proved that they were delivered up by Fenning to Pickford & Co. under a delivery order from

the defendant dated 27th October. The defendant's counsel admitted that it must be taken that the sale was not subject to any warranty; but objected that the price of the goods exceeded £10, and that there was nothing proved to satisfy the requisitions of the statute of frauds. The verdict was entered for the plaintiffs for £420 10s. 1d., with leave to the defendant to move to enter a nonsuit, if there was no evidence proper to be left to the jury either of a memorandum of the contract or of an acceptance and actual receipt of the goods.

In Hilary term, 1861, Edward James obtained a rule nisi, Mellish and Quann shewed cause. Milward, in support of the rule.

BLACKBURN, J. (After fully stating the facts his lordship proceeded.) It was not contended that there was any sufficient memorandum in writing in the present case; but it was contended that there was sufficient evidence that the defendant had accepted the goods sold and actually received the same; and on consideration we are of that opinion.

The words of the statute are express that there must be an acceptance of the goods or part of them, as well as an actual receipt; and the authorities are very numerous to shew that both these requisites must exist, or else the statute is not satisfied. In the recent case of *Nicholson v. Bower*,¹ which was cited for the defendant, 141 quarters of wheat were sent by a railway, addressed to the vendees. They arrived at their destination, and were there warehoused by the railway company under circumstances that might have been held to put an end to the unpaid vendor's rights. But the contract was not originally a sale of specific wheat, and the vendees had never agreed to take those particular quarters of wheat; on the contrary it was shewn to be usual, before accepting wheat thus warehoused, to compare a sample of the wheat with the sample by which it was sold, and it appeared that the vendees, knowing that they were in embarrassed circumstances, purposely abstained from accepting the goods; and each of the judges mentions that fact as the ground of their decision. In *Meredith v. Meigh*² the goods, which were not specified in the original contract, had been selected by the vendor and put on board ship by the directions of the vendee, so that they were in the hands of a carrier to convey them from the vendor to the vendee. It was there held, in conformity with *Hanson v. Armitage*,³ that the carrier, though named by the vendee, had no authority to accept the goods. And in this we quite agree; for though the selection of the goods by the vendor, and putting them in transit, would but for the statute have been a sufficient delivery to vest the property in the vendee, it could not be said that the selection by the vendor, or the receipt by the carrier, was

¹ 1 E. & B. 172.² 2 E. & B. 361.³ 5 B. & Ald. 557.

an acceptance on those particular goods by the vendee.

In *Baldev v. Parker*,⁴ which was much relied on by Mr. Milward in arguing in support of this rule, the ground of the decision was that pointed out by Holroyd, J., who says (p. 44): "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession; and therefore as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute." The principle here laid down is, that there cannot be an actual receipt by the vendee so long as the goods continue in the possession of the seller as unpaid vendor so as to preserve his lien; and it has been repeatedly recognized. But though the goods remain in the personal possession of the vendor, yet if it is agreed between the vendor and the vendee that the possession shall thenceforth be kept, not as vendor, but as bailee for the purchaser, the right of lien is gone, and then there is a sufficient receipt to satisfy the statute. *Marvin v. Wallis*,⁵ *Beaumont v. Brengeri*.⁶ In both of these cases the specific chattel sold was ascertained, and there appear to have been acts indicating acceptance subsequent to the agreement which changed the nature of the possession.

In the present case there was ample evidence that the goods when placed in Fenning's Wharf were put under the control of the defendant to await his further directions, so as to put an end to any right of the plaintiffs as unpaid vendors, as much as the change in the nature of the possession did in the cases cited. There was also sufficient evidence that the defendant had at Liverpool selected these specific 156 firkins of butter as those which he then agreed to take as his property as the goods sold, and that he directed those specific firkins to be sent to London. This was certainly evidence of an acceptance; and the only remaining question is, whether it is necessary that the acceptance should follow or be contemporaneous with the receipt, or whether an acceptance before the receipt is not sufficient. In *Saunders v. Topp*,⁷ which is the case in which the facts approach nearest to the present case, the defendant had, according to the finding of the jury, agreed to

buy from the plaintiff forty-five couple of sheep, which the defendant, the purchaser, had himself selected, and the plaintiff had by his directions put them in the defendant's field. Had the case stopped there, it would have been identical with the present. But there was in addition some evidence that the defendant, after seeing them in the field, counted them, and said it was all right; and as this was some evidence of an acceptance after the receipt, it became unnecessary to decide whether the acceptance under the statute must follow the delivery. Parke, B., from the report of his observations during the argument, seems to have attached much importance to the selection of particular sheep by the defendant; but in his judgment he abstains from deciding on that ground, though certainly not expressing any opinion that the acceptance must be subsequent to the delivery. The other three barons—Alderson, Rolfe, and Platt—express an inclination of opinion that it is necessary under the statute that the acceptance should be subsequent to or contemporaneous with the receipt; but they expressly abstain from deciding on that ground. In the elaborate judgment of Lord Campbell in *Morton v. Tibbett*,⁸ in which the nature of an acceptance and actual receipt sufficient to satisfy the statute is fully expounded, he says (p. 434): "The acceptance is to be something which is to precede or at any rate to be contemporaneous with the actual receipt of the goods, and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined. The intention of the legislature seems to have been that the contract should not be good unless partially executed; and it is partially executed if, after the vendee has finally agreed on the specific articles which he is to take under the contract, the vendor by the vendee's directions parts with the possession, and puts them under the control of the vendee, so as to put a complete end to all the rights of the unpaid vendor as such. We think therefore that there is nothing in the nature of the enactment to imply an intention, which the legislature has certainly not in terms expressed, that an acceptance prior to the receipt will not suffice. There is no decision putting this construction on the statute, and we do not think we ought so to construe it.

We are therefore of opinion that there was evidence in this case to satisfy the statute, and that the rule must be discharged.

Rule discharged.

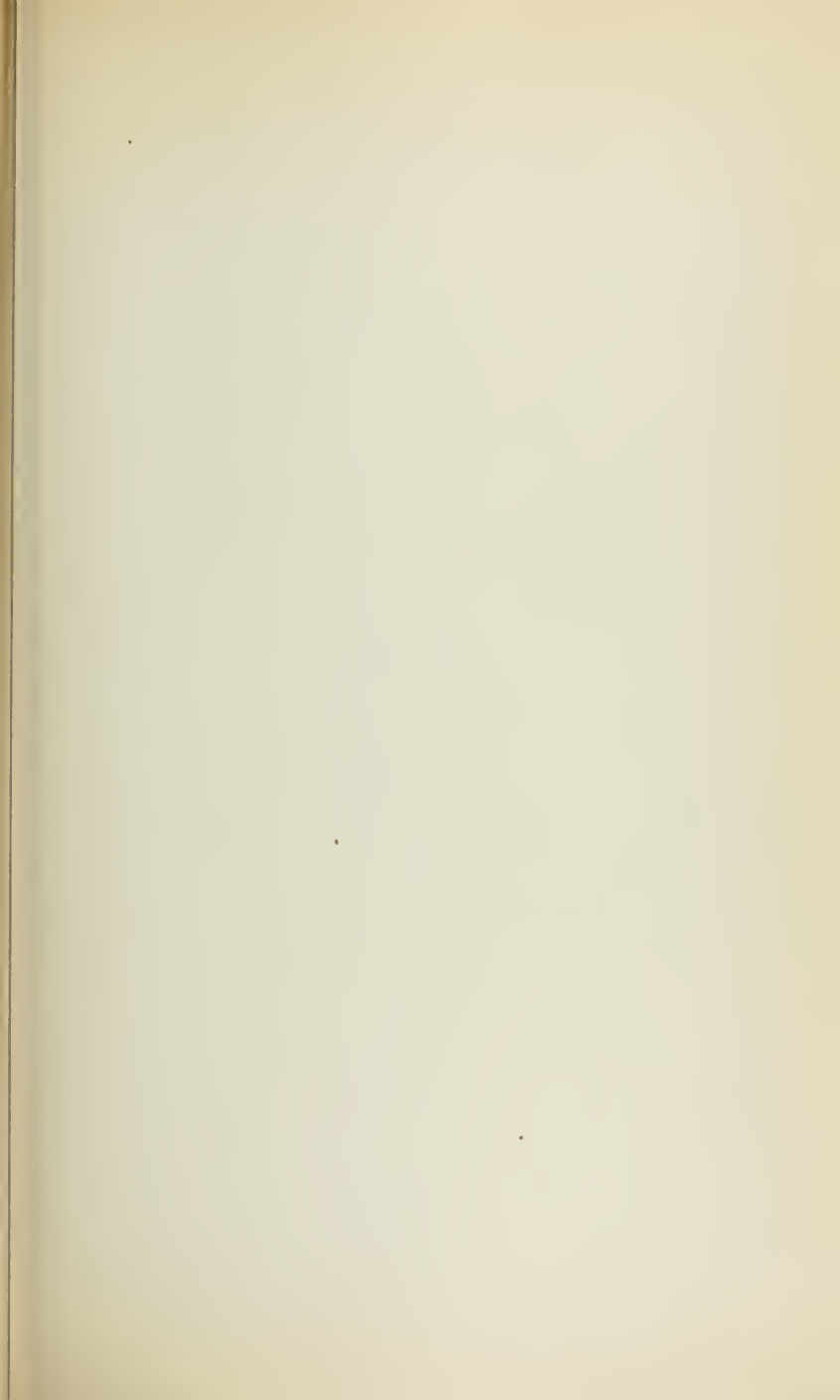
⁴ 2 B. & C. 37.

⁵ 6 E. & B. 726.

⁶ 5 C. B. 301.

⁷ 4 Exch. 390.

⁸ 15 Q. B. 428.



CUSHING et al. v. BREED et al.

(14 Allen, 376.)

Supreme Judicial Court of Massachusetts.
Jan. Term, 1867.

Contract to recover the price of 500 bushels of oats sold and delivered. The answer admitted the sale and delivery of 105 bushels, and offered judgment for the price thereof, and denied the residue. It appeared that the plaintiffs were owners of a cargo of oats, which, on being weighed, was found to contain 6,695 bushels, and was stored in the Merchants' Grain Elevator in Boston, which belonged to persons whose business it was to receive, elevate, store, weigh, and deliver grain. The plaintiffs thereafter agreed to sell to the defendants 500 bushels thereof, and delivered to them the following order upon the proprietors of the elevator, dated June 23, 1864: "Please deliver Breed & Co., or order, 500 bushels of black oats from cargo, per schooner Seven Brothers, storage commencing, to the person or persons in whose favour this order is drawn, June 29, 1864." This order was presented on June 25, 1864, and accepted in the usual manner. The order was entered in the books, and on the same day 105 bushels of the oats were delivered to defendants, and before July 5, 1864, the whole cargo had been sold and delivered and removed from the elevator, except 1,274 bushels, which included the 305 bushels agreed to be sold to the defendants. On the 5th of July a fire occurred, which rendered the oats which remained in the elevator nearly worthless. It was the general usage of dealers in grain in Boston to place large quantities of grain in elevators, where the same remained until sold, by orders given to the purchaser, and after such sale it was removed from the elevator or kept therein, at the election of the purchaser. After the acceptance of such order by the proprietors of the elevator, the grain covered thereby was treated by them as the property of the purchaser; the vendor had no further control over it, but the proprietors held the same subject to the order of the purchaser, received orders from him in the same manner as from the original vendor, or weighed it out to him as he required, they guaranteeing to deliver out the full number of bushels weighed into the elevator, charging him with storage. Different cargoes of the same quality, belonging to different owners, were sometimes mingled in the bins. Grain so bought was paid for without regard to whether or not it had been separated and removed from the elevator, and all damage to grain so sold, from internal causes occurring after the delivery of the order, was borne by the purchaser. All the above usages were known to the defendants, but they objected to the evidence to prove the same. The judge ruled that there was no such change of title to the grain, except as to the 105 bushels actually removed by the defendants from the elevator, as to make the defendants liable, and found that the plaintiffs were only entitled to recover the price agreed for the 105 bushels,

with interest. The plaintiffs alleged exceptions.

W. Gaston and W. A. Field, for plaintiffs. C. B. Goodrich and I. J. Austin, for defendants.

CHAPMAN, J. The use of elevators for the storage of grain has introduced some new methods of dealing, but the rights of parties who adopt these methods must be determined by the principles of the common law. The proprietors of the elevator are the agents of the various parties for whom they act. When several parties have stored various parcels of grain in the elevator, and it is put into one mass, according to a usage to which they must be deemed to have assented, they are tenants in common of the grain. Each is entitled to such a proportion as the quantity placed there by him bears to the whole mass. When one of them sells a certain number of bushels, it is a sale of property owned by him in common. It is not necessary to take it away in order to complete the purchase. If the vendor gives an order on the agents to deliver it to the vendee, and the agents accept the order, and agree with the vendee to store the property for him, and give him a receipt therefor, the delivery is thereby complete, and the property belongs to the vendee. The vendor has nothing more to do to complete the sale, nor has he any further dominion over the property. The agent holds it as the property of the vendee, owned by him in common with the other grain in the elevator. It is elementary law that a tenant in common of personal property in the hands of an agent may sell the whole or any part of his interest in the property by the method above stated, or by any other method equivalent to it. Actual separation and taking away are not necessary to complete the sale. As to the property sold, the agent acts for a new principal, and holds his property for him. The law is the same, whether the proprietors are numerous or the vendor and vendee are owners of the whole. If the vendee resells the whole or a part of what he has purchased, his vendee may, by the same course of dealing, become also a tenant in common as to the part which he has bought.

This is not like the class of sales where the vendor retains the possession, because there is something further for him to do, such as measuring, or weighing, or marking, as in *Scudder v. Worcester*, 11 Cush. 573; nor like the case of *Weld v. Cutler*, 2 Gray. 195, where the whole of a pile of coal was delivered to the vendee in order that he might make the separation. But the property is in the hands of an agent; and the same person who was the agent of the vendor to keep, becomes the agent of the vendee to keep; and the possession of the agent becomes the possession of the principal. *Hatch v. Bayley*, 12 Cush. 27, and cases cited. The tenancy in common results from the method of storage which has been agreed upon, and supersedes the necessity of measuring, weighing, or separating the part sold.

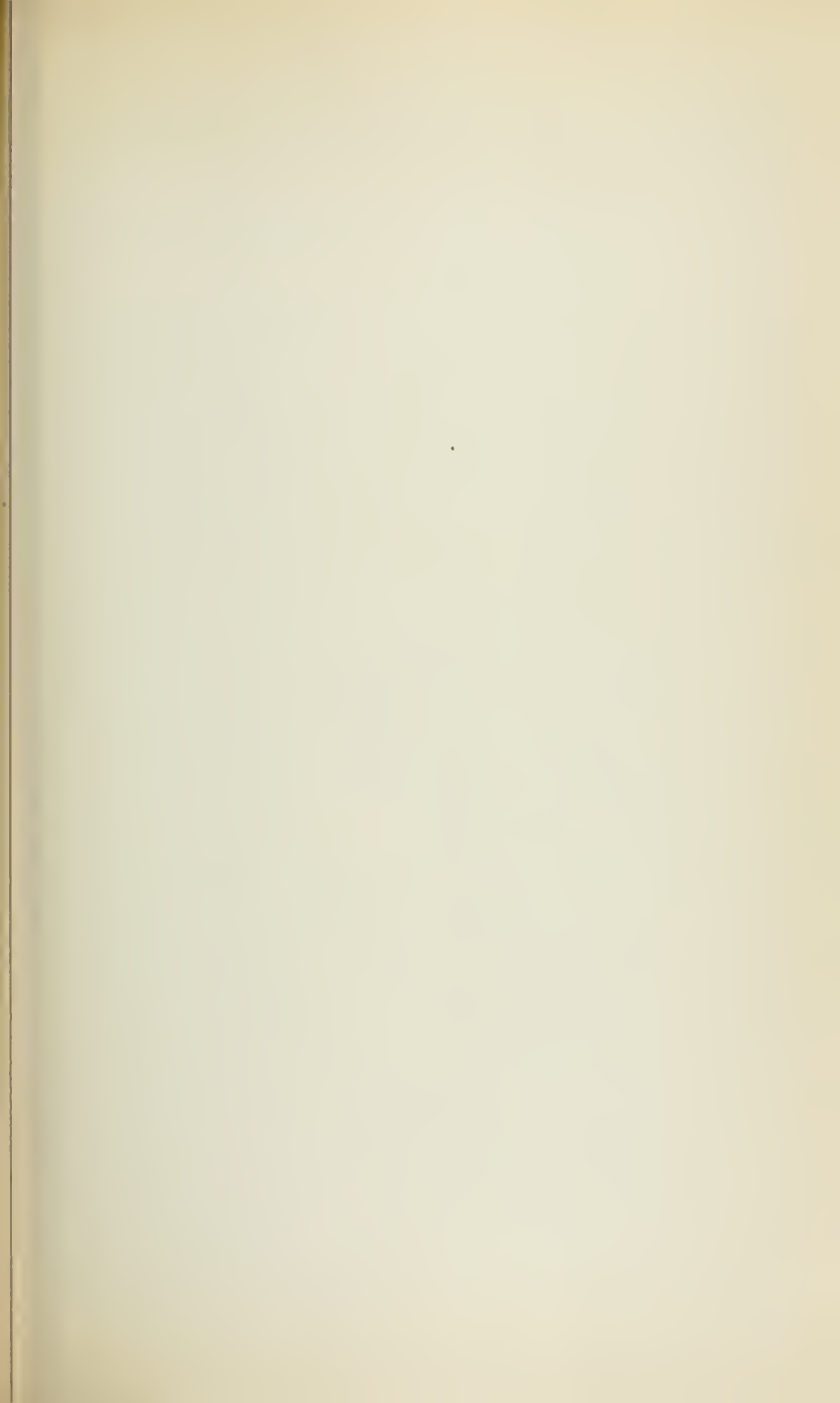
No delivery is necessary to a tenant in

common. *Beaumont v. Crane*, 14 Mass. 400.

Upon these principles, the plaintiffs are entitled to recover the amount due them for the property thus sold and delivered

to the defendants. The damage occasioned to this property by the fire must be borne by the defendants, as owners of the property.

Exceptions sustained.



DAVIS v. RUSSELL, et al.

(52 Cal. 611.)

Supreme Court of California. Jan. Term,
1878.

Ryers & Elliot and Hewell & Turner, for appellants. Terry, McKinn & Terry, Budd & Son, and F. T. Baldwin, for respondent.

BY THE COURT. Davis being the owner of a lot of wheat, deposited it in the warehouse of Russell, took a warehouse receipt for it in the usual form, and thereafter indorsed the same in blank and delivered it to Barney. Barney transferred the receipt to the Bank of Stockton, and the bank transferred it to a person not a party to the action, and the wheat was afterward delivered by Russell to the holder of the receipt. The bank was notified by Davis that he had not sold the wheat to Barney, but the witnesses do not agree whether the notice was before or after the bank transferred the receipt. Before the wheat was delivered to the holder of the warehouse receipt, Davis made a demand upon Russell for a delivery of the wheat, but Russell refused so to do unless the receipt was returned to him. Davis claims that Barney was only his agent for the sale of the wheat, and that he—Barney—transferred the receipt to the bank as security for an antecedent debt due from him to the bank. The defendants claim that Barney purchased the wheat from Davis, that he transferred the receipt to the bank not only as security for an antecedent debt, but also for further advances, which were afterward made, and that the transfer by the bank was prior to the time when it was notified that Davis had not sold the wheat to Barney.

The jury found for the plaintiff.

The court was requested by the defendants to give the following instruction: "The possession of the instrument in writing produced in evidence, dated August 18th, 1875, and called a warehouse receipt, covering this wheat in controversy, together with the plaintiff's indorsement thereon, is of itself presumptive evidence of the ownership of the grain, by the person having such possession of such receipt so indorsed;" but the court refused to give the instruction, and gave the following instructions at the plaintiff's request: "If the jury believe from the evidence that the plaintiff did not sell the wheat in controversy to Barney, but authorized him to sell the same at a fixed price for cash, to be paid on or before delivery, then the indorsement and delivery of the warehouse receipt did not vest Barney with the title of said property, or deprive plaintiff of his title and right to the possession of the wheat;" also, that "the instrument in writing called a warehouse receipt is not a contract for the payment of money or personal property, and cannot be transferred by indorsement, like a negotiable promissory note." Other instructions were given embodying the same legal proposition. There was evidence introduced

by the defendants tending to show that Barney had purchased the wheat from the plaintiff, and that the warehouse receipt, indorsed in blank by the plaintiff, had been transferred to the Bank of Stockton, and by the bank transferred to a person not a party to the action, before the bank was notified by the plaintiff that he had not sold the wheat to Barney; and the defendants were entitled to have instructions given to the jury which would state the effect of such transfers of the warehouse receipt.

The foregoing instruction, requested by the defendants, expresses very fairly the law in that regard. It was held in many cases in the English courts that an assignment of such a receipt does not amount to a constructive delivery of the goods until the warehouseman is notified thereof, and agrees to hold the goods for the assignee. (Benjamin on Sales, sec. 815.) No substantial reason is offered for giving to the assignment of such an instrument an effect differing materially from that of an assignment of a bill of lading. In *Horr v. Barker*, (8 Cal. 613) a warehouse receipt was regarded as standing on the same footing as a bill of lading; and it was held that a transfer of such receipt operated as a transfer of the title to the goods. The doctrine of that case has not been questioned, so far as we are aware, by the courts of this state. If an assignment of the receipt will transfer the title to the goods, it must necessarily follow that the possession of the receipt, indorsed in blank, is presumptive evidence of the ownership of the goods by the holder of the receipt. The defendants were entitled to an instruction which would give them the benefit of that presumptive evidence; although, as between the plaintiff and Barney, and those claiming under Barney, with notice that he was only the agent of plaintiff, (if such was the fact) the plaintiff remained the owner of the wheat.

The court also instructed the jury that "if you believe from all the evidence in this case that Davis did sell the wheat in question to Barney, your verdict will be for the defendants." * * * If, however, you find that there was no sale of this wheat, and that there was a demand and refusal of it by the party, then it is your duty to find a verdict for the plaintiff for a return of the wheat or its value." This instruction entirely ignores any rights which any of the defendants may have acquired, in reliance upon the apparent ownership or authority of the holder of the warehouse receipt, and in that respect is erroneous. It is provided by the Civil Code, sec. 2991, that "one who has allowed another to assume the apparent ownership of property, for the purpose of making any transfer of it, cannot set up his own title to defeat a pledge of the property made by the other to a pledgee who received the property in good faith, in the ordinary course of business, and for value." The evidence seems to leave no room for doubt that the Bank of Stockton received the warehouse receipt from Barney in good faith, and in the ordinary course of business; and upon the authority of *Payne v. Bensley*, (8 Cal. 260) Robin-

son v. Smith, (14 Cal. 94) Naglee v. Lyman, (14 Cal. 450) and Frey v. Clifford, (44 Cal. 355) it must be held that the pre-existing debt of Barney to the bank constituted a valuable consideration within the meaning of that section. If the evidence brings the case within that section, neither the Bank of Stockton nor Russell would be liable to the plaintiff in this action.

Judgment and order reversed, and cause remanded for a new trial.





DENNY v. WILLIAMS.

(5 Allen, 1.)

Supreme Judicial Court of Massachusetts.
Worcester. Oct. Term, 1862.

Contract to recover the price of about 75,000 pounds of wool. The declaration contained six counts, three of which set forth an executory contract for the purchase of the wool, and three were for wool sold and delivered. The answer set up in defence, amongst other things, the statute of frauds. At the trial the plaintiff proved that the defendant agreed to purchase the wool of his brokers, in New York, and introduced in evidence the brokers' note of the contract, which the judge ruled was insufficient to take the case out of the statute. The plaintiff then introduced evidence to show a delivery and acceptance of a portion of the wool, sufficient to satisfy the statute. The defendant requested the court to rule that, in order to entitle the plaintiff to a verdict, he must prove that there had been a delivery of the property sold to the defendant, and an acceptance of it by him, and that there was no evidence to warrant the jury in finding either a delivery or an acceptance. He also contended that, assuming the testimony offered by the plaintiff to be true, the case ought to be withdrawn from the jury, and a verdict directed for the defendant, or that the jury should be instructed that the defendant was entitled to a verdict, on the ground that the evidence was not sufficient to prove such a delivery and acceptance of the wool, or any part thereof, as to make him responsible upon the contract. The judge gave the jury instructions requiring them to find a delivery and acceptance of a portion of the wool, in order to warrant them in giving a verdict for the plaintiff, and defining what would be a sufficient delivery and acceptance for this purpose. The jury returned a verdict for the plaintiff, with damages in the sum of \$10,639.71, and the defendant alleged exceptions.

P. C. Bacon & F. H. Dewey, for plaintiff.
D. Foster, (T. L. Nelson with him,) for defendant.

CHAPMAN, J. The ruling of the judge, that there was no sufficient memorandum in writing of the contract, made it necessary for the plaintiff to prove either an executed contract, by sale and delivery, or a delivery and acceptance of a part of the property, so as to satisfy the statute of frauds, and supply the lack of a sufficient memorandum.

As the contract was made in the city of New York, and was to be performed there, the laws of the state of New York must govern us in respect to its construction and performance. In *Shindler v. Houston*, 1 Comst. 261, the court of appeals say that, to constitute a delivery and acceptance of goods, such as the statute of frauds requires, something more than mere words is necessary. Superadded to the language of the contract, there must be some act of the parties

amounting to a transfer of the possession, and an acceptance thereof by the buyer; and the case of embroiled articles is not an exception to this rule. The case is fully discussed, and the authorities are cited. Under our statute, it is also held that the acceptance must be proved by some clear and unequivocal act. *Snow v. Warner*, 10 Met. 136. Weighing and measuring are not always necessary to constitute a delivery and transfer of property, even when it is sold by weight or measure; but in cases where the property to be sold is in a state ready for delivery, and the payment of money or giving security therefor is not a condition precedent to the transfer, it may well be the understanding of the parties that the sale is perfected; and the interest passes immediately to the vendee, although the weight or measure of the articles sold remains to be ascertained. Such a case presents a question of the intention of the parties to the contract. *Riddle v. Varnum*, 20 Pick. 280. It is also settled that a contract may be one and entire in its origin, and yet, looking to the performance of different things at different times, it may be divisible in its operation. *Knight v. New England Worsted Co.*, 2 Cush. 271. If the performance is several, and the contract divisible, an action will lie on each default. *Badger v. Titcomb*, 15 Pick. 409. The case is to be examined in the light of these principles.

The plaintiff offered evidence tending, as he contended, to prove a delivery and acceptance, sufficient to satisfy the statute. After the evidence on both sides was in, the defendant's counsel requested the court to rule that there was no evidence to warrant the jury in finding either a delivery or an acceptance. The court declined to give this instruction, but left it to the jury to decide, under instructions that are reported, whether there were a delivery and acceptance or not. The exception to this ruling brings the whole evidence before this court; and the principal point argued here is, whether there was such evidence as ought to have been submitted to the jury.

The question whether the jury have found a verdict for the plaintiff against the weight of the evidence is not before us. That question could not be raised in any way except by a motion for a new trial. If there was any evidence which it was proper to submit to a jury, the judge was right in submitting it to them, and the exception must be overruled. It is only in a very limited class of cases that such a question can be brought to this court by exceptions. They are cases where the evidence is insufficient in law to support a verdict. *Commonwealth v. Packard*, 5 Gray, 101. *Chase v. Breed*, 1b. 440. *Commonwealth v. Merrill*, 14 Gray, 417. *Polley v. Lenox Iron Works*, 4 Allen, 329.

In such cases, a refusal of the judge to instruct the jury that the evidence is insufficient is a good ground of exception. It is not necessary that there should be absolutely no evidence. The rule, as stated in *Browne on the St. of Frauds*, c. 15, § 321, is sustained by the authorities cited:

"Whether there has been a delivery and acceptance sufficient to satisfy the statute of frauds is a mixed question of law and fact. But it is for the court to withhold the facts from the jury, when they are not such as can afford any ground for finding an acceptance; and this includes cases where, though the court might admit that there was a scintilla of evidence tending to show an acceptance, they would still feel bound to set aside a verdict finding an acceptance upon that evidence." What this scintilla is, needs to be stated a little more definitely; otherwise it may be understood to include all cases where, on a motion for a new trial, a verdict would be set aside, as against the weight of the evidence. It would be impossible to draw a line theoretically, because evidence in its very nature varies from the weakest to the strongest, by imperceptible degrees. But the practical line of distinction is, that if the evidence is such that the court would set aside any number of verdicts rendered upon it, to ties quotes, then the cause should be taken from the jury, by instructing them to find a verdict for the defendant. On the other hand, if the evidence is such that, though one or two verdicts rendered upon it would be set aside on motion, yet a second or third verdict would be suffered to stand, the cause should not be taken from the jury, but should be submitted to them under instructions. This rule throws upon the court a duty which may sometimes be very delicate; but it seems to be the only practicable rule which the nature of the case admits.

It appears by the report in this case, that in the summer of 1857 the plaintiff purchased a quantity of wool at Chicago, and sent it at various times to Pettibone & Co. of New York, wool brokers, whom he had made his agents to receive, store, grade and prepare it for sale, and also to sell it; their rates of compensation being stipulated. In the month of August, after two hundred and eighty-one bales of the wool had been received, and about one hundred bales which had been purchased were on their way and expected to arrive, the defendant called on Pettibone & Co., and made some examination of the wool on hand, and some inquiries about the whole; but made no contract. But, as the conversation at this time seems to have been referred to subsequently in making the bargain, it may be well to state it, as represented in the twenty-fifth answer of Pettibone's deposition. This witness was the person with whom the plaintiff dealt. He says, "Mr. Williams came to our place in New York, and the conversation turned on the subject of wool, as usual, to my best recollection. I think I told him I had a lot of wool to sell, as usual. We went up stairs and there the wool lay opened. My impression is, he asked me what I asked for that wool. I answered 'Fifty-two and a half cents, six months.' I think he asked, 'What paper?' I think I answered, 'Erastus Williams's, if I could get it.' I don't recollect what followed. The conversation became general about the wool, its quality and condi-

tion, and where it came from. Then I think he asked me if fifty cents, six months, would buy it. I answered, I think, if I could get the offer, I would submit it to the owner."

The defendant called again on the 5th of September. The most particular statement of the conversation on that day is contained in the tenth answer, which was excluded by the court. It is as follows: "Mr. Williams remarked that he might want some portions of the wool for his son, or Winslow, I forget which words he used. I think he mentioned number two, but am not certain. (The witness had already stated that the wool had been graded, and described the grades.) I think that was it; that he would advise us on his return home. The rest he should want sold; us to sell for him; that was the substance of it. There might have been some other things, I don't recollect." In his thirteenth answer he says, "I think the substance of the conversation was this: that I offered him the wool for fifty cents, six months, his notes, and he said he would take it; or he offered me his notes, fifty cents, six months, and I took it." In his thirtieth answer he says, "I told Mr. Williams I thought there were about one hundred bales to arrive of this same lot. The wool that was to arrive was to equal in grade and condition the wool already opened, agreeing that the wool should average as number one grade." In his thirty-first answer he says, "Tare actual, or three pounds to the bag. Bags to be charged at fifty cents apiece." In the thirty-second answer, "Don't recollect as to unwashed wool; presume it was one third off for wool unwashed. That was our custom." The thirty-fifth cross-interrogatory is, "Will you swear Mr. Williams ever did agree that his notes should bear date before he had examined and accepted the whole wool?" Answer, "I won't swear to anything. No, I don't suppose he did. I have no idea about it." To the forty-third cross-interrogatory he says, he agreed on the 8th of September that the whole lot of wool, both on hand and to arrive, should average number one of the grade that he divided it into. In his eighteenth answer he says: "The question arose, how long can this wool remain here free of expense to the buyer, to Mr. Williams, for instance. I think I stated, until the first of October; after that, he was to assume the expense of the wool. The substance was, that if a man came in and wanted to buy the wool, I should have taken him up, and sold him the wool as Mr. Williams's wool. That was the way I understood it." His twenty-first answer states that "he wanted we should sell it if we could."

The statements of Mr. Pettibone are fragmentary, and his memory seems to be very defective. His deposition is quite long; but the foregoing extracts are all that need be made from it.

On the 7th of September a sale note was made by a member of the firm and sent to the defendant. It was supposed to be sufficient to bind the bargain; but proved to be defective. On the 11th of September

the defendant called and inquired if all the wool had arrived, and said he did not wish to give his notes till all the wool had arrived. Pettibone then added to his memorandum of the sale on his books, "The notes to be dated when all the wool is examined and ready to deliver. H. A. P." On the same day, the defendant said to Snyder, a member of the firm, after some conversation about the wool, "My son would like one or two of the grades to work in his mill, and I shall want that part to be shipped to him; and the rest I shall want you to sell for me. I will let you know which of the grades my son will want, and shall look to you to see that the wool that is coming is equal to what is here." The witness answered, "We will do so." This was after the defendant had received the sale note.

The correspondence of the parties has been produced. None of the letters of Mr. Williams contains anything tending to establish the plaintiff's case. A letter of Denny to Pettibone of September 15th, is significant: "The wool is in your lofts; is all right and ready to deliver; and before that can be delivered, the balance will be ready, and if it is not, he certainly will not be obliged to pay for it before he receives it." It appears from this that the plaintiff did not then understand that any of the wool had then been delivered; or that the notes were to be given till the whole was delivered. A letter of Pettibone & Co. of September 10th says, "We cannot get the paper for the wool until we get all the wool in. We want to get the wool in order and weighed up as soon as possible to do it." On the 11th of September they write, "He will claim a delay in the date of the notes, as he says the wool is not in a condition to deliver. What is the matter, and why this delay?" On the 12th of September they write, "We are as anxious as yourself to get the sale to Williams settled. The only delay will be in the arrival of the one hundred bales." September 21st, they write, "We are now packing and getting it in shape to weigh, and get in order to settle. We hope the balance will be along this week, or that we shall know where it is." These letters admit that none of the wool had then been delivered, and indicate that it could not be, till the remaining one hundred bales should arrive and be graded and weighed.

The residue did not arrive until September 25th, and proved to be ninety-seven bales. On the 26th of September the defendant wrote to Pettibone & Co., declining to take the wool, and assigning the

delay as a reason. The wool was not all graded and weighed till October 20th.

All this testimony, as well as the testimony not cited, concurs in showing that the execution of the contract was to be entire. The defendant wished the whole to be graded and weighed, so that he could decide, before making any sales, what portion to forward to his son; and also ascertain whether the quality of the whole conformed to the contract; and the amount for which he was to give his notes. There is no intimation in the conversation or the letters that the delivery was to be in separate parcels or at different times, or that the contract was in any respect divisible. And as to the agency of Pettibone & Co. the conversation stated does not show that they were to be the defendant's agents to accept the wool. They were the agents of the plaintiff as to the sale and delivery, and acted exclusively for him. The agency for the defendant, which was spoken of, related to the disposal of the wool after the delivery of it to the defendant and the acceptance by him. It could not have been a present agency to sell; because the defendant had not then determined what part he would desire to sell. He had first to consult his son. And before Pettibone & Co. could sell the wool as his agents, they would need instructions as to the terms of sale. There were no instructions on this subject.

It appears, therefore, that up to the time when the defendant repudiated the contract on the 26th of September, it stood merely in parol, without any act of delivery or acceptance, either actual or constructive.

The defendant would have had no right, by the terms of the contract, to take possession of any part of the wool, or sell any part, against the consent of the plaintiff; and there is no evidence that the plaintiff had in any communication with the defendant waived his rights in this respect, or that the defendant desired him to do so. The property remained unchanged. And as the contract was invalid by the statute of frauds, for want of a sufficient writing, and for want of a delivery and acceptance to satisfy the statute, instead of a writing, we think the jury should have been instructed to find a verdict for the defendant, on the ground that the evidence was insufficient in law to sustain a verdict for the plaintiff. There does not seem to us to be even a scintilla of evidence to prove any act of delivery or acceptance. Exceptions sustained.



DEVOE v. BRANDT.

(53 N. Y. 462.)

Court of Appeals of New York. Sept. 30, 1873.

Appeal from order setting aside a verdict for plaintiff, and granting a new trial.

Action to recover goods fraudulently purchased by defendant, George Samuels, of plaintiff.

A. R. Dyett, for appellants. C. Bainbridge Smith, for respondent.

PECKHAM, J. Replevin in the detinet for certain goods of the value of over \$600, fraudulently purchased, as is alleged by defendant Samuels, of the plaintiff, with intent to cheat plaintiff out of their value. They were subsequently found in the possession of the defendant Brandt. The defendant Samuels made default; Brandt answered, denying the complaint, and setting up among other things, that he bought the goods at a public auction thereof as the goods of Samuels.

The case was tried at the New York circuit. It appeared in proof, that in March, 1865, Brandt commenced an action against this Samuels for goods sold and delivered to him in 1863 and 1864, chiefly in 1863. That Samuels put in no answer, but no judgment was perfected until the 7th of November, 1866, and then for \$4,078.34 damages and costs; and execution issued thereon on the same day to the sheriff of New York, which was returned on the 10th of December, 1866, satisfied to \$2,712.77, and nulla bona as to the residue. It was shown that Samuels had been in the habit of purchasing goods of the plaintiff, to a limited extent, prior to this sale. That this sale was made, and the larger part of the goods delivered on the 26th of October, 1866, a portion on the 30th of October, and the remainder on the 8th of November following. That Samuels, at the time of the purchase by him, said nothing as to his circumstances, or as to the suit then pending against him in favor of Brandt, in which the right to enter up judgment had been then due over a year and a half; evidence was also given of the replevin papers in this case, and of an undertaking given by the defendants for a return of the property replevined, before it had been delivered to plaintiff.

The defendants offered no evidence. The jury found for the plaintiff. The general term, in the first district, granted a new trial.

It is clear that there was sufficient evidence to go to the jury upon the question whether this was a fraudulent purchase by Samuels. There was abundant evidence for their consideration that this purchase was made with a view of cheating the plaintiff, and that he never intended to pay for the goods. He concealed from the plaintiff a fact (the right of Brandt to enter up his judgment for \$1,000), which he knew to be most material, and he well knew that if plaintiff had been aware of that fact he never would have made the sale.

There is good ground for inferring, from the facts proved, that he intended to com-

mit a fraud in this purchase, and he deliberately proceeded to its consummation. Such a fraud may be as easily consummated by a suppression of the truth as by the suggestion of a falsehood. The law is guilty of no such absurdity as to require a false affirmation as the only basis on which to prove a fraud among merchants. It is not necessary or usual for merchants to inquire of their customers as to their pecuniary condition at each sale. The fact to be proved is that the purchase was made with intent to defraud. Any evidence that will satisfy a jury of that fact, that affords reasonable proof of such a purpose makes a case for a jury. That evidence may be positive or circumstantial, and as various as the proof of any other fact.

The proof here is abundant; obviously defendant Samuels was then wholly insolvent. The deficiency on the execution showed him able to pay only about fifty per cent. of these two debts. He purchased when he knew the goods would or might be all seized and consumed upon this execution. In fact a portion of these goods was delivered after the execution was issued. It would seem as if he bought in order to subject the goods to that execution; and he offers no explanation. *Nichols v. Michael*, 23 N. Y. 264, 274; 80 Am. Dec. 259; *Hennequin v. Naylor*, 21 N. Y. 139; *Earl of Bristol v. Wilsmore*, 1 Barn. & Cress. 514. We may assume then that these goods were fraudulently purchased. No title then passed, and the vendor can retake them from any one but a bona fide purchaser. Is Brandt such a purchaser? The goods are found in his possession, and it rests with him to show that he is a bona fide purchaser thereof. He shows nothing. He alleges in his answer that he bought them at public auction, as the goods of Samuels. But he gives no proof of that; and it would not aid him if he did, unless he showed that he paid value for them. But assume that Brandt seized these goods upon his execution and purchased them at a sale thereon, he did not thereby become a bona fide purchaser.

In this case, upon several grounds: First. The facts disclosed show that there was enough, to put him upon inquiry as to the fraud of Samuels, even if he could otherwise become a bona fide purchaser (*Durell v. Haley*, 1 Paige, 492, a case much like the one at bar); Second. Because the plaintiff in the execution made no advances thereat. It was not necessary, to avoid such sale, that the execution creditor knew of the fraudulent purchase (*Ash v. Putnam*, 1 Hill, 302; *Rout v. French*, 13 Wend. 570; 28 Am. Dec. 482; *Cary v. Hottel*, 1 Hill, 311; 37 Am. Dec. 323; *Atwood v. Dearborn*, 1 Allen, 483; 79 Am. Dec. 755; *Mowrey v. Walsh*, 8 Cow. 238; *Acker v. Campbell*, 23 Wend. 372; *Earl of Bristol v. Wilsmore*, *supra*); Third. Because such property, so fraudulently purchased, is not the subject of levy and sale by a sheriff. Replevin in the caput will be therefore at the suit of the defrauded vendor. See same authorities.

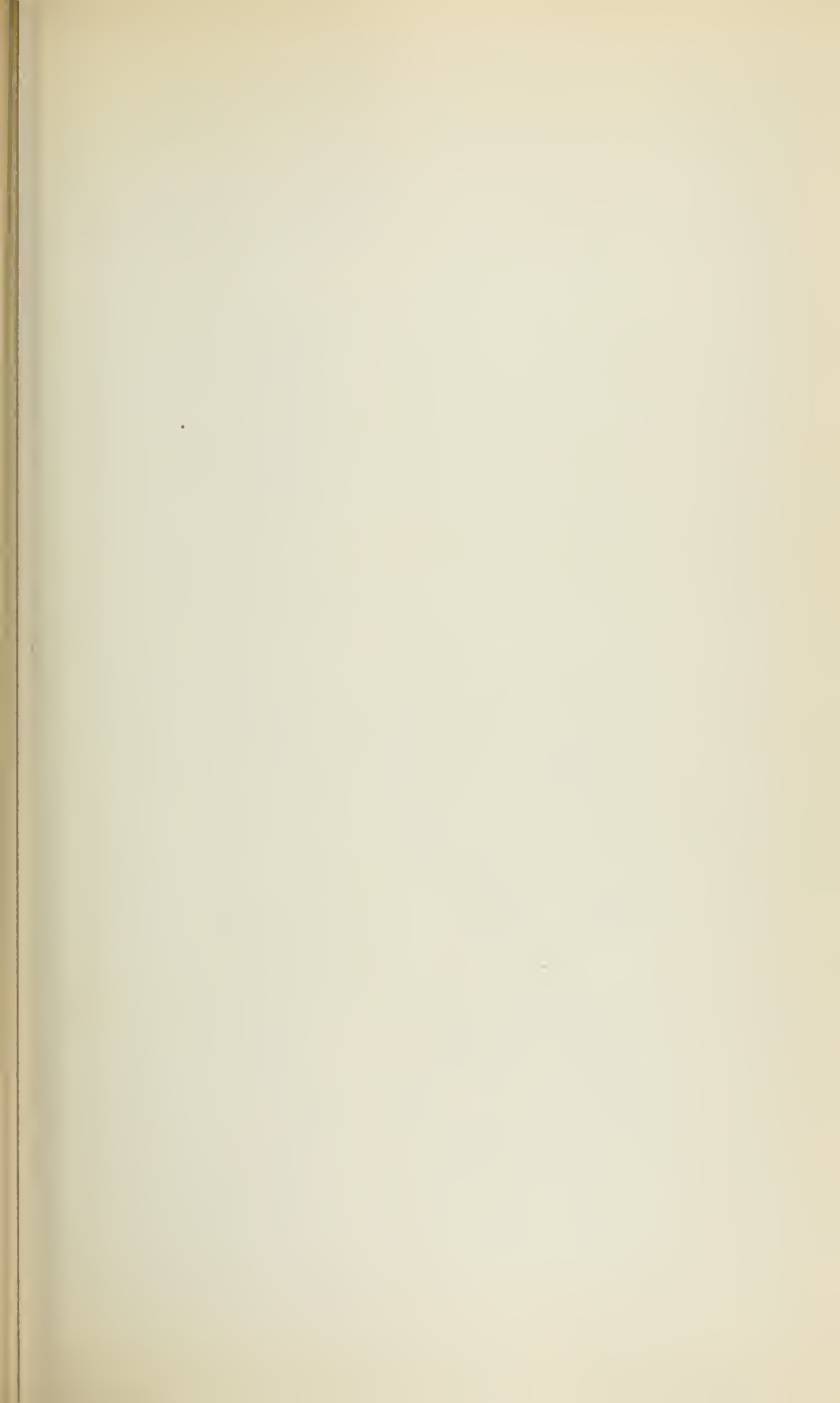
It is only necessary to decide in this case that Brandt, the execution creditor, does

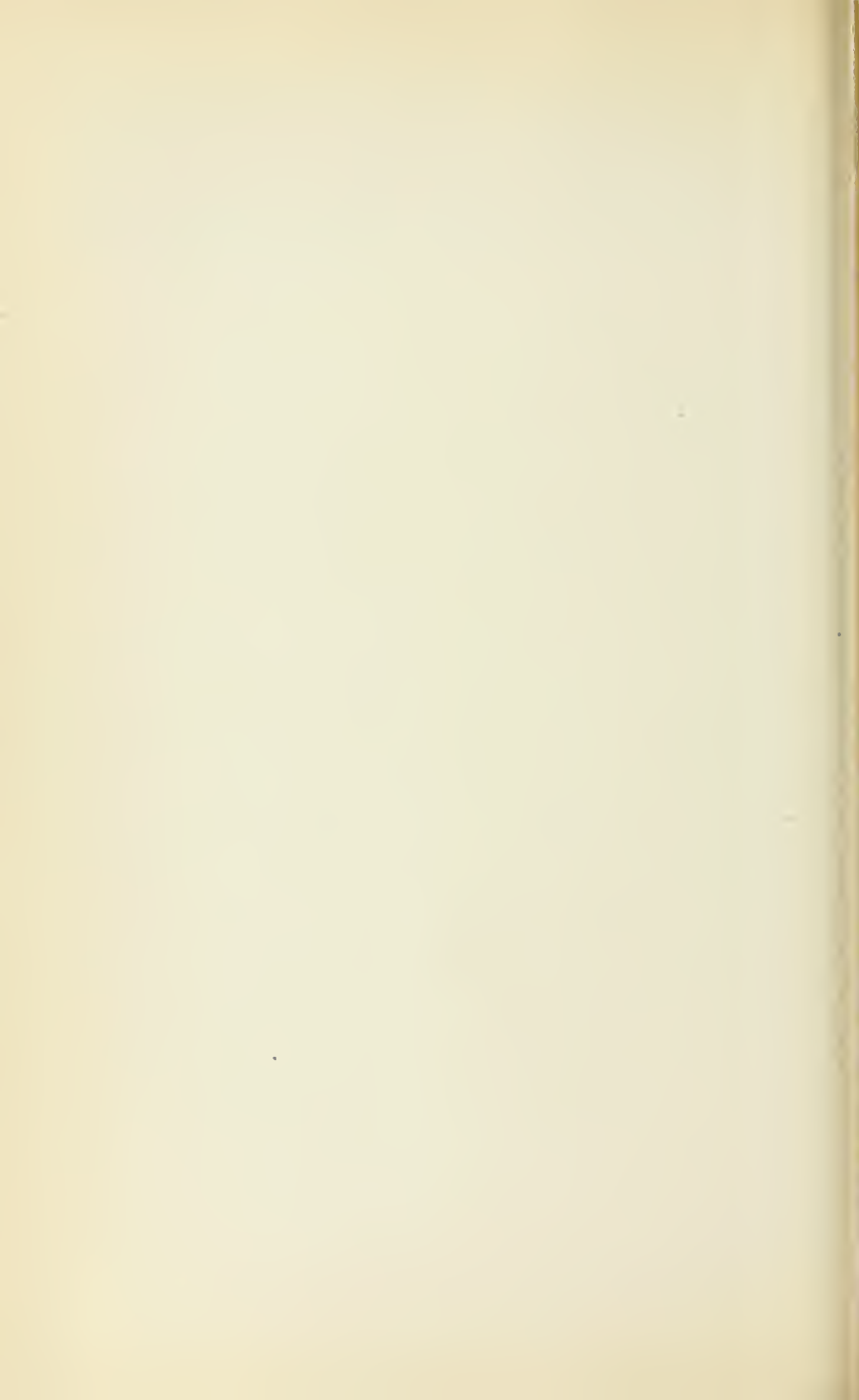
not become a bona fide purchaser by buying goods at a sale thereon which were fraudulently purchased by the defendant in that execution. That proceeding gave him no better title than a mere delivery would from the fraudulent vendee. He advanced nothing, and he lost nothing by the proceeding. The sale on the execution did not contain the first element to constitute this defendant a bona fide purchaser. The execution was returned unsatis-

fied in part. No lien was therefore relinquished, and the amount realized from a stranger's property would be stricken from the execution on application to the court. The charge of the court was therefore right.

The order of the general term granting a new trial should be reversed and judgment ordered upon the verdict for the plaintiff.

All concur.





DEXTER v. NORTON et al.

(47 N. Y. 62.)

Court of Appeals of New York. 1871.

Action for damages for breach of a contract to sell and deliver cotton. The opinion states the facts. Judgment for defendant dismissing the complaint.

James C. Carter, for appellant. Wm. W. McFarlane, for respondents.

CHURCH, C. J. The contract was for the sale and delivery of specific articles of personal property. Each bale sold was designated by a particular mark, and there is nothing in the case to show that these marks were used merely to distinguish the general kind or quality of the article, but they seem to have been used to describe the particular bales of cotton then in possession of the defendant. Nor does it appear that there were other bales of cotton in the market of the same kind, and marked in the same way. The plaintiff would not have been obliged to accept any other cotton than the bales specified in the bought note.

The contract was executory, and various things remained to be done to the one hundred and sixty-one bales in question by the sellers before delivery. The title therefore did not pass to the vendee, but remained in the vendor. *Joyce v. Adams*, 8 N. Y. 291.

This action was brought by the purchaser against the vendor to recover damages for the non-delivery of the cotton, and the important and only question in the case is, whether upon an agreement for the sale and delivery of specific articles of personal property, under circumstances where the title to the property does not vest in the vendee, and the property is destroyed by an accidental fire before delivery without the fault of the seller, the latter is liable upon the contract for damages sustained by the purchaser.

The general rule on this subject is well established that where the performance of a duty or charge created by law is prevented by inevitable accident without the fault of the party he will be excused, but where a person absolutely contracts to do a certain thing not impossible or unlawful at the time, he will not be excused from the obligations of the contract unless the performance is made unlawful, or is prevented by the other party.

Neither inevitable accident nor even those events denominated acts of God will excuse him, and the reason given is, that he might have provided against them by his contract. *Paradine v. Jane*, Alexn. 27; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349.

But there are a variety of cases where the courts have implied a condition to the contract itself, the effect of which was to relieve the party when the performance had without his fault, become impossible; and the apparent confusion in the authorities has grown out of the difficulty in determining in a given case whether the im-

plication of a condition should be applied or not, and also in some cases in placing the decision upon a wrong basis. The relief afforded to the party in the cases referred to is not based upon exceptions to the general rule, but upon the construction of the contract.

For instance, in the case of an absolute promise to marry, the death of either party discharges the contract, because it is inferred or presumed that the contract was made upon the condition that both parties should live.

So of a contract made by a painter to paint a picture, or an author to compose a work, or an apprentice to serve his master a specified number of years, or in any contract for personal services dependent upon the life of the individual making it, the contract is discharged upon the death of the party, in accordance with the condition of continued existence, raised by implication. *Cutter v. Powell*, 2 Smith Lead. Cas. 50.

The same rule has been laid down as to property: "As if A. agrees to sell and deliver his horse Eclipse to B. on a fixed future day, and the horse die in the interval, the obligation is at an end." *Benj. Sales*, 424. In replevin for a horse and judgment of retorno habendo, the death of the horse was held a good plea in an action upon the bond. *Carpenter v. Stevens*, 12 Wend. 589. In *Taylor v. Caldwell*, 3 Best & Smith, 836, A. agreed with B. to give him the use of a music hall on specified days, for the purpose of holding concerts, and before the time arrived the building was accidentally burned; Held, that both parties were discharged from the contract. *Blackburn, J.*, at the close of his opinion, lays down the rule as follows: "The principle seems to us to be, that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance, arising from the perishing of the person or thing, shall excuse the performance." And the reason given for the rule is, "because from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."

In *School District v. Dauchy*, 25 Conn. 539, 68 Am. Dec. 371, the defendant had agreed to build a school-house by the 1st of May, and had it nearly completed on the 27th of April, when it was struck by lightning and burned; and it was held that he was liable in damages for the non-performance of the contract. But the court, while enforcing that general rule in a case of evident hardship, recognizes the rule of an implied condition in case of the destruction of the specific subject-matter of the contract; and this is the rule of the civil law. *Pothier Cont. Sale*, art. 4, § 1, p. 31. We were referred to no authority against this rule. But the learned counsel for the appellant, in his very able and forcible argument, insisted that the general rule should be applied in this case. While it is difficult to trace a clear distinction between this case and those where

no condition has been implied, the tendency of the authorities, so far as they go, recognize such a distinction, and it is based upon the presumption that the parties contemplated the continued existence of the subject-matter of the contract.

The circumstances of this case are favorable to the plaintiff. The property was merchandise sold in the market. The defendant could, and from the usual course of business we may infer did, protect himself by insurance; but in establishing rules of liability in commercial transactions, it is far more important that they should be uniform and certain than it is to work out equity in a given case. There is no hardship in placing the parties (especially the buyer) in the position they were in before the contract was made. The buyer can only lose the profits of the purchase; the seller may lose the whole contract price, and if his liability for non-delivery should be established, the enhanced value of the property. After considerable reflection, I am of the opinion that the rule here indicated of an implied condition in case of the destruction of the property bargained without fault of the party, will operate to carry out the intention of the parties under most circumstances, and will be more just than the contrary rule. The buyer can of course always protect himself against the effect of the implied condition, by a pro-

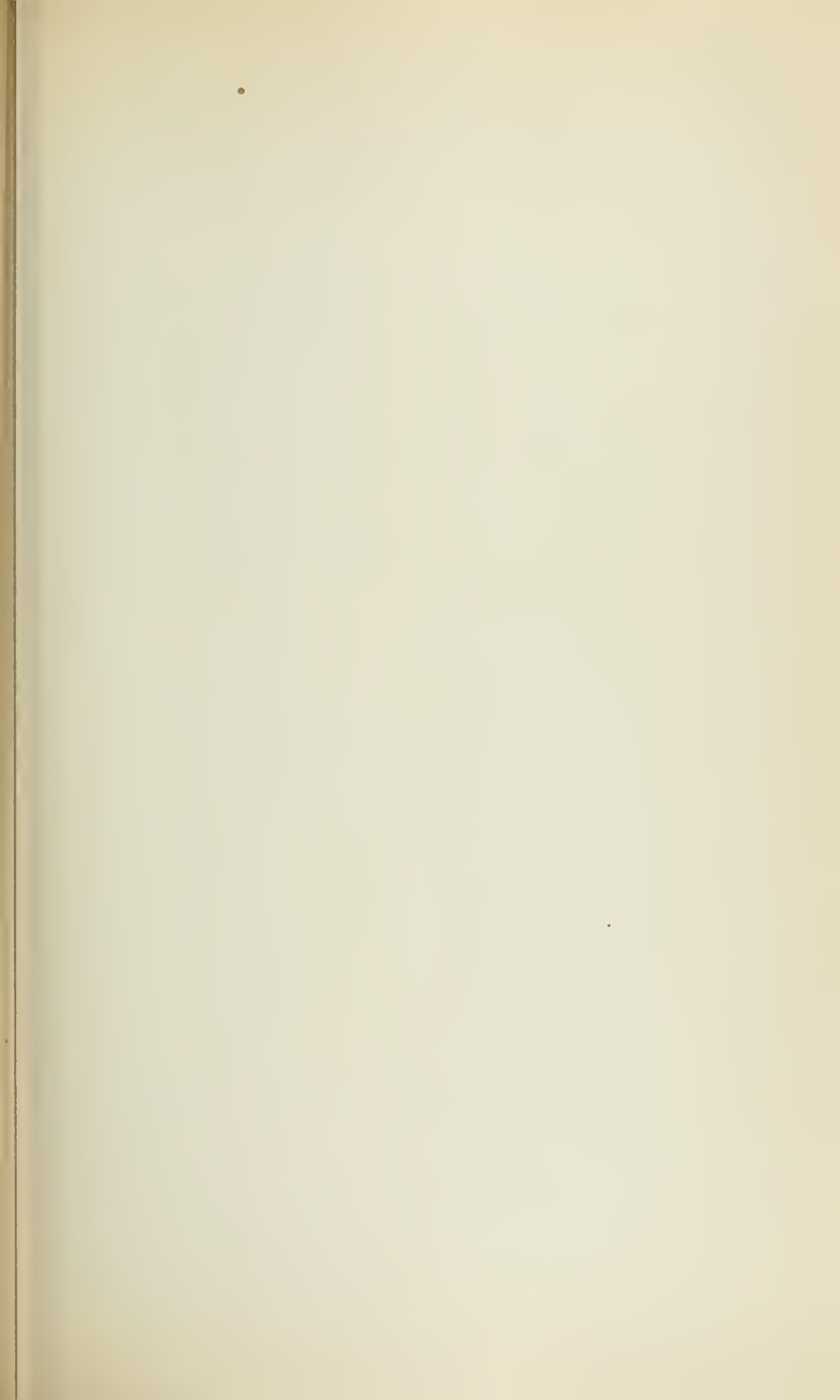
vision in the contract that the property shall be at the risk of the seller.

Upon the grounds upon which this rule is based of an implied condition, it can make no difference whether the property was destroyed by an inevitable accident or by an act of God, the condition being that the property shall continue to exist. If we were creating an exception to the general rule of liability, there would be force in the considerations urged upon the argument, to limit the exception to cases where the property was destroyed by the act of God, upon grounds of public policy, but they are not material in adopting a rule for the construction of the contract so as to imply a condition that the property was to continue in existence. It can make no difference how it was destroyed, so long as the party was not in any degree in fault. The minds of the parties are presumed to have contemplated the possible destruction of the property, and not the manner of its destruction; and the supposed temptation and facility of the seller to destroy the property himself cannot legitimately operate to affect the principle involved.

The judgment must be affirmed.

ALLEN, GROVER, and RAPALLO, JJ., concur; PECKHAM and FOLGER, JJ., dissent.

Judgment affirmed.



DOANE et al. v. DUNHAM.

(79 Ill. 181.)

Supreme Court of Illinois. Sept. Term, 1875.

Assumpsit by John H. Dunham against John W. Doane and others for certain sugar sold and delivered. From a judgment for plaintiff, defendants appeal. Reversed.

Plaintiff, a commission merchant, had on hand a lot of Mollar & Martin's powdered sugar, and one of his employes called on defendants, wholesale grocers, and sold them 20 barrels of such sugar, at 13½ cents per pound. No time was specified for the delivery of the sugar, but from the course of business it would seem to be at the option of the buyer, to be exercised within a reasonable time. No specific barrels were set apart at the time of the sale, but defendants, two days later, sent to plaintiff's store for the sugar, and 20 barrels were delivered. It was kept by defendants without any examination for 26 days, when it was found to be of an unmerchantable quality. It appeared originally to have been powdered sugar, of Mollar & Martin's make, but was caked so hard as to be useless as powdered sugar, and not worth the price paid for any purpose. Defendants' offer to return it was refused.

Hugh A. White and Sidney Smith, for appellants. Hawes & Lawrence, for appellee.

WALKER, J. This case was previously before this court, and is reported in 65 Ill. 512. The facts presented by this record do not vary materially from those stated in the opinion, as reported, except there seems to be a conflict of evidence on the last trial as to the length of time the sugar was retained by appellants before it was examined, found to be different from that intended to be purchased, and the notice to take it back.

When the case was formerly before us, it was held that this was an executory contract, and after the sugar was received appellants were entitled to a reasonable time within which to make an examination, and to give notice to remove the sugar; and that whether the notice was given in apt time was a question to be determined by the jury, in the light of all the attending circumstances, and, of course, with proper instructions from the court.

Appellee having again recovered a judgment for the supposed value of the sugar, appellants again bring the record to this court, and seek a reversal, upon the grounds that the court below gave improper instructions on behalf of appellee, and refused to give proper ones asked by appellants.

An examination of those given, of which complaint is made, fails to disclose error. They inform the jury that there should have been an examination of the sugar, and a notice to take it back, within a reasonable time, considering all the circumstances. This is, no doubt, true, as a legal proposition. Even under clear and satisfactory evidence that it was the gen-

eral and uniform usage for the kind of goods in question never to be examined until the wholesale merchant sold to his customer, the proposition is correct. If such was the usage, and both parties dealt with reference to it, then it would, according to such usage, be within a reasonable time to examine it when offered for sale by appellants. But the rule, no doubt, has the limit that it must be so offered in due course of trade. A person who should buy as speculation, or with the intention of holding it for sale at a distant period of time, could not claim its benefits. It could only be applied in cases falling within the general course of trade.

The court below refused to instruct for appellants, that:

"If the jury believe, from the evidence, that it is not the custom among wholesale dealers in Chicago, engaged in business as defendants were, to examine sugar of the kind and quality sold by plaintiff to the defendants, upon receiving the same in store, or upon sale of the same to customers, and that it was not customary for such sugar to be examined until opened by dealers to sell from to customers, and that the sugar was damaged when it was delivered, and not of the quality sold them, the jury are to take into consideration all of these facts and things in determining whether defendants gave plaintiff notice, within a reasonable time, to take back said sugar; and if they find therefrom that they did, then they must find for the defendants."

If such was the uniform custom, understood and acted upon by the trade in Chicago, then it is but a fair presumption that the parties acted upon it, and should be governed by it. There was sufficient evidence upon which to base the instruction, and it should have been given.

Appellants asked, but the court refused to give, this instruction:

"If the jury believe, from the evidence, that, according to the well established usage and custom of trade among wholesale dealers in standard powdered sugar in Chicago, the same is sold and handled in original packages, and no examination is made as to quality or condition thereof upon purchase or sale thereof, and that the plaintiff was familiar with said usage and custom, and had long been in the habit of handling and dealing in said sugar in Chicago, and that the sugars in question were not examined by either parties when taken from plaintiff's store; and if the jury also believe, from the evidence, that said sugar was caked when so taken from plaintiff's store, and not in the condition contemplated by either plaintiff or defendants, and that the defendants dealt with said sugars pursuant to said usage and custom, and that as soon as they found out that said sugar was damaged they offered to return the same, and notified said plaintiff to take same away, and that the plaintiff neglected so to do, and that the same was destroyed by fire while being so held by defendants, subject to the order of said plaintiff, then they must find for the defendants."

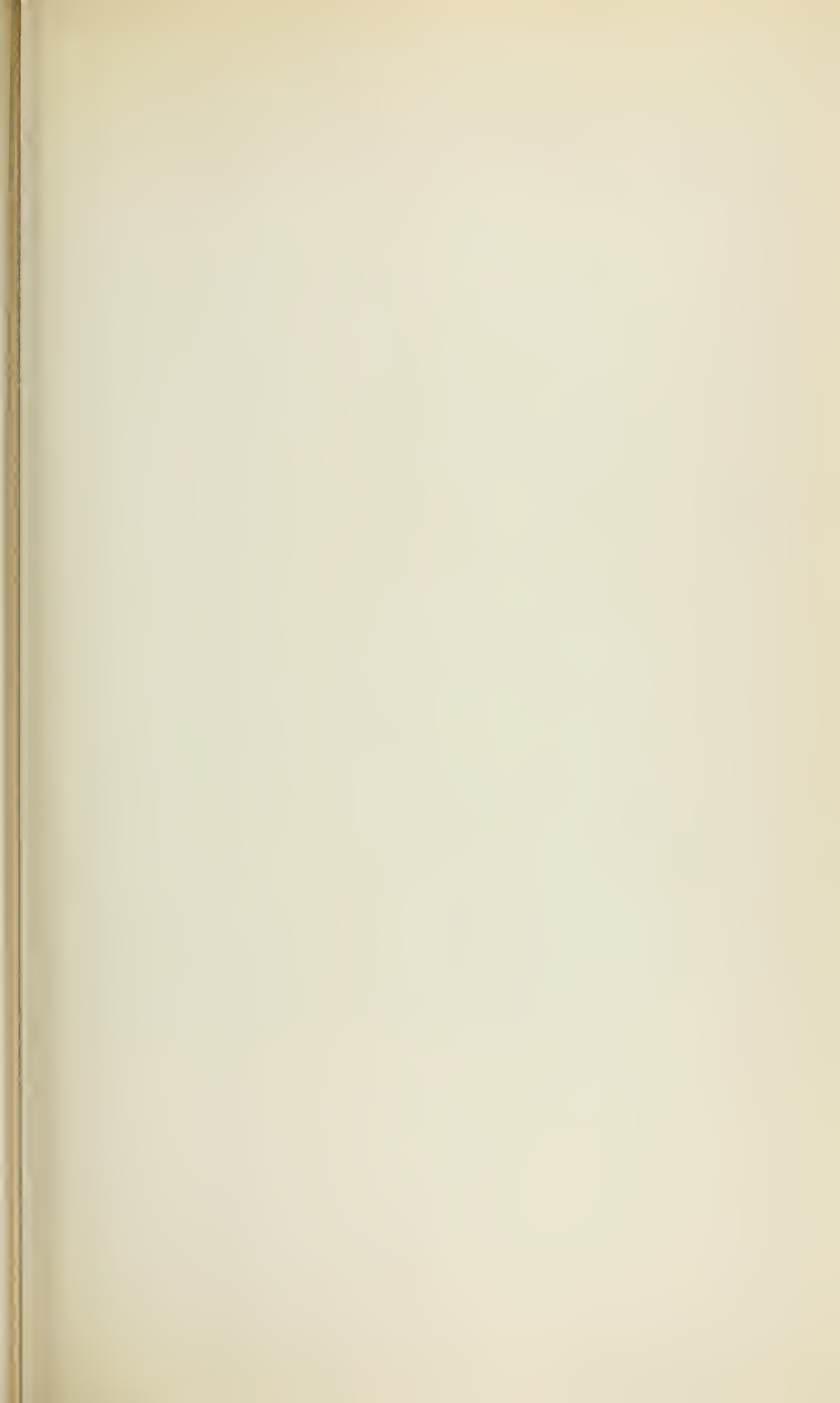
In this, we think, the court erred.

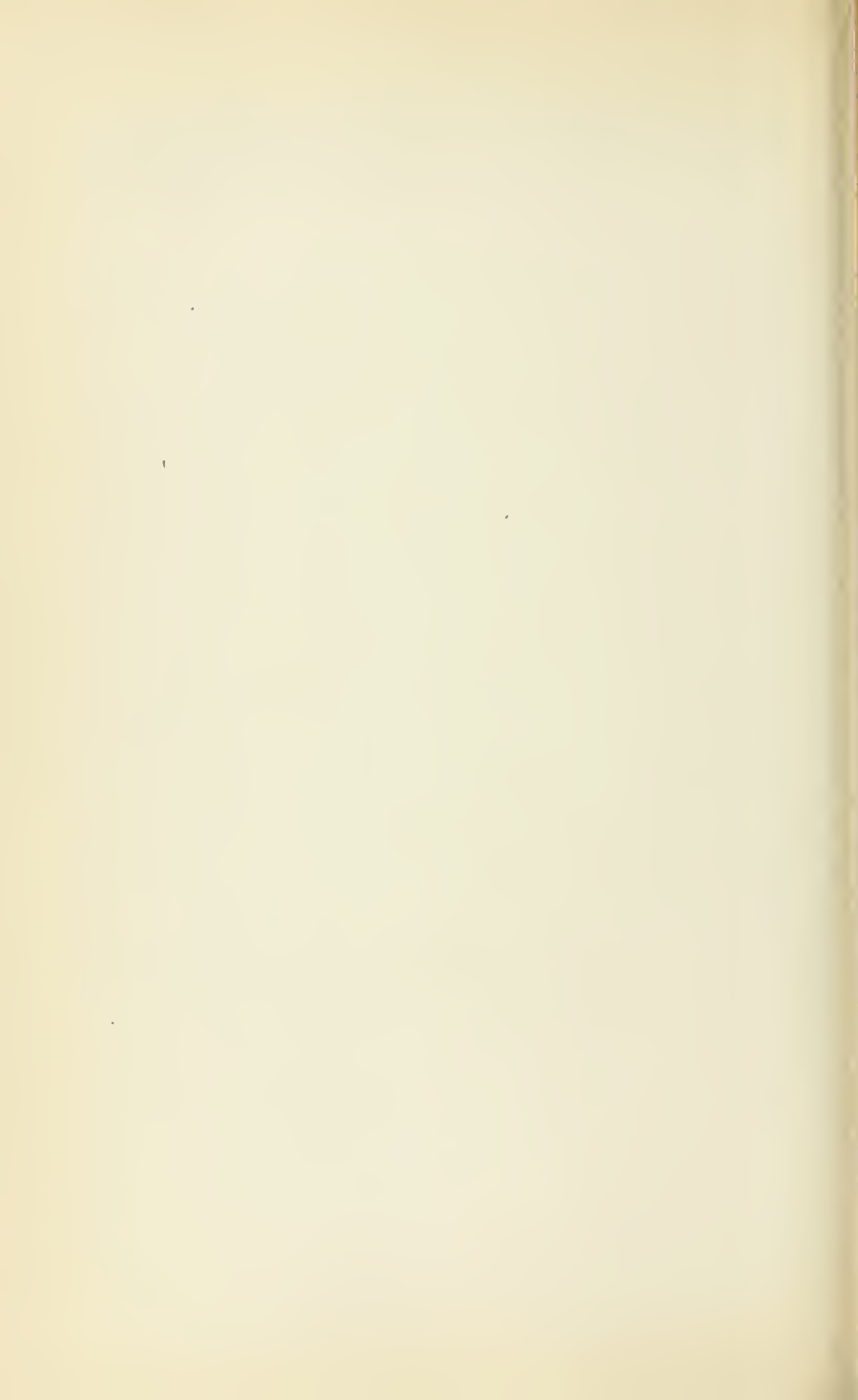
It has been frequently held by this court,

and the rule seems to be general, that custom and usages of trade are supposed to enter into and form a part of all contracts, where the usage or custom prevails, in reference to the matter to which the contract relates. And if such be the presumption, then it was manifest error to refuse this instruction.

For the wrongful refusal to give these instructions, the judgment of the court below is reversed and the cause remanded.

Judgment reversed.





DONALDSON v. FARWELL et al.

(93 U. S. 611.)

Supreme Court of the United States. Oct. Term, 1876.

Error to the circuit court of the United States for the eastern district of Wisconsin.

Emanuel Mann, a merchant at Richfield, Wis., filed, May 21, 1872, his petition in bankruptcy. He was duly adjudged a bankrupt the 6th day of June, and the plaintiff was, on the 1st day of July, appointed his assignee. In the month of April of that year the defendants sold, at Chicago, to Mann, on credit, merchandise, amounting in value to \$5,000. The last of the invoices bears date the 17th of that month. His son was the agent in making the purchase, and directed the goods to be shipped to Milwaukee, to be hauled from there to Richfield. He knew that his father was then, and for two or three years before had been, insolvent, and testified that at the time of the purchase he did not expect that his father would pay for the goods; that he did not expect to pay for them himself; and that his object in having them sent to Milwaukee was to place them in the hands of one Schram, in order that they should be there disposed of, and the proceeds paid to some creditors of his father, who had sold him produce and advanced him money. The goods were shipped to "E. Mann, Milwaukee," and, on their arrival, sent to Schram's store. Mann was reputed to be solvent. The defendants had no notice of his insolvency until the last days of May. In June they took possession of the goods, with the exception of \$100 in value, in the store of Mann, at Richfield, and, after formally demanding them of the assignee, shipped them to Chicago. This action is brought by the assignees to recover the value of them. The court gave the jury a general charge, to the following parts of which the plaintiff excepted: "The sale made by the defendants passed the title in the property to the bankrupt, but it passed a defeasible title; that is to say, it could be rendered inoperative at the instance of the vendors, Farwell & Co. If the bankrupt retained the property at the time of the filing of the petition in bankruptcy, the title passed to the assignee; and, as we think, the weight of authority is it passed as a defeasible, and not as an

absolute, title, with the right still on the part of the vendors to reclaim the property, provided it was done within a reasonable time after the sale, and after knowledge of the fraud which had been perpetrated." There was a verdict for the defendants. Judgment having been rendered thereon, the assignee sued out this writ of error.

W. P. Lynde, for plaintiff in error. Mr. E. Mariner, contra.

Mr. Justice DAVIS delivered the opinion of the court.

The instructions present the questions of law arising upon the facts which this controversy involves. The doctrine is now established by a preponderance of authority, that a party not intending to pay, who, as in this instance, induces the owner to sell his goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods. *Byrd v. Hall*, 2 Keyes, 617; *Johnson v. Monell*, id. 655; *Noble v. Adams*, 7 Taunt. 59; *Killy v. Wilson, Ryan & Moody*, 178; *Bristol v. Wilmore*, 1 Barn. & Cress. 514; *Stewart v. Emerson*, 52 N. H. 391; *Benjamin on Sales*, sect. 140, note of the American editor, and cases there cited.

Here the vendors exercised the right of rescission shortly after the sale in question, and as soon as they obtained knowledge of the fraud. If, therefore, this controversy were between Mann and them, it is clear that he would not be entitled to recover.

The assignment relates back to the commencement of the proceedings in bankruptcy, and vests, by operation of law, in the assignee the property of the bankrupt, with certain specified exceptions, although the same be then attached. It also dissolves any attachment made within four months next preceding the commencement of the proceedings. If there be no such liens, and the property has not been conveyed in fraud of creditors, he has no greater interest in or better title to it than the bankrupt. Only the defeasible title of the latter to the goods in controversy passed to the assignee, and it was determined by a prompt disaffirmance of the contract.

Judgment affirmed.

DORR v. FISHER.

(1 Cush. 271.)

Supreme Judicial Court of Massachusetts.
Suffolk and Nantucket. March Term, 1848.

This was an action to recover the price of two tubs of butter. The plaintiff having been allowed, against objection on the part of the defendant, to prove his claim as a book account, the defendant then introduced evidence that in November, 1845, he offered several kegs of butter to the defendant for sale. On examining the butter, (two or three kegs only,) the defendant told the plaintiff that he was unable to decide whether it was good or not, but that he wanted it of a first-rate quality. The plaintiff then said that he called the butter first-rate, and the defendant replied that, if it was good, the plaintiff might leave him two tubs. The two tubs were left at the defendant's store, where they remained for about a week, when the plaintiff came to the store, and some conversation ensued relative to the butter. The plaintiff was there again some time afterwards and requested that the butter should be put into the cellar. The principal question was as to the quality of the butter, and the evidence upon this point was conflicting. The defendant contended that the butter was sold under a warranty that it was of the best quality, and that the burden of proof was on the plaintiff to prove that it was of such a quality. Judge instructed the jury that if the butter were sold with a warranty as to quality, or with a representation amounting to a warranty, the burden of proof was on the defendant to show that it was not equal to the warranty or representation. The jury returned a verdict against the defendant, who thereupon filed exceptions.

T. Willey, for plaintiff. T. Wentworth, for defendant.

SHAW, C. J. This cause has been argued, on the part of the defendant, as if the suit were brought upon an open, unexecuted contract for the purchase of goods; whereas the declaration is in *indebitatus assumpsit* for goods sold and delivered. To maintain this action, it is not necessary to set out the contract of sale, with its conditions and limitations; it is enough to prove an agreement for a sale of the goods, at a fixed price in money, or without a price, (in which case, the law implies an agreement to pay so much as they are worth,) and an actual delivery, whereby a debt arises. A delivery by the vendor implies an acceptance by the vendee. An offer, by the vendor, not accepted by the vendee, may be a good tender, and a good performance on his part, but it is not a delivery. If there are conditions annexed to the agreement of sale, respecting the quality, or other circumstances, which are not complied with by the vendor, the vendee should decline to accept the goods; but, if he does accept them, the acceptance is a waiver. And, so, in an *indebitatus assumpsit*, for goods sold and delivered, the plaintiff must prove

a delivery, or he will fail in the action. And this is not confined to the case of an implied assumpsit, on a *quantum valebat*; if the sale be made by an express contract, not under seal, and the goods are actually delivered, it is sufficient to allege that the defendant is indebted to the plaintiff for goods sold and delivered, and the law implies a promise to pay. No matter, therefore, what may have been the terms and conditions, under which goods are sold and delivered; if nothing remain but the obligation to pay for them, this is a debt, the existence of which supports the allegation of being indebted, and supersedes the necessity of setting out specially such terms and conditions.

"Where goods have been sold and actually delivered to the defendant, though under a special agreement, it is in general sufficient to declare on the *indebitatus* count, provided the contract were to pay in money, and the credit be expired." 1 Chit. Plead. 338.

This is not a mere technical rule of pleading, but a sound rule of law and justice, growing out of the nature of a sale. Were it otherwise, and were the plaintiff, after a delivery of goods on a contract of sale, bound to prove the terms and conditions of such sale, and to prove affirmatively that he had complied with those conditions, on his part, the result would be, that the vendee, having accepted the goods, as and for the goods contracted for, and without offering to return them, or giving notice to the vendor, to come and take them back, might hold and retain the goods, without paying any thing for them. The vendor could not recover them back in an action, because he has delivered them to the vendee, in pursuance of a contract, as his own.

It is asked, then, has the vendee no remedy against the vendor, after delivery, if the vendee fails to derive the benefits, expected and stipulated for on the sale? Certainly not. If he has been deceived, as to the title, quality, or character of the thing purchased, he may rescind the contract, restore or tender back the goods, and recover back the purchase money; or he may be secured by a warranty on the sale. The law, on the sale of personal property, implies a warranty of good title, so that if the vendee be deprived of his purchase by a paramount title, he has a remedy on his warranty. Or he may take an express warranty, as to the quality, condition, value, age, origin, or other circumstances respecting the thing sold. But a warranty is a separate, independent, collateral stipulation, on the part of the vendor, with the vendee, for which the sale is the consideration, for the existence or truth of some fact, relating to the thing sold. It is not strictly a condition, for it neither suspends nor defeats the completion of the sale, the vesting of the thing sold in the vendee, nor the right to the purchase money in the vendor. And, notwithstanding such warranty, or any breach of it, the vendee may hold the goods, and have a remedy for his damages by action.

But, to avoid circuity of action, a warranty may be treated as a condition sub-

sequent, at the election of the vendee, who may, upon a breach thereof, rescind the contract, and recover back the amount of his purchase money, as in case of fraud. But, if he does this, he must first return the property sold, or do every thing in his power requisite to a complete restoration of the property to the vendor, and, without this, he cannot recover. *Conner v. Henderson*, 15 Mass. 319; *Kimball v. Cunningham*, 4 Mass. 502; *Perley v. Balch*, 23 Pick. 283. Such a restoration of the goods, and of all other benefits derived from the sale, is a direct condition, without a compliance with which, the vendee cannot rescind the contract, and recover back the money or other property, paid or delivered on the contract.

But his other remedy is by an action on the warranty, or contract of the vendor, on which, if there be a breach, he will recover damages to the amount of the loss sustained by the breach, whatever that may be. If it be a warranty of the quality of goods, and the breach alleged is, that the goods delivered were inferior to the goods stipulated for, the damage will ordinarily be the difference in value between the one and the other. Such an action affirms instead of disaffirming the contract of sale, leaves the property in the vendee, and gives damages for the breach of such separate, collateral contract of warranty.

This remedy is so familiar, that it scarcely requires to be supported and explained by authorities. But it naturally requires an action to be brought by the vendee against the vendor, which, if the vendor is at the same time suing for the price, is a cross action.

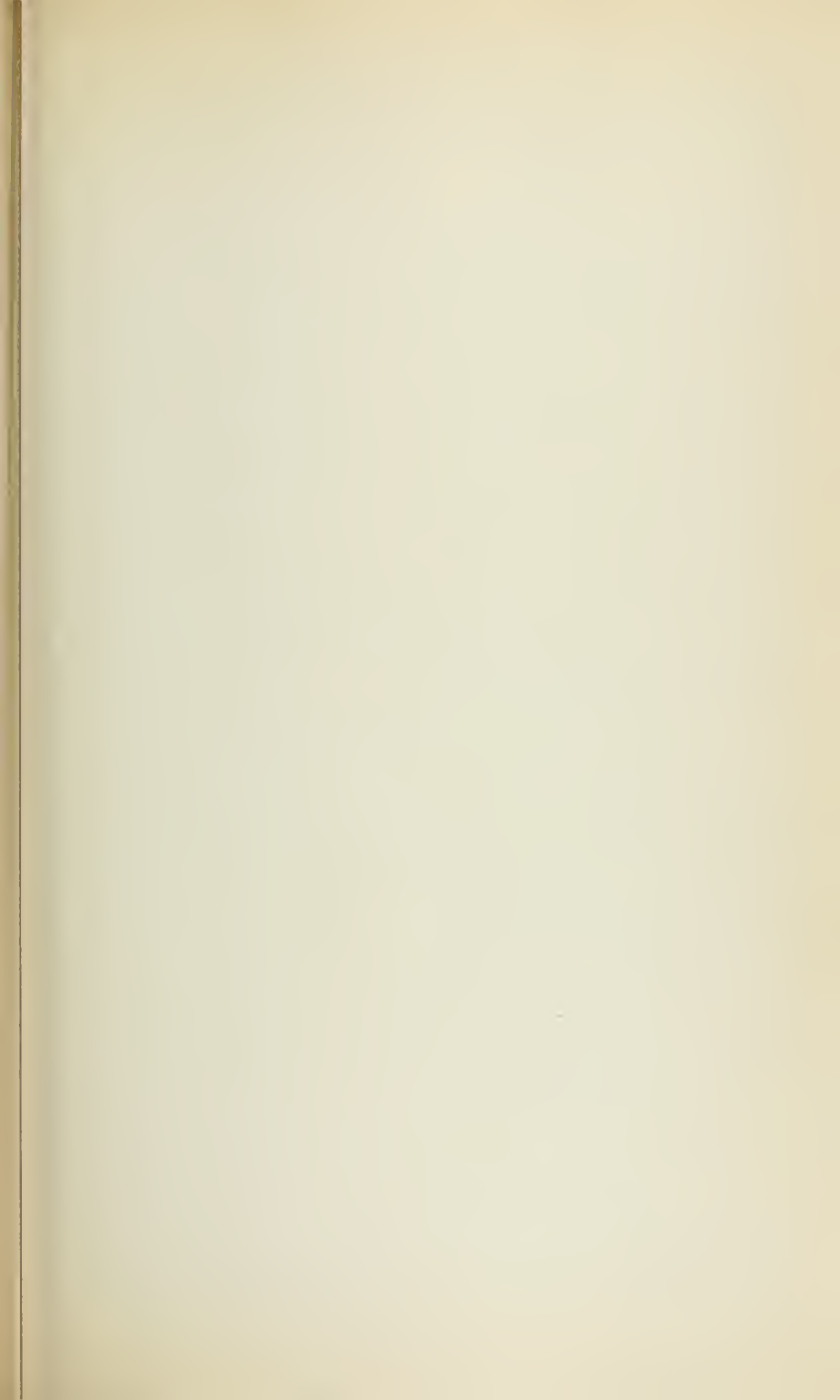
But the general tendency of modern judicial decisions has been, to avoid circuitry and multiplicity of actions, by allowing matters growing out of the same transaction to be given in evidence by way of defence, instead of requiring a cross action, when it can be done without a violation of principle, or great inconvenience in practice.

And it has lately been decided, in this court, after consideration and upon a review of the authorities, that, when a cross action will lie for a deceit in the sale

of a chattel, the deceit may be given in evidence in reduction of the damages, in a suit for the purchase money. *Harrington v. Stratton*, 22 Pick. 510. And the principles, which govern that case, are precisely applicable to the case, where a cross action will lie to recover damages on a breach of warranty on a sale, and the same may be given in evidence, and a like amount deducted from the purchase money, in assessing damages in a suit by the vendor for the price. *Poulton v. Lattimore*, 9 B. & Cr. 259; *Perley v. Balch*, 23 Pick. 283.

It appears by the report in the present case, that these are the principles on which the trial of the action proceeded. The plaintiff must first have proved a sale and delivery of the two tubs of butter. Some objection was made to the plaintiff's account book; but it was not alluded to in the argument. Indeed, the other proof tends to show, that the defendant agreed to take the two tubs of butter, and directed the plaintiff to leave them at his store, which the plaintiff did the same day. No offer was made afterwards to return the butter. No notice was given to the defendant to take it away. This was evidence, from which a jury might well infer a sale and delivery. The only way, then, in which the defendant could avail himself of proof of warranty of quality, and a breach of it, was in obtaining a reduction of damages, by way of set-off, in nature of a cross action, and as a substitute therefor. Had the defendant brought his action, it is quite clear, that the burden of proof would have been on him to prove such warranty and breach, and the damage sustained by it. The burden was on him in the same manner, when he resorted to this line of defence, as a substitute for a cross action. We are of opinion, therefore, that the direction of the judge was strictly correct, that if the article was sold to the defendant with a warranty as to its quality, or with a representation amounting to a warranty, the burden of proof was on the defendant, to show that it was not equal to the warranty.

Exceptions overruled and judgment on the verdict.



DOWS et al. v. NATIONAL EXCH. BANK
OF MILWAUKEE.

(91 U. S. 618.)

Supreme Court of the United States. Oct.
Term, 1875.

Error to the circuit court of the United States for the southern district of New York.

Action of trover by the National Exchange Bank of Milwaukee for the alleged conversion by Dows & Co. of 22,341 bushels of wheat. The wheat was purchased in Milwaukee, Wis., by McLaren & Co., in the month of September, 1869, upon orders from Smith & Co. of Oswego, N. Y., who requested that the drafts on account thereof be drawn on them through the Merchants' Bank of Watertown, N. Y. McLaren & Co. paid for the wheat, and shipped it on three vessels, the "Kate Kelly," "Grenada," and "Corsican," and received from the captains of said vessels triplicate bills of lading in the name of McLaren & Co. as shippers, to the account of W. G. Fitch, cashier, care Merchants' Bank, Watertown, N. Y. McLaren & Co. presented drafts drawn on Smith & Co., with the original bills of lading attached thereto, to the National Exchange Bank of Milwaukee, which discounted them, placing the proceeds to the credit of McLaren & Co. Its cashier wrote a special indorsement on each bill of lading. The indorsement on that of the "Grenada" was as follows:—

"On payment of two drafts drawn by McLaren & Co. on Smith & Co., Oswego, N. Y., to my order, dated Sept. 13, 1869,—one draft at thirty days' date for \$8,000, and the other at forty-five days' date, for \$8,900, both drafts being payable at the Merchants' Bank, Watertown, N. Y.,—you will surrender the within-mentioned wheat to Smith & Co. or order. Should drafts above mentioned not be promptly paid, hold the wheat for my account, without recourse. W. G. Fitch, Cashier. Milwaukee, 13th September, 1869. To Merchants' Bank, Watertown, N. Y."

Similar indorsements, except as the amounts and dates of the drafts, were made on the bills of lading of the "Kate Kelly" and the "Corsican." McLaren & Co. insured the cargoes from Milwaukee to Oswego, and transferred the insurance certificates to the bank. After making the indorsements on the bills of lading, the cashier enclosed the drafts, bills of lading, and certificates of insurance, to the Merchants' Bank, Watertown, N. Y., with the following letter as to the "Kate Kelly":—

"Sept. 2. To Cashier Merchants' Bank, Watertown, N. Y.:—I hand you for collection and remittance to Mercantile National Bank, New York, for my credit,—

McLaren & Co., on Smith &
Co., Oswego..... \$1,080 St. exp.
McLaren & Co., Oct. 5..... 7,500 00 "
" " Oct. 20..... 7,500 00 "
B. L. schr. "Kate Kelly," 8,727 bushels Amber
Mil. wheat.
B. L. schr. "Kate Kelly," 5,527 20/60 bush-
els No. 1, Amber Mil. wheat, consigned to

your bank for my account, and to be held by you subject to the payment of the above drafts.

Insured North-Western Nat. Ins. Co....	\$5,000
Nat. Ins. Co., Boston.....	5,000
Aetna Ins. Co., Hartford.....	5,000
Republic Ins. Co.....	5,000
Security Ins. Co.....	4,000

"I consign this wheat to you, to be held as per indorsed bill of lading, and surrender only on payment of the drafts drawn against it, holding you responsible for the same in case of non-payment of the drafts. Will you receive consignments in this way, charging reasonably for the same? Yours truly, W. G. Fitch, Cashier."

On the sixth of September, 1869, J. F. Moffatt, cashier of the Merchants' Bank, acknowledged the receipt of the letter and its enclosures. On the 8th of that month Fitch addressed another letter, as follows:—

"To Merchants' Bank of Watertown, N. Y.:—In my letter of the 2d, I requested you to state in your letter whether you would hold all wheat I consign to you strictly for my account, holding your bank responsible for the safe keeping of the property for this bank, and holding such property subject to my orders in all cases where the drafts made against it are not paid. Your reply of the 6th instant does not answer my enquiry. Will you please write me by return mail, defining your position? We have adopted the invariable rule, to in no instance consign property only on condition that the consignee acknowledges himself responsible for it, until instructed to hand over to a third party. Very respectfully, W. G. Fitch, Cashier."

Moffatt wrote on the 11th:

"In reply to yours of the 2d instant, I would say that we will receive, until further notice, such consignments as you choose to send us, holding us responsible for the grain in case of non-payment of drafts, and shall charge $\frac{1}{2}$ per cent. commissions for so doing." On the 13th he acknowledged the receipt of Fitch's letter of the 8th, and said: "I believe your enquiry was answered in mine of the 11th instant." Similar letters were written to the cashier of the Merchants' Bank, enclosing the drafts, bills of lading, and certificates of insurance, of the cargoes of the "Grenada" and "Corsican." The cashier of the Merchants' Bank, upon receipt of the drafts and bill of lading of the "Kate Kelly," wrote three letters,—one to Smith & Co., dated Watertown, N. Y., Sept. 6, 1869, as follows:—

"Please find enclosed for acceptance, and return the following: to wit:—
McLaren & Co., on your st. \$1,080 St. and exp.
" " Oct. 5..... 7,500 00 "
" " Oct. 20..... 7,500 00 "

"Also inspection certificate."

Another bearing the same date, as follows:—

"Proprietors of Corn Exchange Elevator, Oswego, N. Y.:—Please find enclosed an order for cargo schooner 'Kate Kelly' for 8,727 bushels of Amber Milwaukee wheat, and 5,527 20/60 bushels No. 1 Amber Milwaukee wheat, to be delivered to you:

and you will please hold the same subject to, and deliver the grain only on payment of, the following drafts; to wit:—

McLaren & Co., on Smith & Co., st.	\$4,080 81 and exg.
McLaren & Co., Oct. 5.....		7,500 00 "
Oct. 20....		7,500 00 "

And the third, of the same date, as follows:—

"Merchants' Bank, Watertown, N. Y., Sept. 6, 1869. Robert Hayes, Esq., Master schr. 'Kate Kelly,' Oswego, N. Y.:— Please deliver to the Corn Exchange Elevator, Oswego, N. Y., your cargo, 8,727 bushels of Amber Milwaukee wheat, and 5,527 20/60 bushels of No. 1 Amber Milwaukee wheat, consigned to us by W. G. Fitch, Esq., cashier."

Similar letters were written as to the cargoes of the "Grenada" and "Corsican," except that, in the case of the "Corsican" the letter enclosing the order to the master of that vessel to deliver her cargo was addressed to "Smith & Co., Proprietors Corn Exchange Elevator." Smith & Co., on receipt of the letters, paid each of the sight drafts, and returned the time drafts, accepted, to the Merchants' Bank, without objection. The sight drafts were paid, and the time drafts accepted, several days before the arrival of the cargoes at Oswego. McLaren & Co. forwarded to Smith & Co. invoices of the purchases, with statement of account for disbursements and commissions. The invoice of the "Kate Kelly" is headed, "Account purchase of 14,250 20/60 bushels of wheat, bought for account, and by order of Smith & Co., Oswego, N. Y., through McLaren & Co." Those of the "Grenada" and of the "Corsican" differ only in the number of bushels. No bills of lading were sent to Smith & Co. The "Kate Kelly" arrived in Oswego Sept. 16, 1869. Her cargo was discharged into the Corn Exchange Elevator and a bill of lading, dated Sept. 18, 1869, signed by G. A. Bennett, was delivered to Smith & Co. The wheat was shipped by canal boat and arrived in New York October 9, 1869. Smith & Co. paid the time draft of \$7,500, drawn at thirty days. The time draft of \$7,500, drawn at forty-five days, was unpaid at the date of this shipment. The "Grenada" arrived on the twenty-fourth day of September, 1860. Her cargo was shipped by canal boat by Smith & Co., and a bill of lading of that date, signed by G. A. Bennett, was delivered to them. This canal boat arrived in New York, Oct. 27, 1869. The two time drafts drawn on the cargo of the "Grenada" were unpaid at the date of this shipment. The "Corsican" arrived on the 8th October, 1869; and on the same day Smith & Co. shipped by the canal boats. These canal boats arrived in New York on the 4th November, 1869. The time drafts drawn on the cargo of the "Corsican" were not paid at the time of these shipments. The drawees of the drafts were the proprietors of the Corn Exchange Elevator. The captains of the vessels, on their arrival at Oswego, called at the office of the Corn Exchange Elevator and received from Smith & Co., before deliver-

ing their cargoes, the orders in the letters of the cashier of the Merchants' Bank to the "Proprietors Corn Exchange Elevator," and to "Smith & Co., Proprietors Corn Exchange Elevator". The latter paid the freight on the cargoes, and received therefor on the back of the bills of lading retained by the captains. The shipments by Smith & Co. were made without the knowledge or consent of the officers of the Merchants' Bank. There was no mixture in the elevator of the cargoes of the "Kate Kelly", "Grenada", or "Corsican". Smith & Co., on receiving the canal boat bills of lading, sent the same with drafts attached, through banks in New York city, to Dows & Co., defendants. They paid the drafts, and received the bills of lading. All of the time drafts drawn by McLaren & Co. on Smith & Co. (except the thirty day draft on the cargo of the "Kate Kelly"), being unpaid, were, with the original bills of lading and certificates of insurance, returned by the Merchants' Bank to the Milwaukee Bank. The latter having been advised in October that the wheat had been shipped by Smith & Co., William P. McLaren, a member of the firm of McLaren & Co., went to Oswego to look after it. He was there from about the 20th to the 25th of that month, and, on examination, found no wheat in the elevator. Having ascertained on the 22d that portions of the cargoes had been shipped to Dows & Co., a telegram was sent to and received by them on that day, notifying them that the wheat shipped was the property of the National Exchange Bank of Milwaukee. The following day, parties interested in the wheat called on Dows & Co., who agreed, that, if no attempt was made to stop the wheat on the canal, it should, on its arrival in New York, be kept separate; that the Milwaukee Bank should be notified of its arrival; and that they (Dows & Co.) would identify it as the wheat coming out of the said canal boats, and would require proof of the identity of the wheat in the canal boats at Oswego. On the arrival of the wheat, a formal demand in writing therefor was made on Dows & Co. by the Milwaukee bank. They refused to deliver it unless they were reimbursed the amount of their advances to Smith & Co. and freight and charges, and unless the Milwaukee bank would take care of an order given by Smith & Co. to Norris Winslow on them for any margins in their hands due Smith & Co.

The jury found a verdict in favor of the plaintiff for \$31,111.51.

Mr. C. Van Santvoord for plaintiffs in error. Mr. H. M. Finch for defendant in error.

Mr. Justice STRONG delivered the opinion of the court.

The verdict of the jury having established that the wheat came to the possession of the defendants below (now plaintiffs in error), and that there was a conversion, there is really no controversy respecting any other fact in this case than whether the ownership of the plaintiffs had been divested before the conversion.

The evidence bearing upon the transmission of the title was contained mainly in written instruments, the legal effect of which was for the court; and, so far as there was evidence outside of these instruments, it was either uncontradicted, or it had no bearing upon the construction to be given to them. We have, therefore, only to inquire to whom the wheat belonged when it came to the hands of the defendants, and when they refused to surrender it at the demand of the plaintiff.

It is not open to question that McLaren & Co., having purchased it at Milwaukee and paid for it with their own money, became its owners. Though they had received orders from Smith & Co. to buy wheat for them, and to ship it, they had not been supplied with funds for the purpose, nor had they assumed to contract with those from whom they purchased on behalf of their correspondents. They were under no obligation to give up their title or the possession on any terms other than such as they might dictate. If, after their purchase, they had sold the wheat to any person living in Milwaukee or elsewhere, other than Smith & Co., no doubt their vendee would have succeeded to the ownership. Nothing in any agency for Smith & Co. would have prevented it. This we do not understand to be controverted. Having, then, acquired the absolute ownership, McLaren & Co. had the complete power of disposition; and there is no pretence that they directly transmitted their ownership to Smith & Co. They doubtless expected that firm to become purchasers from them. They bought from their vendors with that expectation. Accordingly, they drew drafts for the price; but they never agreed to deliver the wheat to the drawees, unless upon the condition that the drafts should be accepted and paid. They shipped it; but they did not consign it to Smith & Co., and they sent to that firm no bills of lading; on the contrary, they consigned the wheat to the cashier of the Milwaukee bank, and handed over to that bank the bills of lading as a security for the drafts drawn against it,—drafts which the bank purchased. It is true, they sent invoices. That, however, is of no significance by itself. The position taken on behalf of the defendants, that the transmission of the invoices passed the property in the wheat without the acceptance and payment of the drafts drawn against it, is utterly untenable. An invoice is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity, and cost or price of the things invoiced, and it is as appropriate to a billment as it is to a sale. It does not of itself necessarily indicate to whom the things are sent, or even that they have been sent at all. Hence, standing alone, it is never regarded as evidence of title. It seems unnecessary to refer to authorities to sustain this position. Reference may, however, be made to *Shepherd v. Harrison*, Law Rep. 5 H. L. 116, and *Newcomb v. Boston & Lowell R. R. Co.*, 115 Mass. 230. In these and in many other cases it has been regarded as of no importance that an invoice was sent by the

shipper to the drawee of the drafts drawn against the shipment, even when the goods were described as bought and shipped on account of and at the risk of the drawee.

It follows that McLaren & Co. remained the owners of the wheat, notwithstanding their transmission of the invoices to Smith & Co. As owners, then, they had a right to transfer it to the plaintiff as a security for the acceptance and payment of their drafts drawn against it. This they did by taking bills of lading deliverable to the cashier of the plaintiff, and handing them over with the drafts when the latter were discounted. These bills of lading unexplained are almost conclusive proof of an intention to reserve to the shipper the *jus disponendi*, and prevent the property in the wheat from passing to the drawees of the drafts. Such is the rule of interpretation as stated in *Benjamin on Sales*, 306; and in support of it he cites numerous authorities, to only one of which we make special reference,—*Jenkyns v. Brown*, 14 Q. B. 496. There it appeared that the plaintiff was a commission merchant, living in London, and employing Klingender & Co. as his agents at New Orleans. The agents purchased for the plaintiff a cargo of corn, paying for it with their own money. They then drew upon him at thirty days' sight, stating in the body of the drafts that they were to be placed to the account of the corn. These drafts they sold, handing over to the purchaser with them the bills of lading, which were made deliverable to the order of Klingender & Co., the agents; and they sent invoices and a letter of advice to the plaintiff, informing him that the cargo was bought and shipped on his account. On this state of facts, the court ruled that the property did not pass to the plaintiff; that the taking of a bill of lading by Klingender & Co., deliverable to their own order, was nearly conclusive evidence that they did not intend to pass the property in the corn; and that, by indorsing the bills of lading to the buyer of the bills of exchange, they had conveyed to him a special property in the cargo, so that the plaintiff's right to the corn could not arise until the bills of exchange were paid by him. That such is the legal effect of a bill of lading taken deliverable to the shipper's own order, that it is inconsistent with an intention to pass the ownership of the cargo to the person on whose account it may have been purchased, even when the shipment has been made in the vessel of the drawee of the drafts against the cargo, has been repeatedly decided. *Turner v. The Trustees of the Liverpool Docks*, 6 Exch. 543; *Schotsmans v. Railway Co.*, Law Rep., 2 Ch. Ap. 335; *Ellershaw v. Magulac*, 6 Exch. 570. In the present case the wheat was not shipped on the vessels of Smith & Co., and the bills of lading stipulated for deliveries to the cashier of the Milwaukee bank. When, therefore, the drafts against the wheat were discounted by that bank, and the bills of lading were handed over with the drafts as security, the bank became the owner of the wheat, and had a complete right to maintain it until payment. The ownership of Mc-

Laren & Co. was transmitted to it, and it succeeded to their power of disposition. That the bank never consented to part with its ownership thus acquired, so long as the drafts it had discounted remained unpaid, is rendered certain by the uncontradicted written evidence. It sent the drafts, with the bills of lading attached, to the Merchants' Bank, Watertown, accompanied with the most positive instructions, by letter and by indorsement on the bills, to hold the wheat until the drafts were paid; and when, subsequently, the Merchants' Bank sent orders to the masters of the carrying vessels to deliver it to the "Corn Exchange Elevator, Oswego, N. Y.," they accompanied the orders with letters to Smith & Co., the proprietors of the elevator, containing clear instructions to hold the grain, and "deliver" it only on payment of the drafts. To these instructions Smith & Co. made no objection. Now, as it is certain that whether the property in the wheat passed to Smith & Co. or not depends upon the answer which must be given to the question whether it was intended by McLaren & Co., or by the Milwaukee bank, their successors in ownership, that it should pass before payment of the drafts, where can there be any room for doubt? What is there upon which to base an inference that it was intended Smith & Co. should become immediate owners of the wheat, and be clothed with a right to dispose of it at once? Such an inference is forbidden, as we have already said, by the bills of lading made deliverable to W. G. Fitch, cashier of the Milwaukee bank; and it is inadmissible, in view of the express orders given by that bank to their special agents, the Merchants' Bank at Watertown, directing them to hold the wheat subject to the payment of the drafts drawn against it. No intent to vest immediate ownership in the drawees of the drafts can be implied in the face of these express arrangements and positive orders to the contrary. It is true that Smith & Co. were the proprietors of the Corn Exchange Elevator, and that the wheat was handed over to the "custody of the elevator" at the direction of the Merchants' Bank; but it cannot be claimed that that was a delivery to the drawees under and in pursuance of their contract to purchase. The Merchants' Bank, having been only special agents of the owners, had no power to make such a delivery as would divest the ownership of their principals. *Stollenwerk et al. v. Thacher*, 115 Mass. 124. And they made no attempt to divest that ownership. They guardedly retained the *jus disponendi*. Concurrently with their directions that the wheat should be delivered to the elevator, in the very orders for the delivery, they stated that the cargoes were for the account of W. G. Fitch, cashier, and were to be held subject to their order. By accompanying letters to the proprietors of the elevator, they stated that the cargoes were delivered to them "to be held subject to and delivered only on payment of the drafts drawn by McLaren & Co." All this contemplated a subsequent delivery,—a delivery after the receipt of the grain in the elevator, and when the drafts

should be paid. It negatives directly the possibility that the delivery into the elevator was intended as a consummation of the purchase, or as giving title to the purchasers. It was a clear case of bailment, utterly inconsistent with the idea of ownership in the bailees. A man cannot hold as bailee for himself. By the act of accepting goods in bailment, he acknowledges a right or title in the bailor. When, therefore, as was said in the court below, "the proprietors of the Corn Exchange Elevator, or Smith & Co., received the wheat under the instructions of the Merchants' Bank, they received it with the knowledge that the delivery to them was not absolute; that it was not placed in their hands as owners, and that they were not thereby to acquire title." They were informed that the holders of the drafts, and bills of lading, had no intention to let go their ownership so long as the drafts remained unpaid. The possession they had, therefore, was not their possession. It belonged to their bailors; and they were mere warehousemen, and not vendees.

We agree, that where a bill of lading has been taken containing a stipulation that the goods shipped shall be delivered to the order of the shipper, or to some person designated by him other than the one on whose account they have been shipped, the inference that it was not intended the property in the goods should pass, except by subsequent order of the person holding the bill, may be rebutted, though it is held to be almost conclusive; and we agree, that where there are circumstances pointing both ways, some indicating an intent to pass the ownership immediately, notwithstanding the bill of lading, in other words, where there is any thing to rebut the effect of the bill, it becomes a question for the jury, whether the property has passed. Such was the case of *Ogg v. Shuter*, 10 Law Rep. C. P. 159. There the ordinary effect of a bill of lading deliverable to the shipper's order was held to be rebutted by the court sitting with power to draw inferences of fact. The delivery to the carrier was "free on board," and the bill of lading was sent to the consignor's agent. The goods were also delivered into the purchaser's bags, and there was a part payment. But in this case there are no circumstances to rebut the intent to retain ownership exhibited in the bills of lading, and confirmed throughout by the indorsements on the bills, and by the written instructions to hold the wheat till payment of the drafts. Nothing in the evidence received or offered tended to show any other intent. Hence there was no necessity of submitting to the jury the question, whether there was a change of ownership. That would have been an invitation to find a fact of which there was no evidence. The circumstances as relied upon by the plaintiffs in error, as tending to show that the property vested in Smith & Co., cannot have the significance attributed to them.

It is certainly immaterial that the wheat was consigned to W. G. Fitch, cashier, care of the Merchants' Bank, Watertown, and that it was thus consigned at the request of Smith & Co., made to McLaren &

Co. Had it been consigned directly to that bank, and had there been no reservation of the *jus disponendi* accompanying the consignment, the case might have been different. Then an intent to deliver to the purchasers might possibly have been presumed; but, as the case was, no room was left for such a presumption. The express direction to hold the wheat for the payment of the drafts, and to deliver it only on payment, removes the possibility of any presumed intent to deliver it while the drafts remained unpaid. A shipment on the purchaser's own vessel is ordinarily held to pass the property to the purchaser but not so if the bill of lading exhibits a contrary intent,—if thereby the shipper reserves to himself or to his assigns the dominion over the goods shipped. *Turner v. The Trustees of the Liverpool Docks*, *supra*. There are many such decisions. A strong case may be found in the court of queen's bench, decided in 1840. It is *Mitchel v. Ede*, 11 Ad. & E. 888. A Jamaica planter, being the owner of sugars, and indebted to the defendant, residing in London, for more than their value, shipped them at Jamaica, on the 4th of April, on a ship belonging to the defendant which was in the habit of carrying supplies to Jamaica to the owner of the sugars, and others, and taking back consignments from him and others. On the same day he took a bill of lading by which the goods were stipulated to be delivered to the defendant at London, he paying freight. Two days afterwards (April 6) the shipper made an indorsement on the bill that the sugars were to be delivered to the defendant only on condition of his giving security for certain payments, but otherwise to the plaintiff's agent. He also drew drafts on the defendant. At the same time he indorsed the bill of lading, and delivered it to the plaintiff, to whom he was indebted. The bill was never in the defendant's hands. The sugars arrived in London; and the defendant paid the drafts drawn by the shipper, but did not comply with the conditions of the indorsement of April 6. On this state of facts, it was held by the court that the plaintiff was entitled to the sugars; that the shipper had not parted with the property by delivering it on board the defendant's ship, employed as it was, nor by accepting the bill of lading as drawn on the 4th of April; and that he was entitled to change the destination of the sugars till he had delivered them or the bill. In the case now in hand, there never was an instant, after the purchase of the wheat by McLaren & Co., when there was not an express reservation of the right to withhold the delivery from Smith & Co., and also an avowed purpose to withhold it until the drafts should be paid. Consent to consign the wheat to W. G. Fitch, cashier, care of Merchants' Bank, amounts, therefore, to no evidence of consent that it should pass into the control and ownership of the purchasers.

It has been argued on behalf of the plaintiffs in error that the correspondence between Smith & Co. and McLaren & Co. shows that the wheat was wanted by the former to supply their immediate need;

and that, therefore, it was a legitimate inference that both parties to the correspondence intended an immediate delivery. If this were so, it was still in the power of the vendors to change the destination of the property until delivery was actually, or at least symbolically, made; and that the intention, if any ever existed, was never carried out, the bills of lading prove. It may be that Smith & Co. expected to secure early possession of the wheat by obtaining discounts from the Watertown bank, and then by taking up the drafts. If so, it would account for their request that the drafts and bills of lading might be sent through that bank; but that has no tendency to show an assent by either McLaren & Co. or the Milwaukee bank to an unconditional delivery of the property before payment of the drafts.

Nor does the fact that any engagement to hold themselves responsible for the safe keeping of the wheat for the plaintiff, and subject to its orders until the drafts drawn against it should be paid, was exacted from the Watertown bank, have any tendency to prove such an assent. This was an additional protection to the continued ownership of the plaintiff; and the words of the engagement plainly negative any consent to a divestiture of that ownership.

Without reference, therefore, to the testimony of McLaren,—which was, in substance, that, before the shipments, the agent of Smith & Co. was informed, that while the shipping firm would agree to send their time drafts through any bank he might designate, and consign the property to any responsible bank Smith & Co. might designate, they would adhere to their positive business rule in such cases, and on no account consent that any property so shipped should pass out of the control of the banks in whose care it had been placed until all drafts made against it had been paid,—without reference to this, we think it clear that the ownership of the wheat, for the conversion of which the defendants were sued, never vested in Smith & Co., never passed out of the plaintiff.

This is a conclusion necessarily drawn from the written and uncontradicted evidence; and there is nothing in any evidence received, or offered by the defendants and overruled by the court, which has any tendency to resist the conclusion. It is unnecessary, therefore, to examine in detail the numerous assignments of error in the admission and rejection of evidence. None of the rulings have injured the defendants.

If, then, the Exchange Bank of Milwaukee was the owner of the wheat when Smith & Co. undertook to ship it to the defendants, and when the defendants received it and converted it to their use, the right of the bank to recover in this action is incontrovertible. Smith & Co. were incapable of divesting that ownership. The defendants could acquire no title, or even lien, from a tortious possessor. However innocent they may have been (and they were undoubtedly innocent of any attempt to do wrong), they could not obtain ownership of the wheat

from any other than the owner. The owner of personal property cannot be divested of his ownership without his consent, except by process of law. It is not claimed, and it could not be, that the defendants were deceived or misled by any act of the plaintiff. They are the victims of a gross fraud perpetrated by Smith & Co.; and, however unfortunate their case may be, they cannot be relieved by casting the loss upon the plaintiff, who is at least equally innocent with themselves, and who has used the extremest precaution to protect its title.

It is sufficient to add, that, in our opinion, there is no just reason for complaint against the instruction given by the circuit judge to the jury, and his rulings upon the subject of damages and interest. Judgment affirmed.



Ex parte DRAKE.

In re WARE.

(5 Ch. Div. 866.)

Court of Appeal. May 10, 1877.

This was an appeal from a decision of Mr. Registrar Pepys, sitting as chief judge in bankruptcy.

In March, 1875, James Ware, a carrier and carman, hired a grey mare of Daniel Drake. He neglected to return the mare when required by Drake to do so, and in May, 1876, Drake commenced an action in the exchequer division against Ware for the recovery of the mare. The action was tried on the 2nd of December, 1876, when a verdict was found for the plaintiff for £60, the value of the mare, such amount to be reduced to 1s. if the mare was returned to the plaintiff on the 4th of December, and £25 damages for the wrongful detention. And the judge directed judgment for £85, and the costs of the action. The defendant did not return the mare, and on the 6th of December, the plaintiff's solicitor's bill of costs was taxed at £70 10s. 2d. At an earlier hour on the same day Ware had filed a liquidation petition, and notice of the petition was given to the plaintiff's solicitor by Ware's solicitor when they attended the taxation. On the same day Drake signed judgment in the action for £155 10s. 2d., and issued and lodged with the sheriff of Middlesex a writ of fi. fa. on the judgment. On the 7th of December the sheriff levied on the goods of Ware, not including the mare. An order was afterwards made by the court of bankruptcy restraining the proceedings under the execution, and the sheriff withdrew. The first meeting of the creditors was held on the 5th of January, 1877, when Drake tendered a proof. His affidavit stated the verdict in the action, the signing of judgment, the taxation of the costs, and that the mare had not been delivered to him, nor the £85, or the amount of the taxed costs paid to him. The affidavit went on to state that Ware was also, at the date of the institution of the liquidation proceedings, and still was, indebted to him in the sum of £264 for hire of the mare from the 25th of March, 1875, to the 2nd of December, 1876, for which sum he had not received any satisfaction or security. He further said that he had not received any satisfaction or security for the amount recovered by him under the judgment, except so far as the same was secured by the goods levied upon by the sheriff. This proof was objected to by the debtor, on the ground, as to the £264, that an action was pending in the common pleas division by the debtor against Drake, in which Drake had set up a counter-claim for £100 for hire of the mare, upon which issue had been joined, and as to the costs claimed, on the ground that the judgment was not produced. This objection was marked on the proof and signed by the chairman at the meeting. Drake voted at the meeting. The proof was afterwards objected to by the trustee in the liquidation, as to the £264, on the ground that no contract for hire was

ever entered into by the debtor. On the 10th of January, 1877, Drake applied to the court in the liquidation for an order that the trustee should deliver to him the goods which had been seized by the sheriff, or that he should, out of the first assets belonging to the estate of Ware which should come to his hands, pay to Drake the £155 10s. 2d. due to him under the judgment, with interest until payment. This motion was by consent turned into a special case. Upon the hearing of the case on the 13th of February, the registrar decided that Drake was not entitled to any relief. At this time Drake did not know where the mare was. But on the 13th of March he accidentally discovered her in the possession of the debtor, whose servant was driving her. The debtor was, with the permission of the trustee, using her in his business. Drake thereupon instructed the sheriff to seize the mare under the writ of fi. fa., and the sheriff on the same day forcibly removed her from the debtor's possession. On the 14th of March the trustee obtained in the court of bankruptcy an interim injunction restraining the sheriff and Drake from selling the mare, and on the 27th of March the registrar made this injunction perpetual, and ordered that the mare should be forthwith delivered up to the trustee. Drake appealed.

D. Kingsford, for appellant. E. C. Willis, for trustee.

JESSEL, M. R.:—The first question which we have to decide is one which is simple enough to state—i. e. in whom was the property in this grey mare at the time when she was taken possession of by the sheriff? The property was originally in Drake. She had been hired from him by Ware, the liquidating debtor. The hiring was put an end to; the debtor was requested by Drake to return her, and he failed to do so. The action of detinue was brought by Drake, and he recovered judgment in the ordinary form. After that the plaintiff issued execution on his judgment, but the execution was defeated by the prior act of bankruptcy which overrode it, so that the plaintiff got nothing by his execution. After the filing of the liquidation petition he took in what has been called a proof for the judgment debt and the costs of the action. Some time after this he accidentally saw the mare in the possession of the debtor's servant, and he directed the sheriff's officer to seize her under the old writ. This was not a proper mode of proceeding. The trustee then obtained from the registrar the order for an injunction, and for the delivery of the mare to him; and from that order the appeal is brought. The first question is, in whom was the property in the mare when she was seized by the sheriff's officer? I am of opinion that, after the decision in *Brinsmead v Harrison*¹, we are bound to hold that the property was never divested from Drake. He had the property unless something which he did under the judgment divested it from

¹ Law Rep. 7 C. P. 517.

him. It is clear that the judgment itself did not divest the property. Did the execution divest it? Upon that question the authority of *Brinsmead v. Harrison* is distinctly in point. It shews that the execution does not divest the property unless there is satisfaction of the judgment. There are several ways in which an execution might produce nothing. One way would be if the amount produced by the sale of the goods seized did not cover the expenses of the sale. Another way would be if, as happened in the present case, there was a prior act of bankruptcy which nullified the execution. The judgments in *Brinsmead v. Harrison*², and especially that of Mr. Justice Willes, shew that the theory of the judgment in an action of detinue is that it is a kind of involuntary sale of the plaintiff's goods to the defendant. The plaintiff wants to get his goods back, and the court gives him the next best thing, that is, the value of the goods. If he does not get that value, then he does not lose his property in the goods. On the appeal to the exchequer chamber, in *Brinsmead v. Harrison*, the only two judges who expressed any opinion on the point confirmed the view of Mr. Justice Willes. Mr. Justice Blackburn said:³ "I observe that the court of common pleas, in their judgment upon the demurrer to the new assignment, which is not now before us, held that by the recovery in the first action without satisfaction the property in the chattel did not pass. I should be inclined to agree to this, but it is unnecessary to express an opinion upon it." And Mr. Justice Lush said:⁴ "The judges who decided those American cases seem to have thought that, by holding that recovery against one of two wrongdoers was a bar to an action against the other, they would be deciding that the property in the chattel passed by the recovery; but I do not think that by any means follows; and, as at present advised, I am prepared to adhere to the judgment of the court below upon both points." Therefore one judge entirely agreed with Mr. Justice Willes, and the other was inclined to agree with him. Under these circumstances we must consider it established that the property in the mare remained in the plaintiff Drake. That being so, he had a right to obtain possession of his property either by taking it peaceably or by means of proper legal process. As I understand the provisions of sect. 78 of the common law procedure act, 1854, the plaintiff (assuming that there had been no liquidation petition), if the value of the mare had not been paid to him under the judgment, and if he could have found out where the mare was, might have applied to a judge at chambers for an order that the defendant should deliver her to him. The liquidation petition prevented him from doing that, but the power of the judge at chambers became then vested in the court of bankruptcy, which could do complete

justice in the matter. The plaintiff Drake, therefore, if he had applied to the court of bankruptcy, might have obtained an order for the delivery of the mare to him. But it is said that he cannot do this now, because he is bound by the proof which he made in the liquidation. If that means anything it means this, that the plaintiff has deliberately elected to take his chance of a dividend in the liquidation in substitution for his right to recover possession of his mare. It would be very extraordinary if he had done this, but of course it is possible that he may have done it, and we must examine what he actually did in order to see whether he has really made this election. He has done nothing beyond bringing in a proof. The proof has not been formally admitted by the trustee, though, on the other hand, it has not been rejected. But, before a reasonable time had elapsed after the proof was taken in, the plaintiff made a claim to be paid in full the whole amount of his judgment, that is, he made a claim for the full value of the chattel. This was a proceeding wholly inconsistent with the notion that he had finally elected to take the dividend instead of the mare, and I am of opinion that he had made no such election. The result is that the order of the registrar must be discharged, and we must now make the order which he ought to have made, that is, that the mare be delivered to or retained by the appellant. But, inasmuch as his proceedings in directing the sheriff to seize the mare were not such as can be viewed with approbation by the court, the proper order as to costs will be that there be no costs on either side, either of the hearing before the registrar or of the appeal.

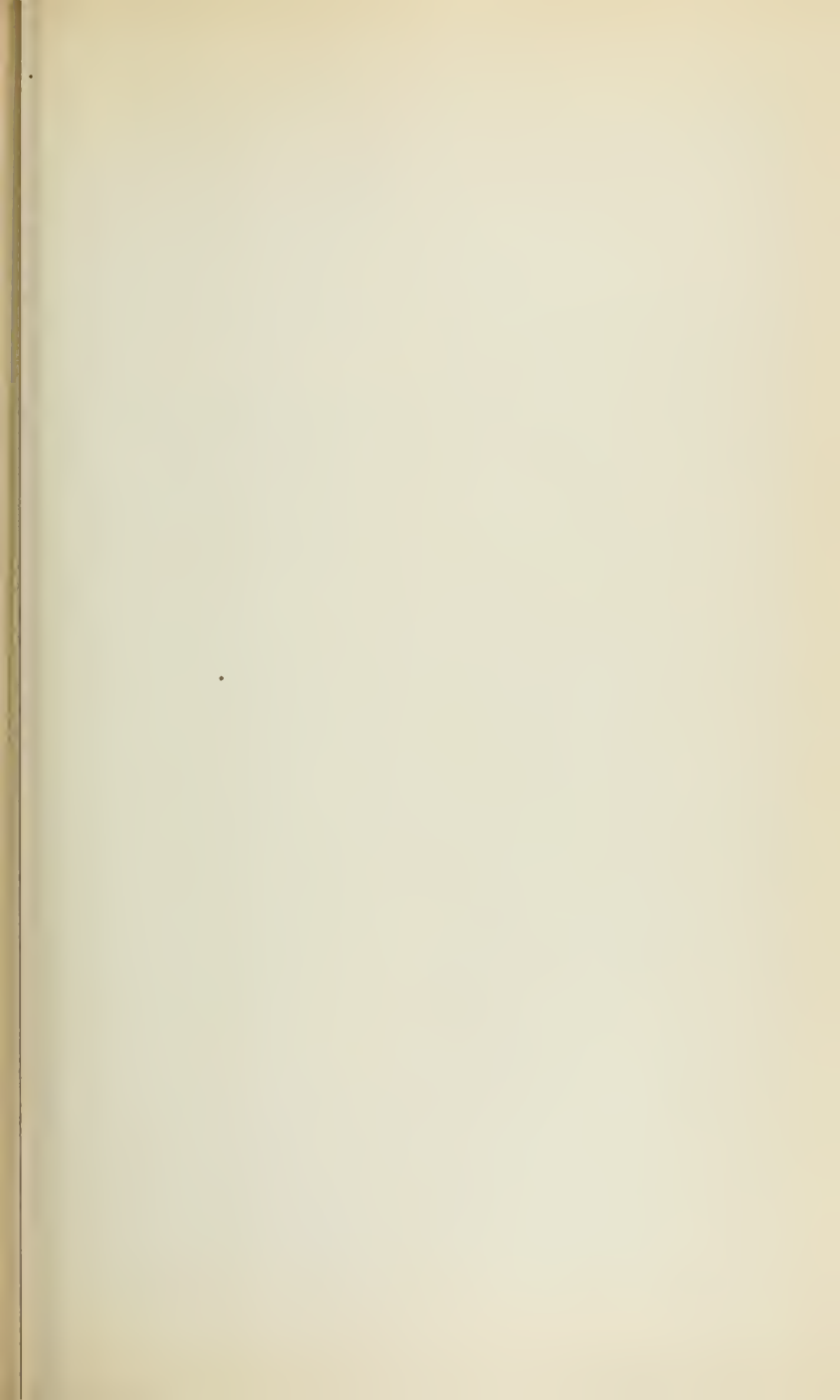
JAMES, L. J.:—I am of the same opinion. I think it is not the business of any court of justice to find facilities for enabling one man to steal another man's property. That is really what we are asked to do by the respondent. The appellant desired to get his mare back. He brought his action of detinue, and he obtained a judgment, the effect of which was that the defendant was to pay the value of the mare or give her up. The trustee seems to think that because the defendant has become bankrupt, he can keep the value and not give up the animal. It is impossible to hold that that can be right, and I am very glad to find that we have the authority of the courts of common pleas and exchequer chamber for saying that such is not the state of the law of England. I agree also with the master of the rolls that in the present case there has been no election by the appellant to take a dividend in lieu of his judgment. A man does not elect himself out of his property in this sort of way. I agree also that the sheriff ought not to have been put in motion to take the mare away from the trustee, who, rightly or wrongly, had got possession of her. But for this improper act the appellant will be sufficiently punished by losing all his costs.

BAGGALLAY, L. J., concurred.

² Law Rep. 6 C. P. 584.

³ Law Rep. 7 C. P. 554.

⁴ Law Rep. 7 C. P. 555.



DRURY et al. v. YOUNG.

(58 Md. 546.)

Court of Appeals of Maryland. July 12, 1882.

Action by William H. H. Young against Edward T. Drury, William H. James, Jr., and Samuel M. Rankin for breach of contract to deliver goods to plaintiff. From a judgment for plaintiff, defendants appeal. Affirmed.

Before BARTOL, C. J., and STONE, MILLER, ALVEY, ROBINSON, and RITCHIE, JJ.

Orlando F. Bump, for appellants. B. Howard Haman and Edgar H. Gans, for appellee.

STONE, J. One of the questions presented for our consideration in this case is, whether the "note or memorandum in writing" required by the seventeenth section of the statute of frauds, must be delivered to the other party thereto. It is apparent from the evidence that the note or memorandum in writing relied on in this case, was made by the bookkeeper of the appellants by the direction of one of them, and by the bookkeeper placed in their safe, among other papers, where it remained from the 27th of August, 1881, the day on which it was written, until it was produced in court, at the trial of the case in February, 1882. There is no evidence that this note was ever seen by the appellee, or even its existence known to him until the trial; and it certainly never was delivered to him, or went out of the possession of the appellants, until produced in court. It is strongly insisted by the appellants that the statute is not gratified without a delivery of this note or memorandum. It must be borne in mind that the statute of frauds was not enacted for cases where the parties have signed a written contract; for in these cases, the common law affords quite a sufficient guarantee against frauds and perjuries, as is provided by the statute. The intent of the statute was to prevent the enforcement of parol contracts, unless the defendant could be shown to have executed the alleged contract by partial performance, or unless his signature to some written note or memorandum of the bargain—not to the bargain itself, could be shown.

The existence of the note or memorandum presupposes an antecedent contract by parol, of which the writing is a note or memorandum. Benjamin on Sales, sec. 208.

Now the statute itself is entirely silent on the question of the delivery of the note or memorandum of the bargain, and its literal requirements are fulfilled by the existence of the note or memorandum of the bargain, signed by the party to be charged thereby. The statute itself deals exclusively with the existence and not with the custody of the paper.

If the non-delivery of the note, does not violate the letter of the statute, would it violate its spirit and be liable to any of the mischiefs which the statute was made to prevent?

The statute was passed to prevent fraud practiced through the instrumentality of perjury. It was passed to prevent the defendant from suffering loss, upon the parol testimony of either a perjured or mistaken witness, speaking of a bargain different from the one in fact made. It made the defendant only liable when a note or memorandum of the bargain signed by himself was produced at the trial.

If produced from the defendant's own custody, it guards against the mischief that the statute was passed to prevent, just as well as if produced from the custody of the plaintiff. The plaintiff is the one likely to suffer by leaving the evidence of his bargain in the hands of the defendant—not the defendant himself.

The statute of frauds is an English statute, and in the absence of any express adjudication of our own court, we naturally look to the English courts as the best expounders of their own statute, and gather from them the principles which should guide us in construing it.

In the case of Gibson vs. Holland, 1 Law Reports, C. P., 1, the only note or memorandum of the bargain was a letter addressed by the defendant to his own agent; the court decided that to be sufficient, and Erie, C. J., in delivering his opinion, said:

"But the objection relied on is, that the note or memorandum of that contract, was a note passing between the defendant, the party sought to be charged, and his own agent, and not between the one contracting party and the other."

"The object of the statute of frauds, was the prevention of perjury in the setting up of contracts by parol evidence, which is easily fabricated. With this view, it requires the contract to be proved, by the production of some note or memorandum in writing. Now, a note or memorandum is equally corroborative, whether it passes between the parties to the contract themselves, or between one of them and his own agent. Indeed, one would incline to think that a statement made by the party to his own agent, would be the more satisfactory evidence of the two."

In Johnson vs. Dodgson, 2 Meeson & Welsby, 653, the defendant made the note of the sale in his own book, and got the agent of the plaintiff to sign it, and the defendant retained the book in his own possession.

It was held by the court, that the note or memorandum was sufficient, and the plaintiff recovered. No notice appears to have been taken by the court in their opinion, of the fact that the memorandum had not been delivered, but had been retained possession of by the defendant. But in the argument of the case, counsel of defendant said: "Suppose the defendant had simply made a memorandum in his own book, that on such a day the plaintiff sold to him; would that be sufficient?" To which Parke, J., replied, "If he meant it to be a memorandum of a contract between the parties, it would."

From these authorities, and the reasons upon which they were decided, we are of

opinion, that delivery is not essential to the validity of the note or memorandum of sale.

The next question which arises is, whether the note or memorandum in this case, is signed by the defendant? The note is in these words: "Office of Drury, Ijams & Rankin, Wholesale and Retail Grocers, and Dealers in Flour, Feed and Fertilizers, Cor. Gay and High streets. E. T. Drury, W. H. Ijams, Jr., S. M. Rankin, Jr. Baltimore, Aug. 27th, 1881. Sold W. H. H. Young & Co., 2,500 cans, say 5,000 doz. C. C. tomatoes, @ \$1.10 p'r doz. cash; cans at Philadelphia. Depot, Balto., Md. 5,000 dozen, @ \$1.10c., \$5,500.00." It appears that all the words, preceding the words, "Baltimore, August 27th, 1881," were printed, and that the printed part, was a letter head, and the written portion under the heading. The names of the defendants being in print, and at the beginning of the note, the question is, whether it is a sufficient signing?

It is entirely immaterial in what part of the instrument the name of the party to be charged appears, if it is put there by him, or by his authority. *Higdon vs. Thomas*, 1 H. & G., 152.

This decision of our court settles the question that the place of the signature in the memorandum is immaterial, and the English cases are equally emphatic, that the name may as well be printed as written, if the printed name is adopted by the party to be charged.

In *Schneider vs. Norris*, 2 Maule & Selwyn, 286, Lord Ellenborough decided, that the appropriation and recognition of a printed name was sufficient.

It is therefore a sufficient signing, if the name be in print, and in any part of the instrument, provided that the name is recognized and appropriated by the party to be his. The note or memorandum in this case upon its face, contains all the necessary terms of a complete bargain.

The names of the vendors and purchasers, the quantity and quality of the goods contracted for, the price at which they were sold, and the terms of sale, and the place of delivery, are all clearly expressed therein, and make a sufficiently good memorandum required by the statute.

If the above mentioned memorandum was insufficient of itself, the following letter addressed by defendants to plaintiff, and which sufficiently refers in its terms to the former note or memorandum, would certainly be sufficient when taken in connection with it, to take this case out of the statute: "Office of Drury, Ijams & Rankin, Wholesale and Retail Grocers, and Dealers in Flour, Feed and Fertilizers, Cor. Gay and High Streets. E. T. Drury, W. H. Ijams, Jr., S. M. Rankin, Jr. Baltimore, Aug. 29th, 1881. Mess. W. H. H. Young & Co.: Gents:—We regret to say, it is impossible for the Chase's Canning Co. to furnish the 2500 cases, 3 C tomatoes purchased of us on 27th inst., @ 1.10 per dozen. Nor do we think it possible to fill order this season, as the fruit cannot be procured. Hoping this may be entirely satisfactory, We are very respectfully,

Drury, Ijams & Rankin." There is no dispute as to the signature of the defendants to this letter, or that it was addressed to the plaintiff, and without the aid of any parol evidence it can easily be connected with the memorandum of 27th August, 1881.

That the letter refers to the same bargain or sale that the memorandum does, is sufficiently shown upon the face of it, as it mentions the same sort of goods, the same quantity and price, and refers to the same date.

The two papers can then be connected with sufficient certainty, without the aid of any extrinsic evidence, and together make a memorandum, meeting the requirements of the statute, even if the memorandum of sale itself were insufficient.

We have then a sufficient note or memorandum of a bargain, provided the jury were satisfied that an antecedent parol bargain, substantially agreeing with the said note or memorandum, had been made between plaintiff and defendants.

Whether such antecedent parol bargain had been made or not, was for the jury to decide, and it was also for the jury to determine the question, whether the printed names were adopted and appropriated by the defendants as theirs, as well as the fact of the memorandum being the act of their authorized agent.

There are eighteen prayers in the record, many of them with shades of difference, so nice, that it is difficult for any one, except the drawer, to see in what the difference consists. The first, sixth, seventh, twelfth, thirteenth and fourteenth prayers of the defendants relate to the insufficiency of the memorandum, considered in itself, and from what we have already said, were properly rejected. The fifteenth prayer of the defendants as to a variance between the oral bargain and the memorandum was substantially covered by the eighteenth and nineteenth prayers, which were granted, and its refusal is therefore no ground of reversal. The second prayer of the defendants was properly refused. The issue in this case was whether there was a contract upon which the plaintiff and defendants had agreed, but there is no issue involving the fact of negotiations only, and the withdrawal of the defendants from such negotiations, and the terms of the prayer were calculated to mislead the jury.

The objections of the defendants to the testimony offered in the second bill of exceptions ought to have been sustained; but as it does not appear what evidence the parties asked gave, if any, the error does not furnish sufficient ground for reversal.

The evidence objected to in the defendants' third bill of exceptions, was admissible.

In a mercantile transaction, where the terms of a written instrument are technical or equivocal on its face, oral evidence is admissible to explain the commercial usage. *Williams vs. Woods & Bridges*, 16 Md., 220.

The question presented by the defendants' first bill of exceptions has been ar-

gued by his counsel with great force and ability, both upon reason and authority. We must, however, decline to express an opinion upon the subject-matter of that exception, for the very obvious reason that no decision that we could now make, upon the question presented in the exception, could have any effect upon this case.

The question presented by the first exception was whether the court below were warranted in ordering the production of the paper mentioned therein, against the protest and objection of the defendants. But they did produce the paper.

It may be that the defendants are right in their hypothesis, and that the court below were in error in ordering its production, and that it has properly no place in this record. But it is in this record, and we have no power to eliminate it therefrom.

The plaintiff has already received the benefit from the production of the paper,

and we know of no way in which we can now deprive him of that benefit.

We would be unable, by a reversal of this judgment and sending the case back for trial, to place the defendants in the same situation that they were before they produced the paper. By their own act they have rendered that impossible. For the purpose of this case, the paper is no longer a private paper, but is in the possession of the court and jury, and has been duly delivered to them by the defendants, and in their possession, for all the purposes of this suit, it must now remain. It was at the option of the defendants to have refused to produce the paper at the trial, and take the risk of a judgment by default, if the court below should have determined to render one against them, and upon an appeal from such judgment the question would have been properly before us.

Judgment affirmed.

DUSTAN v. McANDREW.

(44 N. Y. 72.)

Commission of Appeals of New York. Dec. 28, 1870.

Action for breach of contract. On Aug. 24, 1860, J. S. & W. Brown, of the city of New York, executed an agreement with the plaintiff as follows: "In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, we have sold this day to Mr. John F. Dustan, of this city, 100,000 pounds of first sort western or eastern hops as we may select; growth of 1860; deliverable in the city of New York, at our option, during the months of October or November, 1860, at seventeen cents per pound, subject to Mr. J. S. Brown's inspection, or other mutually satisfactory. Terms, cash on delivery. Mr. Dustan's name to be made satisfactory either by indorsement or by a deposit of \$2,500 by both parties. J. S. & W. Brown."

On Sept. 7, the plaintiff sold this contract to the defendants, by an instrument as follows: "In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, I have this day sold to McAndrew & Wann the contract of J. S. & W. Brown, dated 24th August, 1860, for 100,000 pounds first sort hops, western or eastern, growth of 1860; upon condition that the said McAndrew & Wann fulfill the conditions of said contract to the said J. S. & W. Brown, and pay to me, in addition, on delivery of the hops, ten and one-half cents per pound. John F. Dustan. New York, September 7, 1860."

On Nov. 28 J. S. & W. Brown notified the plaintiff by letter, that they would deliver the hops pursuant to contract on the 30th of that month; and plaintiff immediately, on the same day, notified the defendants of that fact, inclosing to them the letter of J. S. & W. Brown; and on the same day the said J. S. & W. Brown wrote a similar letter to the defendants. These notices actually came to the hands of the defendants on the morning of the 30th.

Prior to Nov. 30, John S. Brown had inspected the hops and put his brand upon them, and certified that they were such hops as the contract called for. On Nov. 30 J. S. & W. Brown were ready and willing to deliver the hops, and the defendants were requested to take them, and they declined on the sole ground as they claimed, that they had not had an opportunity to examine them and inspect their quality, and because Messrs. Brown had refused to let an inspector whom they sent, inspect the hops.

On Dec. 24 the plaintiff took the hops from Messrs. Brown and paid for them, and on the same day wrote the following letter to defendants: "New York, December 24th, 1860. Messrs. McAndrew & Wann: Gentlemen.—The 100,000 pounds hops mentioned in contract of J. S. & W. Brown with me, of 24th August, 1860, and in contract of yourselves with me of 7th September, 1860, are now at the store No. 4 Bridge street, awaiting the fulfillment by you of the terms of your contract, and

I hereby tender to you the said hops, and demand from you the payment of the sum of \$27,500, the amount of such contract price. Unless you comply with the terms of said contract, on or before the 26th day of December, instant, I will proceed to sell the same on your account and hold you for any deficiency. Your obedient servant, John F. Dustan."

Defendants still declined to take the hops, and then on Dec. 26 plaintiff placed them in the hands of a hop broker, who sold them for twenty cents per pound.

The plaintiff also gave evidence that on Nov. 30 and on Dec. 26 twenty cents per pound was the fair market value of the hops; and the defendants gave evidence that on both of these days the market value was some cents higher. There was also evidence showing that hops had a downward tendency in market all through the month of December. It was shown that the hops in all respects answered the contract. Judgment for plaintiff.

William A. Beach, for appellants. John N. Whiting, for respondent.

EARL, C. The contract required that the hops should be inspected by J. S. Brown, or some other inspector satisfactory to both parties. In case J. S. Brown could not or should not inspect them for any reason, then they were to be inspected by some other person mutually satisfactory. Neither party had the right to demand any other inspector, unless Brown neglected or refused to inspect. It is doubtless unusual to insert a stipulation in contracts that the vendor shall inspect the goods sold. But where parties agree to this they must be bound by their contract, and it must be construed the same as if some other person had been chosen inspector.

It is claimed on the part of the respondent, and was held by the court below, that the inspection provided for was intended simply for the convenience of the vendors, to enable them to perform their contract, and that it merely furnished prima facie evidence that the hops answered the contract, and that the inspection was not conclusive upon the parties. I cannot assent to this. The contract was for the sale and purchase of hops of a certain description, and the object of the inspection was to determine for the benefit of both parties whether they answered that description. Until the vendors delivered the hops with the inspection, the vendee was not obliged to pay, and when so delivered, the vendors were entitled to the purchase-price. The inspection was thus as much for the convenience and benefit of one party as the other. Its purpose, like similar provisions in a variety of contracts, was to prevent dispute and litigation at and after performance. But if the inspection was merely for the convenience of the vendors, then they could dispense with it, and compel the vendees to take the hops without any inspection whatever. And if it was merely prima facie evidence of the quality of the hops, then it was an idle ceremony, because not being binding, the vendee could still dis-

pute the quality of the hops, refuse to take them, and show, if he could, when sued for not taking them, that they did not answer the requirements of the contract; and thus the plain purpose for which the provision was inserted in the contract would be entirely defeated.

The inspection could be assailed for fraud, or bad faith in making it, and perhaps within the case of *McMahon v. New York & Erie R. Co.*, 20 N. Y. 463, because made without notice to the vendee. The inspection here was made without notice; but it is not necessary to determine whether this renders it invalid, as no such defense was intimated in the answer or upon the trial.

By the purchase of the contract the defendants were substituted, as to its performance, in the place of the vendee therein named, and were bound to do all that he had agreed to do or was bound in law to do. When notified that the hops were ready for delivery they declined to take them, upon the sole ground that they had not had an opportunity to examine or inspect them; and they claimed that they had sent one Smith to inspect them, and that he had been declined permission to inspect them. There was no proof however that they ever tried to examine or inspect the hops, or that the vendors ever refused to permit them to examine or inspect them. They sent Smith to inspect them, and he went to one of the several storehouses where some of the hops were stored, and he says he was there refused an opportunity to inspect them by Mr. A. A. Brown. But there is no proof that he was in any way connected with the vendor, or that he had any agency or authority whatever from them. There was no proof that defendants ever tried with the vendors to agree upon any other inspector, or that they ever asked the vendors to have the hops inspected by any other inspector, and they made no complaint at any time that they were inspected without notice to them. The point that they should have had notice of the inspection was not taken in the motion for a nonsuit, nor in any of the requests to the court to charge the jury. If the point had been taken in the answer or on the trial, the plaintiff might perhaps have shown that notice was given by the vendors, or that it was waived.

Hence we must hold, upon the case as presented to us, that there was no default on the part of the plaintiff or the vendors,

and that the defendants were in default in not taking and paying for the hops. The only other question to be considered is, whether the court erred in the rule of damages adopted in ordering the verdict.

The court decided that the plaintiff was entitled to recover the difference between the contract price and the price obtained by the plaintiff upon the resale of the hops, and refused, upon the request of the defendants, to submit to the jury the question as to the market value of the hops on or about the 30th day of November.

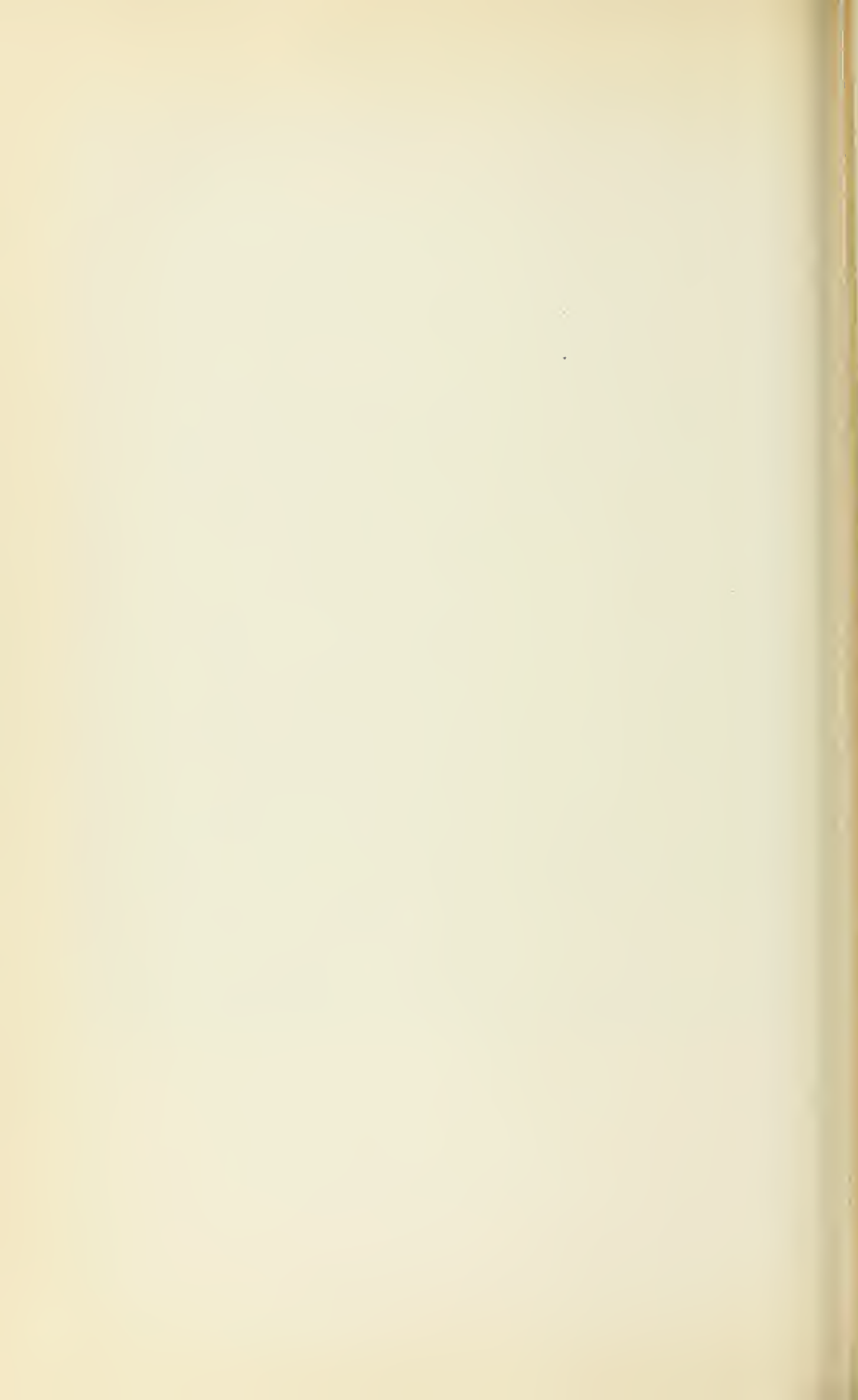
The vendor of personal property in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself. (1) He may store or retain the property for the vendee, and sue him for the entire purchase-price; (2) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3) He may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price. 2 Pars. Cont. 484; Sedgw. Dam. 282; *Lewis v. Greider*, 49 Barb. 606; *Pollen v. Le Roy*, 30 N. Y. 549. In this case the plaintiff chose and the court applied the second rule above mentioned. In such case the vendor is treated as the agent of the vendee to make the sale, and all that is required of him is that he should act with reasonable care and diligence, and in good faith. He should make the sale without unnecessary delay, but he must be the judge as to the time and place of sale, provided he act in good faith and with reasonable care and diligence. Here it is conceded that the sale was fairly made; it was made in the city of New York, in less than one month from the time the defendants refused to take the hops. It was not claimed on the trial that the delay was unreasonable, and we can find nothing in the case to authorize us to hold that it was unjustifiable. We are therefore of the opinion that the court did not err as to the rule of damages.

The judgment should therefore be affirmed, with costs.

For affirmance: LOTT, C. C.; EARL and HUNT, CC. GRAY, C., dissented on the ground that the delay in selling was too great. LEONARD, C., did not vote.

Judgment affirmed, with costs.





EASTER et al. v. ALLEN.

(S Allen, 7.)

Supreme Judicial Court of Massachusetts,
Essex. Jan., 1864.

Replevin. At the trial the plaintiffs introduced evidence that the goods were obtained from them by N. Allen without payment, and by fraud and false pretenses. For the purpose of showing fraud, they offered evidence to show that two days after the transaction Allen went into a store in Boston to purchase goods, and informed the salesman that he had taken a lease of a store, and was going into business, and gave the name of D. P. Dodge, as a reference; and they offered to show what Dodge said in reply to inquiries made of him by the salesman. It was not contended that the answers of Dodge were a part of the pretenses under which the plaintiffs' goods were obtained, or that they were false; and the judge rejected the evidence. The plaintiffs also offered to show that, in a subsequent interview with the same salesman, Allen introduced to him one J. T. Dodge, as a dealer in fluid lamps on Tremont Row, in Boston; and that the salesman inquired at Tremont Row, and found that said Dodge was not a dealer in fluid lamps there. This evidence was rejected.

One of the plaintiffs testified as a witness, and the defendant offered to show, by cross-examination of him, that five days before the trial he made a complaint against N. Allen for obtaining the goods by false pretenses, and that the warrant which issued thereon was served on the morning of the trial, by arresting Allen. This evidence was objected to, but the judge admitted it to show bias or interest, thereby affecting the credibility of the witness.

The judge instructed the jury that, it being agreed that the goods came into the possession of the defendant by a transaction which had the form of a sale, the burden was on the plaintiffs to show, by a preponderance of testimony, not only that the goods were obtained by said N. Allen by false pretenses, but that the defendant was not an innocent purchaser.

The jury returned a verdict for the defendant, and the plaintiffs alleged exceptions.

G. E. Betton, for plaintiffs. S. B. Ives, Jr., (H. G. Johnson with him,) for defendant.

MERRICK, J. It appears from the bill of exceptions to have been satisfactorily proved or admitted that the goods replevied were formerly owned by the plaintiffs, and were sold by them to N. Allen. He afterwards sold and delivered them to defendant, who claims title thereto only under and by force of that sale to him. The plaintiffs alleged that the sale by them to N. Allen was induced, and that he obtained possession of the goods, by fraud and by false and fraudulent pretenses. If such was the fact, they may undoubtedly rescind and avoid their contract of sale, and may maintain this action against the defendant, unless he was a purchaser in

good faith, for value paid and without notice of fraud. *Hoffman v. Noble*, 6 Met. 68. *Rowley v. Bigelow*, 12 Pick. 307.

The plaintiffs, having produced evidence upon the trial tending to show the alleged fraud, asked the court to instruct the jury that if N. Allen obtained the goods from them by fraud and false pretenses, the burden of proof was upon the defendant to show that he bought them in good faith and for value paid.

But the court declined to accede to this request, and ruled that the burden of proof was on the plaintiff to show by a preponderance of evidence, not only that the goods were obtained by N. Allen by false pretenses, but also that the defendant was not an innocent purchaser; and the jury were accordingly instructed to that effect.

This ruling was erroneous. It was sufficient in the first instance for the plaintiffs to prove that they were the owners of the goods, and that their title thereto was never divested by any lawful contract binding upon them. They had, therefore, if such were the fact, an undoubted right to reclaim and recover the goods from any person who had not purchased them in good faith and for value paid. This is an exception of which the defendant might avail himself. But, to establish the validity of his title acquired under the sale to N. Allen, it is incumbent on him to show that he was a purchaser in fact, and paid value for the goods. Proof to this effect will establish his right, unless it be farther shown by the plaintiffs that, at the time of his purchase, he had knowledge of the fraud.

In respect to promissory notes, it has been repeatedly determined that if they have been fraudulently obtained from the maker, or fraudulently put into circulation, in an action thereon by an indorsee, the burden of proof, after such fraud has been established, is on him to show that he became possessed of them in good faith, by a purchase and payment of value. *Sisternans v. Field*, 9 Gray, 331. *Estabrook v. Boyle*, 1 Allen, 412. *Tucker v. Morrill*, 1b. 528. *Smith v. Edgeworth*, 3 Allen, 233. The reason of the rule is applicable with greater force to the case of chattels obtained by fraud; and therefore a purchaser from a fraudulent grantee, who had no just title, ought to be required to prove a fact necessarily in his own knowledge, if such fact occurred, that he paid value for the goods which he purchased. This rule, in its application to chattels, was distinctly recognized and affirmed in the case of *Pringle v. Phillips*, 5 Sandf. 157. And so in the cases of *Hoffman v. Noble* and *Rowley v. Bigelow*, *ibi supra*, the subsequent purchaser was allowed to maintain his title upon showing affirmatively on his part that he paid value for the chattels transferred to him by a fraudulent vendee. The same rule has been observed and practically enforced in reference to real estate. *Somes v. Brewer*, 2 Pick. 181. *Green v. Tanner*, 8 Met. 411.

The further rulings of the court, to which exception was taken by the plaintiffs, were unobjectionable. The testimony offered as to what was said by D. P. Dodge, and what answers, were re-

turned to the plaintiffs to their inquiries made in Tremont Row, was, under the circumstances stated, inadmissible. It was an offer of proof, not of what was said by any party to the suit, as to any of the matters involved in its issue, but by strangers who had no connection with or interest in it, and therefore was obviously incompetent. The evidence which was admitted in relation to the conduct of the plaintiffs in reference to the attendance of N. Allen as a witness on the trial was competent, as having some tendency to

show an effort on their part to suppress the introduction of material evidence in the case, and thus to obtain an unfair and unjust advantage. Such conduct might well create a doubt whether their allegation as to any fraud committed by Allen was well founded.

The exceptions, therefore, as to the rejection and admissibility of evidence must be overruled; but they are sustained as to the ruling of the court upon the subject of the burden of proof.

Exceptions sustained.



EDGERTON v. HODGE.

(41 Vt. 676.)

Supreme Court of Vermont. Rutland, Jan. Term, 1869.

Assumpsit, which was referred to a referee, who reported: "That on the 30th day of June, 1864, the parties made an agreement by parol, by which the defendant agreed to sell to the plaintiff what new milk cheese he then had on hand, and unsold, amounting to 975 lbs., and the new milk cheese he should make thereafter during the season, and the plaintiff agreed to pay the defendant therefor at the rate of fifteen and a half cents per pound, and every twenty days thereafter agreed to call at the defendant's house in Dorset, select such cheese as would be fit for market, attend its weight there, and pay the defendant for the cheese so selected and weighed, and then the defendant was to deliver the same to the plaintiff at the railroad depot in Manchester. The day after the above agreement was made, the defendant, by his son, Albert Hodge, wrote and sent by mail a letter to the plaintiff (a copy of which is annexed, dated July 1, 1864,) depositing the same at the post office in East Rupert, and directed to the plaintiff at Pawlet, and received by him by mail on the same day. The next day, after the return mail from Pawlet to East Rupert had gone out, it being on Saturday, the plaintiff enclosed in a letter, directed to the defendant, at East Rupert, and left it in the post office at Pawlet, to be carried by mail to the defendant, the sum of fifty dollars. (A copy of plaintiff's letter is hereunto annexed, and the envelope enclosing the fifty dollars is postmarked 'Pawlet, July 1.')

This letter of the plaintiff was, on the 8th day of July, 1864, handed to the said Albert Hodge, by the postmaster of East Rupert, and it was on the same day carried by him to the defendant, opened by the said Albert, the fifty dollars refused to be received by the defendant, and the letter of the plaintiff, with the fifty dollars, and the envelope enclosing them, were, by mail, returned to the plaintiff, with no communication accompanying them from the defendant. The plaintiff received the so enclosed wrapper, money and letter, on the 9th of July, 1864, and kept the same fifty dollars for six months thereafter. A daily mail is carried between the postoffices of Pawlet and East Rupert, a distance of six miles. On the 20th day of July, 1864, the plaintiff sent word to the defendant to deliver what cheese he had fit for market to the depot in Manchester. The defendant replied to the messenger that he had no cheese for the plaintiff. No other communication ever took place between the parties in regard to the cheese after the return of the money as above stated until this suit was brought. The defendant sold all his cheese to other parties, making his first sale on the 26th day of July, 1864. If the court shall be of opinion that from the foregoing facts the plaintiff is entitled to recover, and that the rule of damages should be the New York market price for cheese for the season of 1864, de-

ducting freight and commission, then I find due the plaintiff \$411.01. If the current price in the country, paid by purchasers and sent by them to market, is to be the rule, then I find due the plaintiff the sum of \$306.32."

"Dorset, July 1st, 1864. Mr. Edgerton: Sir:—According to our talk yesterday you bought my cheese for the season. I shall stand to it, but shall want you to pay me fifty dollars to bind it. I suppose there is nothing holding unless there is money paid. I do not wish you to think I wish to fly from letting you have it so that it is sure. I will pay you interest on the money until the last cheese is delivered. Yours in haste, J. H. C. Hodge, per A. H."

"Pawlet, July 2, 1864. Mr. Hodge: Dear Sir:—I enclose you fifty dollars to apply on your dairy of cheese as you proposed. Yours, truly, S. Edgerton."

The court at the March term, 1868, Pierpont, C. J., presiding, rendered judgment on the report that the plaintiff recover of the defendant the smaller sum reported by the referee, and for his costs, to which the defendant excepted.

Fayette Potter, for plaintiff. Edgerton & Nicholson and J. B. Bromley, for defendant.

WILSON, J. The parol agreement, entered into by the parties, June 30th, being for the sale of goods, wares and merchandise for the price of forty dollars and more, is within the statute of frauds, and inoperative, unless taken out of the statute by the subsequent acts of the parties. It is claimed by the plaintiff that the defendant's letter under date of July 1st, and the depositing of the plaintiff's letter with the fifty dollars in the postoffice on the 2d of that month, constitute a payment of part of the purchase money within the meaning of the statute. It will be observed that when those letters were written, no binding agreement had been concluded. The defendant, in his letter of July 1st, says: "According to our talk yesterday, you bought my cheese for the season. I shall stand to it, but shall want fifty dollars to bind it." By that letter the plaintiff was notified that he could make the bargain binding upon himself as well as the defendant, by paying to the defendant the sum demanded for that purpose. The plaintiff on the 2d day of July enclosed fifty dollars in a letter, directed to the defendant and deposited it in the postoffice, which letter was delivered to the defendant on the 8th of that month. He did not accept the money, but returned it to the plaintiff. It is clear that the act of depositing the letter and the money in the postoffice was not a payment to the defendant. His letter did not direct the money to be sent by mail; it contains nothing that would indicate that the defendant expected the plaintiff would reply by letter, or accept the proposition by depositing the money in the postoffice; and the fact that the defendant by letter offered to allow the plaintiff to perfect the agreement, by paying part of the purchase money, did not authorize or invite the plaintiff to send

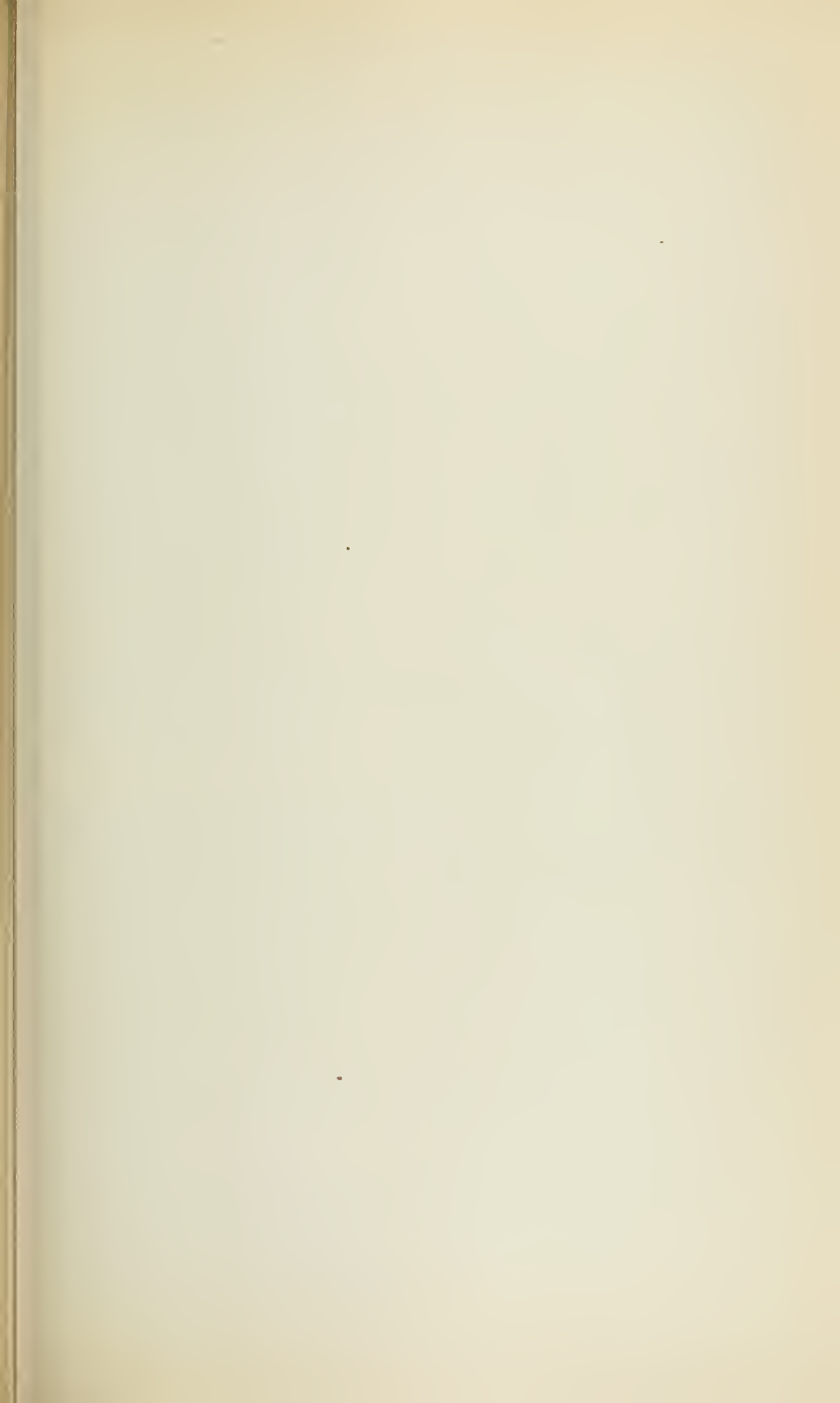
the money by mail, or make the mail the defendant's carrier of the money. The language of the defendant's letter is: "I shall want you to pay me fifty dollars to bind it," that is, to make it a valid contract.

The money, when deposited in the post-office, belonged to the plaintiff; it belonged to the plaintiff while being carried by mail to the defendant, and it would continue the property of the plaintiff unless accepted by the defendant. The plaintiff took the risk not only of the safe conveyance of the money to the defendant, but also as to the willingness of the defendant to accept it. The defendant's letter, not constituting such a note or memorandum of the agreement as the statute required, left it optional with the defendant to accept or refuse part payment when offered to him, the same as if the defendant had sent to the plaintiff a verbal communication of the same import as the defendant's letter. A point is made by counsel as to whether the money was conveyed and delivered or offered to the defendant, within a reasonable time after his letter was received by the plaintiff, but it seems to us that the time the money was offered is not material. We think, even if the plaintiff had gone immediately after receiving the defendant's letter, and offered and tendered to him the fifty dollars, the defendant would have been under no legal obligation to accept it. The mere offer of the defendant to receive the money would not estop him from refusing to accept it; but in order to take the case out of the operation of the statute, it required the agreement or consent of both parties, as to payment by the plaintiff and acceptance of it by the defendant. Upon the facts of this case, we think the rights of the parties rest upon and are to be determined by the verbal agreement entered into by them on the 30th of June, and that their subsequent attempts to make that agreement a valid contract can not aid the plaintiff. The statute provides that "no contract for the sale of any goods, wares or merchandise, for the price of forty dollars or more, shall be valid, unless the purchaser shall accept and receive part of the goods so sold, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum of the bargain be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

The very language of the statute above quoted implies that in whichever way the parties verbally agree or propose that contract for the sale of goods, wares or merchandise, for the price of \$40 or more, shall be made exempt from the statute of

frauds, whether it be by the purchaser accepting and receiving part of the goods so sold, by giving something in earnest to bind the bargain, or in part payment, or by making a note or memorandum of the bargain, it must be done, if done at all, by the consent of both parties. It is obvious that it would require the consent of the purchaser to accept and receive part of the goods, and he could not receive them unless by consent of the seller; the purchaser could not give something in earnest to bind the bargain, or in part payment, unless the seller accept and receive it; nor could a note or memorandum of the bargain be made and signed unless by the consent of the party to be charged thereby. A valid contract is an agreement or covenant between two or more persons, in which each party binds himself to do or forbear some act; and each acquires a right to what the other promises; but if the parties, in making a contract like the present one, omit to do what the statute requires to be done to make a valid contract, it would require the consent of both parties to supply the thing omitted. Suppose it had been one stipulation of the verbal agreement on the 30th of June that the plaintiff should give and the defendant receive something in earnest to bind the bargain, and in pursuance of such stipulation the plaintiff had then offered to give or pay the amount so stipulated, and the defendant had refused to receive it, saying that he preferred not to receive any money until he had delivered the whole or part of the property, or had refused to accept the money so offered, or do any other act to bind the bargain, without giving any reason for such refusal, it would be evident that he did not intend to make a binding contract. But the fact that he had made such verbal agreement to receive something or to do some other act to bind the bargain, and that the plaintiff was ready and offered to comply on his part, would not take the agreement out of the statute. A verbal stipulation to give and to receive something in earnest to bind the bargain or in part payment, or a verbal promise to make a note or memorandum in writing necessary to exempt the agreement from the operation of the statute, is as much within the statute of frauds as is the agreement or contract taken as a whole; and a note or memorandum in relation to giving something in earnest to bind the bargain, or in part payment, which is insufficient of itself to take the contract out of the statute, is also insufficient to make the contract binding upon either party.

The judgment of the county court is reversed and judgment for the defendant for his costs.



EICHHOLZ v. BANNISTER.

(17 C. B. [N. S.] 708.)

Common Pleas, Michaelmas Term, 28 Victoria.
Nov. 17, 1864.

This was an action for money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff, for money paid by the plaintiff for the defendant at his request, and for money found to be due from the defendant to the plaintiff on accounts stated: Claim, £19. Plea, never indebted, whereupon issue was joined.

The cause was tried in the court of record for the trial of civil actions within the city of Manchester, before the deputy recorder, when the facts which appeared in evidence were as follows:—The plaintiff was a commission-agent at Manchester. The defendant was a job-warehouseman in the same place. On the 18th of April last, the plaintiff went to the defendant's warehouse, and there saw, amongst other goods which the defendant had just purchased, 17 pieces of prints, which he offered to buy of him at 5½d. a yard. After some discussion, the defendant agreed to sell them, and gave the plaintiff an invoice in the following form, the whole of which was printed, with the exception of the parts in italics:—

"21, Chorlton Street, Portland Street,
"Manchester. April 18th, 1864.

"Mr. Eichholz

"Bought of R. Bannister, Job-Warehouseman.

"Prints, Fents, Grey Fustians, etc. Job and Perfect Yarns in Hanks, Cops, and Bundles.

"17 pieces of prints, 52 yds at 5½ d.	19 0 0
"1½ per cent. for cash	0 6 0

"£18 14 0"

The plaintiff paid for the goods before he left the warehouse, and the defendant sent them by a porter to the plaintiff's place of business. The plaintiff sold the lot a few days afterwards for £19 15s. net. The goods were subsequently returned to the plaintiff, they having been recognized as goods which had been stolen from the premises of one Krauss. The goods were taken possession of by the police, and the thief, one Aspinall, was tried at the general quarter sessions of the peace holden in and for the city of Manchester on the 9th of May last, and convicted, and sentenced to penal servitude for four years.

On the part of the defendant, it was objected that there was no case to go to the jury, inasmuch as there is no implied warranty of title on the sale of goods.

For the plaintiff it was insisted that he was entitled to recover, the money having been paid upon a consideration which had wholly failed.

The learned judge directed a verdict to be entered for the plaintiff for the amount claimed, reserving leave to the defendant to move to set aside the verdict and enter a nonsuit or a verdict for the defendant, if the court should be of opinion that the plaintiff was not entitled to recover.

Holker, on a former day in this term, obtained a rule nisi accordingly. C. Pollock now shewed cause.

ERLE, C. J. I am of opinion that this rule should be discharged. The plaintiff brings his action to recover back money which he paid for goods bought by him in the shop of the defendant, which were afterwards lawfully claimed from him by a third person, the true owner, from whom they had been stolen. The plaintiff now claims to recover back the money as having been paid by him upon a consideration which has failed. The jury at the trial found a verdict for the plaintiff, under the direction of the learned judge who presided; and a rule has been obtained on behalf of the defendant to set aside that verdict and to enter a nonsuit, on the ground that it is part of the common law of England that the vendor of goods by the mere contract of sale does not warrant his title to the goods he sells, that the buyer takes them at his peril, and that the rule caveat emptor applies. The case has been remarkably well argued on both sides; and the court are much indebted to the learned counsel for the able assistance they have rendered to them. The result I have arrived at, is, that the plaintiff is entitled to retain his verdict. I consider it to be clear upon the ancient authorities, that, if the vendor of a chattel by word or conduct gives the purchaser to understand that he is the owner, that such representation forms part of the contract, and that, if he is not the owner, his contract is broken. So is the law laid down in the very elaborate judgment of Parke, B., in *Morley v. Attenborough*, 3 Exch. 500, 513, where that learned judge puts the case upon which I ground my judgment. A difference is taken in some of the cases between a warranty and a condition;¹ but that is foreign to the present inquiry. In *Morley v. Attenborough*, 3 Exch. 513, Parke, B., says: "We do not suppose that there would be any doubt, if the articles are bought in a shop, professedly carried on for the sale of goods, that the shop-keeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case the vendor sells 'as his own,' and that is what is equivalent to a warranty of title." No doubt, if a shop-keeper in words or by his conduct affirms at the time of the sale that he is the owner of the goods, such affirmation becomes part of the contract, and, if it turns out that he is not the owner, so that the goods are lost to the buyer, the price which he has received may be recovered back. I ventured to throw out some remarks in the course of the argument upon the doctrine relied on by Mr. Holker, which he answered by assertion after assertion coming no doubt from judges of great authority in the law, to the effect that upon a sale of goods there is no implied warranty of title. The passage cited from Noy certainly puts the proposition in a manner that must shock the understanding of any ordinary person. But I take the principle intended to be illustrated to be this,—I am in possession of a horse or other chattel: I neither affirm or deny that I am the owner: If you choose to

¹ See *Bannerman v. White*, 10 C. B. (N. S.) 844.

take it as it is, without more, caveat emptor; you have no remedy, though it should turn out that I have no title. Where that is the whole of the transaction, it may be that there is no warranty of title. Such seems to have been the principle on which *Morley v. Attenborough* was decided. The pawnbroker, when he sells an unredeemed pledge, virtually says,—I have under the provisions of the statute² a right to sell. If you choose to buy the article, it is at your own peril. So, in the case of the sale by the sheriff of goods seized under a *f. fa.*—*Chapman v. Speller*, 14 Q. B. 621. The fact of the sale taking place under such circumstances is notice to buyers that the sheriff has no knowledge of the title to the goods; and the buyers consequently buy at their own peril. Many contracts of sale tacitly express the same sort of disclaimer of warranty. In this sense it is that I understand the decision of this court in *Hall v. Conder*, 2 C. B. (N. S.) 22. There, the plaintiff merely professed to sell the patent-right such as he had it, and the court held that the contract might still be enforced, though the patent was ultimately defeated on the ground of want of novelty. The thing which was the subject of the contract there was not matter, it was rather in the nature of mind. These are some of the cases where the conduct of the seller expresses at the time of the contract that he merely contracts to sell such a title as he himself has in the thing. But, in almost all the transactions of sale in common life, the seller by the very act of selling holds out to the buyer that he is the owner of the article he offers for sale. The sale of a chattel is the strongest act of dominion that is incidental to ownership. A purchaser under ordinary circumstances would naturally be led to the conclusion, that, by offering an article for sale, the seller affirms that he has title to sell, and that the buyer may enjoy that for which he parts with his money. Such a case falls within the doctrine stated by Blackstone, and is so recognized by *Littledale, J.*, in *Early v. Garrett*, 9 B. & C. 928, 4 M. & R. 687, and by *Parke, B.*, in *Morley v. Attenborough*, 3 Exch. 513. I think justice and sound sense require us to limit the doctrine so often repeated, that there is no implied warranty of title on the sale of a chattel. I cannot but take notice, that, after all the research of two very learned counsel, the only semblance of authority for this doctrine from the time of *Noy* and *Lord Coke* consists of mere dicta. These dicta, it is true, appear to have been adopted by several learned judges, amongst others by my excellent Brother *Williams*, whose words are almost obligatory on me. But I cannot find a single instance in which it has been more than a repetition of barren sounds, never resulting in the fruit of a judgment. This very much tends to show the wisdom of *Lord Campbell's* remark in *Sims v. Marryat*, 17 Q. B. 291, that the rule is beset with so many exceptions that they well nigh eat it up. It is to be hoped that the notion

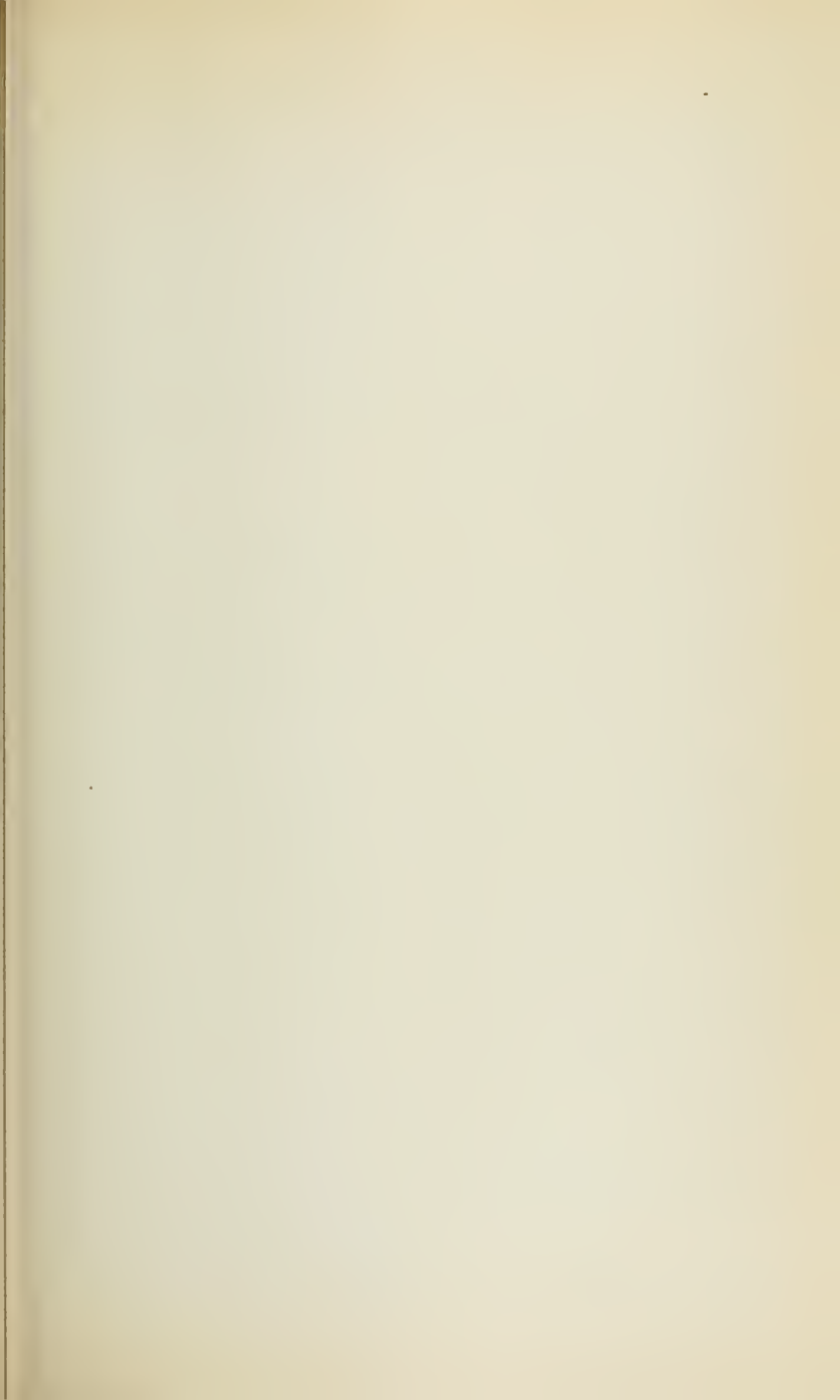
which has so long prevailed will now pass away, and that no further impediment will be placed in the way of a buyer recovering back money which he has parted with upon a consideration which has failed.

BYLES, J. I also am of opinion that this rule should be discharged. It has been said over and over again that there is no implied warranty of title on the mere sale of a chattel. But it is certainly, as my Lord has observed, barren ground; not a single judgment has been given upon it. In every cause, there has been, subject to one single exception, either declaration or conduct. *Chancellor Kent*, 2 Com. 478, says: "In every sale of a chattel, if the possession be at the time in another, and there be no covenant or warranty of title, the rule of caveat emptor applies, and the party buys at his peril;" for which he cites the dicta of *Lord Holt* in *Medina v. Stoughton*, 1 Salk. 210, 1 Ld. Raym. 593, and of *Buller, J.*, in *Pasley v. Freeman*, 3 T. R. 57, 58. "But," he goes on, "if the seller has possession of the article, and he sells it as his own, and not as agent for another, and for a fair price, he is understood to warrant the title." Thus the law stands that, if there be declaration or conduct or warranty whereby the buyer is induced to believe that the seller has title to the goods he professes to sell, an action lies for a breach. There can seldom be a sale of goods where one of these circumstances is not present. I think *Lord Campbell* was right when he observed that the exceptions had well nigh eaten up the rule.

KEATING, J. I am of the same opinion. Whether it be an exception to the rule or a part of the general rule, I think we do not controvert any decided case or dictum when we assert, that, under circumstances like those of the present case, the seller of goods warrants that he has title. These goods were bought in the defendant's shop in the ordinary course of business. He gives an invoice with them, which represents that he is selling them as vendor in the ordinary course. I think the case falls within that put by *Parke, B.*, in *Morley v. Attenborough*, 3 Exch. 513, of a sale in a shop, which he treats as a circumstance which beyond all doubt gives rise to a warranty of ownership. I was somewhat pressed by *Mr. Holker's* question whether there is more affirmation of title in the case of a sale in a shop than in a sale elsewhere. It may be that the distinction is very fine in certain cases. If a man professes to sell without any qualification out of a shop, it is not easy to see why that should not have the same operation as a sale in the shop. It is not necessary, however, to decide that question now. Here, the sale took place in a public shop, in the ordinary way of business, and every circumstance concurs to bring the case within the distinction put by *Parke, B.*, in *Morley v. Attenborough*.

Rule discharged.

² 39 & 40 Geo. III. c. 99, § 17.



ELLIS v. ANDREWS.

(56 N. Y. 83.)

Court of Appeals of New York. Feb. 24, 1874.

Action for fraud. The complaint alleged that "said defendants fraudulently stated in substance to said plaintiff that the stock of the Congress and Empire Spring Company was worth at least eighty per cent upon the par value thereof, which statement said plaintiff then and there believed to be true; and relying thereupon purchased from the said defendants \$25,000 of said stock, and paid therefor \$20,000 in cash, or its equivalent; whereas, in truth and in fact, the said stock was not then worth over forty per cent, and which fact was then well known to said defendants, whereby the said plaintiff sustained damages," etc. Judgment for defendant.

E. F. Bullard, for appellant. Esek Cowen, for respondents.

GROVER, J. The Code, section 148, in effect provides, that the objections to the jurisdiction of the court, and that the complaint does not state facts sufficient to constitute a cause of action, are not waived by a failure to interpose them by demurrer or answer. The latter objection therefore was properly raised by the respondents upon the trial. In an action to recover damages claimed to have been sustained by the fraudulent representations of the defendants the complaint must set out the representations relied upon. *Gray v. Palmer*, 2 Robt. 500. This case was affirmed by this court, as appears from the index in 41 New York, 620, where it is erroneously said to have been reported in 2 Barbour. The court having dismissed the complaint upon the ground that it did not contain facts sufficient to constitute a cause of action, the only question is, whether it did contain such facts. The complaint is very brief, and in substance avers that the defendants fraudulently stated to the plaintiff that the stock of the Congress and Empire Spring Company was worth at least eighty per cent upon the par value thereof; which statement the plaintiff believed to be true, and relying thereupon, purchased from the defendants \$25,000 of said stock, and paid therefor \$20,000 in cash; whereas the stock was not then, in fact, worth over forty per cent; which fact was then well known to the defendants; whereby the plaintiff sustained damage, etc. The assertion by the defendants that the stock was worth eighty per cent of its par value cannot I think be regarded as the expression of an opinion as to its value, for the reason that it is averred that it was fraudulently made, and that they then knew that it was not worth more than forty per cent. I think it must be regarded as a false statement of the value, made for the purpose of obtaining a higher price for the stock than they knew it was worth. The question then is, whether such a statement so made by the vendor of property, while negotiating the sale, gives the purchaser who has contracted,

relying thereon, a cause of action for the deceit. This precise question arose in *Harvey v. Youag, Yelverton*, 21, in the time of Queen Elizabeth. In that case the plaintiff alleged that the defendant assured him that a certain term of years which he proposed to sell to him was worth £150, when in fact it was worth but £100; and after verdict for the plaintiff in an action for the deceit, the judgment was arrested upon the ground that it was the plaintiff's folly to give credit to such assertion. This case was recognized as sound law in *Ekins v. Tresham*, 1 Lev. 102; although it was held in the latter case that an action would lie for a fraudulent representation by the vendor that the premises were leased at a greater than the actual rent. The distinction is obvious. Upon the question of value the purchaser must rely upon his own judgment; and it is his folly to rely upon the representation of the vendor in that respect; but in regard to any extrinsic fact affecting the quality or value of the subject of the contract, he may rely upon the assurances of the vendor, and if he does so rely and the assurances are fraudulently made to induce him to make the contract, he may have an action for the injury sustained. The doctrine thus settled has rarely since been questioned; which accounts for the very few cases found in the books discussing the point. In *Van Epps v. Harrison*, 5 Hill, 63; 40 Am. Dec. 314, it is stated as undoubted law that an action will not lie by a purchaser against a vendor upon false and fraudulent statements of the value of the property sold, made while negotiating the sale. This was concurred in by the entire court. *Bronson, J.*, was of opinion that the action would not lie upon a false and fraudulent statement so made, as to the price which the vendor had paid for the property, but the majority of the court held that an action would lie for the latter. The cases bearing upon the question were cited and commented upon by *Bronson, J.*, and a repetition is unnecessary. Had the complaint stated that defendants, upon the sale, made false and fraudulent statements to the plaintiff in relation to the property owned by the corporation, its business, pecuniary condition, the price at which its stock was selling in the market, or any other fact affecting its value, with intent to deceive and defraud her, that she in reliance thereon had made the purchase and been thereby injured, it would have shown a good cause of action. *Hubbell v. Meigs*, 50 N. Y. 480. As to such matters a purchaser has a right to rely upon the statements of the vendor but not upon his mere statements of the value. As to the latter he must rely upon his own judgment, and if not sufficiently informed, must seek further information.

The complaint in this case fails to show a cause of action, and was therefore rightly dismissed. The judgment must be affirmed, with costs.

RAPALLO, JOHNSON and FOLGER, J.J., concur; CHURCH, C. J., and ANDREWS, J., dissent; ALLEN, J., absent.



ELLIS et al. v. HUNT et al.

(3 Term. R. 461.)

Court of King's Bench. Michaelmas Term,
1789.

Trover for a quantity of files. At the trial before Lord Kenyon, at Westminster, a verdict was taken for the plaintiffs, subject to the opinion of the court on the following case. On the 31st of October, 1788, Moore, the bankrupt, ordered the goods in question from the plaintiffs, who are manufacturers at Sheffield; and on the 14th of November following they were sent by Royle's waggon, directed to the bankrupt in England; the waggon being overloaded, the cask was taken out at Stamford, in its way to town, and put into the defendant Hunt's waggon, which brought it to the Castle and Falcon inn, in London, on the 22d of November 1788. The plaintiffs drew a bill on the bankrupt for part of the value of the goods, which bill was never paid. The cask and files were, on their arrival in town, immediately attached by Messrs. Fenton and Company, creditors of the bankrupt, by process of foreign attachment issued out of the mayor's court of London; the cask remained at the inn, charged with such attachment, so far as the same could charge it. On the 15th of November a docquet was struck against Moore; and on the 18th a commission of bankrupt issued against him, on which he was declared a bankrupt, and the other defendants were chosen his assignees. On the 24th of November a provisional assignment was executed by the commissioners to John Wells, a messenger under the commission, who on the same day demanded the goods in question from the defendant Hunt the carrier, and put his mark upon the cask, but did not take the goods away. On the 28th of November the plaintiffs wrote a letter to the agent of Royle's waggon, directing him, in case the goods were not delivered, to keep them in his warehouse, as they had heard that Moore was become a bankrupt. On the 13th of December the plaintiffs demanded the cask and files of Mott, the master of the Castle and Falcon, and offered to pay the carriage and to indemnify him, which Mott refused; and upon the attachment being withdrawn, he delivered up the goods to the defendants, the assignees, of whom they have since been demanded; but they have refused to deliver them up.

Wood, for plaintiffs. Baldwin, for defendants.

LORD KENYON, C. J.—If any case had been decided to the extent of the plaintiffs argument, namely, that bankruptcy is of itself a countermand, the plaintiffs here would be entitled to recover; but that has never yet been decided. The doctrine of stopping goods in transitu is bottomed on the case of *Snee v. Prescott*, 1 Atk. 218, where Lord Hardwicke established a very wise rule, that the vendor might resume the possession of goods consigned to the vendee before delivery, in case of the bankruptcy of the vendee: on this all the other

cases are founded. There have indeed been cases, where nice distinctions have been taken on the fact, whether the goods had or had not got into the possession of the vendee; but they all profess to go on the ground of the goods being in transitu, when they were stopped. As to the necessity of the goods coming to the "corporal touch" of the bankrupt, that is merely a figurative expression, and has never been literally adhered to. For there may be an actual delivery of the goods, without the bankrupt's seeing them; as a delivery of the key of the vendor's warehouse to the purchaser. In order to decide this case, it is material to attend to the dates; on the 24th of November the provisional assignment was made to Wells, who on the same day demanded the goods in question of the defendant Hunt, and put his mark on the cask. Now it is said that this should have been done by the bankrupt himself: but by the assignment he was stripped of all his property, which was then vested in the provisional assignee. Therefore, if a corporal touch were necessary to defeat the right of the vendors, it took place here. It is true that the provisional assignee did not alter the situation of the goods; but they were then arrived at the end of their destined journey, and deposited in a place where they would have remained till the bankrupt could have carried them to a warehouse of his own. All this happened on the 24th of November; and it was not until the 28th of that month that the vendor wrote to countermand the delivery of the goods; but that was too late; for the goods were no longer in transitu, they were then in the possession of the party to whom they were consigned, or of those who represented him. In cases of this sort we cannot but feel for the situation of the manufacturer; but it is such as they are necessarily subject to from their mode of dealing; however the severity of the case cannot induce us to break through the rule of law.

ASHMURST, J.—The leaning of my mind would be in favour of the plaintiff; but the law will not allow him to be in a better situation than the rest of the bankrupt's creditors. The general rule is that the consignor has a right to stop the goods, if he can, before they get into the actual possession of the bankrupt. But here, before the plaintiffs thought of countermanding the goods in question, the provisional assignee, who then stood in the place of the bankrupt, had actually taken possession of them, and put his mark on them.

BULLER.—I am not disposed to disturb or to lessen the authority of any of the cases that have been decided on this subject; but none of them could justify the vendor in this case in taking back the goods. In the former cases the line has been precisely drawn; and they all turn on the question, whether or not there had been an actual delivery to the bankrupt. It is of the utmost importance to adhere to that line; for if we break through it, we shall endanger the authority of the

cases that have been already decided, and shall fritter away the rule entirely. In one of the cases cited Lord Mansfield took the distinction between an actual, and a constructive, delivery to the vendee. There may be cases where, as between the buyer and seller, if no bankruptcy or insolvency happen, the goods are considered in the possession of the buyer, the instant they go out of the possession of the vendor; as if A. order goods from B. to be sent by a particular carrier at his own risk, the delivery to the carrier is a delivery to the vendee to every other purpose, but still, if he become a bankrupt before the carrier actually deliver them to him, I should hold that the vendor might seize them; because that is only a constructive delivery to the vendee: but an actual delivery is necessary to divest the vendor's right to stopping the goods in transitu. It is clear that bankruptcy itself does not put an end to the contract; and if not, the right of the vendor to seize goods in transitu is founded only on equitable principles. It is a right, with which he is indulged on principles of justice, originally established in courts of equity, and since adopted in courts of law. But in order to avail himself of it he must stop the goods before they get into the actual possession of the vendee. But in this case there is the strongest evidence of the consignee's taking actual possession of the goods of his assignee putting his mark on them.

It was said by the plaintiff's counsel that the carrier would have been liable in an action by the vendor: but he would not have been liable in the character of carrier, for the goods had got to the end of their destined journey; but he would have been liable only as a warehouse-keeper, in respect of the recompence which he was to receive for warehouse-room. But the instant the provisional assignee put his mark on the goods, the warehouse-man became the agent or servant to the bankrupt.

GROSE, J.—The general rule is perfectly clear that the consignor may seize the goods in transitu, in case of the insolvency of the consignee, before they actually reach him. The question therefore here is whether, on the facts of this case, the goods were or were not in transitu when the plaintiffs wrote to countermand the delivery of them. Now it is stated as a fact that before this letter arrived the provisional assignee had put his mark upon the cask; and this distinguishes it from the cases cited. When the goods were marked, they were delivered to the consignee as far as the circumstances of the case would permit; the assignee could not then take them away, because they were at this time under an attachment. After the mark was put on them, they were no longer in transitu; and consequently the plaintiff's right to seize them was divested. *Postea* to the defendants.





EMPIRE STATE TYPE FOUNDING CO. v. GRANT, Sheriff.

(21 N. E. Rep. 49, 114 N. Y. 40.)

Court of Appeals of New York, Second Division. March 26, 1889.

Appeal from supreme court, general term, First department.

Action by the Empire State Type Foundry Company against Hugh J. Grant, sheriff of the city and county of New York. Judgment was given for defendant, and plaintiff appeals.

George W. Stephens, for appellant. *Cockran & Clark*, for respondent.

PARKER, J. In March, 1886, the plaintiff, by its president, agreed to sell to one Guy Tremelling two printing-presses, with the necessary shafting, together with a quantity of type and other printers' supplies, for the sum of \$1,100.95, payment to be made as follows: \$500 to be paid in cash, and a chattel mortgage, embracing all the property sold, to be given by Tremelling for the balance. The plaintiff at once commenced to put up the shafting, set the presses, and deliver the type and other materials. When the work was about half done the clerk of the plaintiff was sent to Tremelling to collect the cash agreed to be paid. Tremelling paid \$250, and the plaintiff went on with the work of putting the presses in working order, transferring the type and other materials, in which work the plaintiff was engaged between 15 and 16 days. Immediately after the materials had been put in and work completed, the president of the plaintiff went to the office of Tremelling to receive the payment agreed upon, and there learned that Tremelling had absconded. On the same day, or the day following, the defendant, as sheriff of the city and county of New York, under and by virtue of a warrant of attachment regularly issued against the property of Tremelling, levied upon the effects in question. The plaintiff thereupon commenced this action to recover possession of the property. At the close of the plaintiff's case, the defendant moved the court to direct a verdict for the defendant. The plaintiff asked that the case be submitted to the jury. The court denied the plaintiff's request, and directed a verdict for the defendant, the plaintiff duly excepting. We think that the facts proven did not warrant the trial court in holding as a matter of law that the title to the property had passed from plaintiff to Tremelling, and therefore the disposition made of the case was error. It is too well settled to require the citation of authority, that, where a sale of personal property is made upon condition that the stipulated price shall be paid upon delivery, title does not pass until payment made, unless the vendor waive the condition. Under such a contract, delivery and payment are simultaneous or concurrent acts by the seller and buyer, and although the articles may have been actually delivered into the possession of the vendee, the delivery

is held to be conditional, and not absolute, provided the vendor has not, by subsequent act, waived the condition of payment. If, then, the agreement between the plaintiff and Tremelling had provided in express terms that payment be made on delivery, (no proof having been offered tending to show a subsequent waiver of such condition,) it would have been the duty of the court to hold as a matter of law that the title to the chattels still remained in the plaintiff.

The agreement, however, did not provide in express terms that payment should be made on delivery. Neither did it provide that payment and delivery should not be concurrent. The rule in such case is that the intent of the parties must control. If it can be inferred from the acts of the parties and the circumstances surrounding the transaction that it was the intent that delivery and payment should be concurrent acts, the title will be deemed to have remained in the vendor until the condition of payment is complied with. 1 Benj. Sales, (Amer. Ed.) § 330, and notes; *Leven v. Smith*, 1 Denio, 571; *Hammett v. Linneman*, 48 N. Y. 399; *Smith v. Lynes*, 5 N. Y. 41; *Parker v. Baxler*, 86 N. Y. 586; *Russell v. Minor*, 22 Wend. 653. The question of intent is one of fact, not of law. It is for the jury, not the court, to pass upon. *Hall v. Stevens*, 40 Hun, 578; *Hammett v. Linneman*, 48 N. Y. 399. It appears that the defendant stipulated to pay for the materials sold, \$500 in cash, and give a chattel mortgage on all of the property for the balance; that while the materials were being delivered the plaintiff demanded and received \$250 on account of the cash payment; that, immediately after the plaintiff had performed his part of the contract, its president went to Tremelling's office to receive payment, and found that he had absconded, and that the next day the plaintiff's president asserted to the attaching creditor that he had not parted with the possession of the goods. These facts, together with all the circumstances surrounding the transaction, under the authorities cited, should have been submitted to the jury under proper instructions, to enable them to determine whether the title passed to Tremelling or remained in the plaintiff.

It is suggested in one of the opinions of the court below that Tremelling had acquired an interest to the extent of \$250 in the property which was subject to sale under the attachment. We do not concur in that view. If it be determined that the title to the property remains in the plaintiff, the case falls within the established rule that where a vendor of chattels, when the period of performance arrives, is ready and offers to perform on his part, and the purchaser neglects and refuses to perform for any reason, he cannot recover back the partial payments he has made. *Monroe v. Reynolds*, 47 Barb. 574; *Humeston v. Cherry*, 23 Hun, 141. The judgment of the general term and of the circuit should be reversed, and a new trial ordered; costs to abide the event. All concur.



FAIRBANK CANNING CO. v. METZGER et al.

(23 N. E. Rep. 372, 118 N. Y. 260.)

Court of Appeals of New York, Second Division.
Jan. 14, 1890.

Appeal from judgment of the general term of the supreme court in the fourth judicial department, entered upon an order made January 11, 1887, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to recover the contract price of a car-load of dressed beef. The answer averred, by way of counterclaim, a warranty that the meat should be clean, well dressed, and in first-class condition, not heated before being killed, and a breach thereof by reason of which defendant sustained damage.

The following facts appeared: The plaintiff is a corporation engaged in buying and slaughtering cattle, and selling fresh dressed beef, in Chicago. The defendants are copartners, engaged in wholesaling and retailing meat. In February, 1883, the plaintiff, by letter, solicited the defendants to purchase from it what dressed beef they required. It resulted in a contract, made entirely by correspondence, for meat to be wholesaled from the car by defendants' agent, from Dunkirk to Elmira, the portion remaining unsold when the car should reach Elmira to be retailed by the defendants. The defendants ordered, at different times, four car-loads of fresh beef, and pursuant to their agreement, on receipt of the bill for the second and third car-loads, and before the arrival of the goods, paid the plaintiff therefor by a draft on New York. The referee found as facts that the plaintiff was to deliver the beef on board the cars at Chicago, which was a delivery to the defendants, and the same then and there became the property of the defendants; that by the agreement made between the parties the plaintiff represented and agreed to furnish the defendants beef that had not been heated before being killed; that should be thoroughly chilled before being loaded on the cars; that it should be in first-class condition in every respect, and merchantable; that a portion of the meat furnished, including all of the fourth car-load, had been heated before being killed, and was not in first-class condition or merchantable when shipped at Chicago; that as to the fourth car-load the "defendants did all they could to dispose of it, and save what they could from it, after the car had been opened several times on different days between Dunkirk and Elmira; and, finding they could not use it, they shipped back to the plaintiff 12,391 pounds, and notified plaintiff by wire of the same, and plaintiff immediately wired back that they would not receive it, whereupon the defendants ordered the same back to Elmira." The referee found, as a matter of law, that there was no warranty, and directed a judgment to be entered in favor of the plaintiff for the contract price. Further facts appear in the opinion.

Gabriel L. Smith, for appellant. Henry S. Reduel, for respondent.

PARKER, J., (after stating the facts as above.) In the absence of a warranty as to quality and a breach, the defendant's claim for damages could not have survived the use of the property, for in such case vendees are bound to rescind the contract, and return, or offer to return, the goods. If they omit to do so, they will be conclusively presumed to have acquiesced in their quality. *Iron Co. v. Pope*, 108 N. Y. 232, 15 N. E. Rep. 335. Therefore, if the referee was right in holding that there was no warranty as to quality, collateral to the contract of sale, we need not inquire further, as the judgment must be affirmed. The referee has found the facts, and this court may properly review his legal conclusion as to whether they amounted to a warranty. "A warranty is an express or implied statement of something which a party undertakes shall be a part of a contract, and, though part of the contract, collateral to the expressed object of it." 2 Schouler, Pers. Prop. (2d Ed.) § 521. All contracts of sale with warranty, therefore, must contain two independent stipulations: *First*, an agreement for the transfer of title and possession from the vendor to the vendee; *second*, a further agreement that the subject of the sale has certain qualities and conditions. It is not necessary that in the collateral agreement the word "warranty" should be used. No particular phraseology is requisite to constitute a warranty. "It must be a representation which the vendee relies on, and which is understood by the parties as an absolute assertion, and not the expression of an opinion." *Society v. Lawrence*, 4 Cow. 440. It is not necessary that the vendor should have intended the representation to constitute a warranty. If the writing contains that which amounts to a warranty, the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares. *Hawkins v. Pemberton*, 51 N. Y. 198. In that case the defendants purchased at auction an article, relying upon the representation of the auctioneer that it was "blue vitriol." It was in fact "Salzburger vitriol," an article much less valuable. In an action brought against the purchaser, the trial court directed a verdict for the plaintiff. This was held to be error, because the representation at the sale amounted to a warranty. Judge EARL, in delivering the opinion of the court, after collating and discussing the authorities upon the subject of warranty, said: "The more recent cases hold that a positive affirmation, understood and relied upon as such by the vendee, is an express warranty." In *Kent v. Friedman*, 17 Wkly. Dig. 481, Judge LEARNED in his opinion says, "There can be no difference between an executory contract to sell and deliver goods of such and such a quality and an executory contract to sell and deliver goods which the vendor warrants to be of such and such a quality. The former is as much a warranty as the latter." The court of appeals subsequently affirmed the judgment of the general term. (101 N. Y. 616, 3 N. E. Rep. 905.) In *White v. Miller*, 71 N. Y. 118, frequently referred to as the "Bristol Cabbage Seed Case," the

court say: "The case of *Hawkins v. Pemberton*, 51 N. Y. 198, adopts, as the law in this state, the doctrine upon this subject now prevailing elsewhere, that a sale of a chattel by a particular description is a warranty that the article sold is of a kind specified." So, too, a sale by sample imports a warranty that the quality of the goods shall be equal in every respect to the sample. *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. Rep. 51, and cases cited.

Now, in the case before us, the defendants undertook to purchase of the plaintiff fresh dressed beef, to be wholesaled in part, and the residue retailed to their customers. They endeavored to procure good beef. Not only did they contract for beef that was clean, well dressed, in first-class condition in every respect, and merchantable, and that was thoroughly chilled before being loaded on the cars, but, further, that they should not be given beef that had been heated before being killed. When, therefore, the plaintiff placed in a suitable car beef well dressed and clean, and of the general description given in defendants' order, it had made a delivery of the merchandise sold, and, by the terms of the contract, was entitled to be paid as soon as the bill should reach defendants, and before the arrival of the beef made an examination by defendants possible. But there was another collateral engagement, and yet forming a part of the contract, which the plaintiff had not performed,—an engagement of much consequence to the defendants and their customers, because it affected the quality of the meat. Upon its performance or non-performance depended whether it should be wholesome as an article of food. It was of such a character that defendants were obliged to rely solely upon the representation of the plaintiff in respect thereto. The plaintiff or its agents selected from their stock the cattle to be slaughtered. No one else knew, or could know, whether they were heated and feverish. Inspection immediately after placing the beef in the car would not determine it. That collateral engagement consisted of a representation and agreement that plaintiff would deliver to the defendants beef from cattle that had not been heated before being slaughtered. Such representation and agreement amounted to an express warranty. The referee found, as a fact, "that the meat had been heated before being killed;" therefore there was a breach of the warranty, and the defendants are entitled to recover their damages by way of counter-claim, unless such right must be deemed to have been subsequently waived.

It is not necessary for the disposition of this case to decide, and therefore it is not decided, whether a warranty is implied, in all cases of a sale of fresh dressed meat, by the party slaughtering the animals, that they were not heated before being killed; and, as some of my associates are averse to any expression whatever upon that question at this time, what is said must be regarded as an individual view, rather than that of the court. My attention has not been called to a decision in this state covering that precise question. It was determined in *Divine v. McCormick*,

50 Barb. 116, that, in the sale of a heifer for immediate consumption, a warranty that she is not diseased and unfit for food is implied. That decision is well founded in principle, and is in accordance with a sound public policy, which demands that the doctrine of *caveat emptor* shall be still further encroached upon, rather than that the public health shall be endangered. I see no reason for applying the rule to one who slaughters and sells to his customers for immediate consumption, and denying its application to one who slaughters and sells to another to be retailed by him. In each case, it is fresh meat intended for immediate consumption.

The rule is well settled, by the courts of last resort in many of the states, that a vendor of an article, manufactured by him for a particular purpose, impliedly warrants it against all such defects as arise from his unskillfulness either in selecting the materials, or in putting them together and adapting them to the required purpose. See cases cited in 18 Alb. Law J. 324. One who prepares meat for the wholesale market may be said to come within that rule; because he purchases the cattle, determines whether they are healthy and in proper condition for food, and upon his skill in dressing and preparing the meat for transportation a long distance its quality and condition, as an article of diet for the consumer, largely depends. In two of the states at least, it is held that, where perishable goods are sold to be shipped to a distant market, a warranty is implied that they are properly packed and fit for shipment, but not that they will continue sound for any particular or definite period. *Mann v. Everston*, 32 Ind. 355; *Leopold v. Van Kirk*, 27 Wis. 152.

There respondent insists that the act of defendants' agent in selling some 60 quarters of beef, before the car reached Elmira, when the defendants, after making a personal examination, immediately shipped that which remained unsold to the plaintiff, constituted a waiver of their claim for damages. It is undoubtedly the rule that in cases of executory contracts, for the sale and delivery of personal property, if the article furnished fails to conform to the agreement, the vendee's right to recover damages does not survive an acceptance of the property, after opportunity to ascertain the defect, unless notice has been given to the vendor, or the vendee offers to return the property. *Reed v. Randall*, 29 N. Y. 358; *Beck v. Sheldon*, 48 N. Y. 365; *Iron Co. v. Pope*, 108 N. Y. 232, 15 N. E. Rep. 335. But, when there is an express warranty, it is unimportant whether the sale be regarded as executory or *in present*, for it is now well settled that the same rights and remedies attach to an express warranty in an executory as in a present sale. *Day v. Pool*, 52 N. Y. 416; *Parks v. Axe Co.*, 54 N. Y. 586; *Dounce v. Dow*, 57 N. Y. 16; *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. Rep. 51. In such cases, the right to recover damages for the breach of the warranty survives an acceptance, the vendee being under no obligation to return the goods. Indeed, his right to return them, upon discovery of the breach, is questioned in *Day v. Pool*, su-

pra. And Judge DANFORTH in *Brigg v. Hilton*, supra, after a careful review of the leading authorities upon the question, states the rule as follows: "Where there is an express warranty, it is, if untrue, at once broken, and the vendor becomes liable in damages, but the purchaser cannot, for that reason, either refuse to accept the goods or return them." It follows, from the views expressed, that the judgment should be reversed. All concur, except FOLLETT, C. J., not sitting.

FARLEY et al. v. LINCOLN.

(51 N. H. 577.)

Supreme Judicial Court of New Hampshire.
Merrimack. June, 1872.

Replevin by Farley, Amsden & Co., merchants of Boston, to recover certain goods in the possession of John G. Lincoln. Plaintiffs claimed that the goods were fraudulently purchased of them on April 18, 1870, by one A. B. Sanborn, a merchant in Suncook, N. H., on a credit of 30 days, and that on account of such fraud they were entitled to reclaim the goods and declare the transaction void. On April 27, 1870, Sanborn made an assignment under the insolvent act to defendant, who, together with Sanborn, on demand, refused to deliver the goods.

Tappan & Mugridge, for plaintiffs,
Marshall & Chase, for defendant.

LADD, J. Supposing the facts to be as claimed by the plaintiffs, we think they might maintain trespass or replevin against Sanborn for the goods, notwithstanding he came to the possession of them in the first place by means of a fraudulent sale. And this stands well enough, upon the ground that there never was any real contract of sale between the parties by which the plaintiffs were bound. Sanborn acquired no rights in the property by the form of a sale which was gone through with, and hence his first as well as every subsequent act of dominion over it amounted to a trespass, if the defendant elected so to treat it.

No serious question is made by the defendant's counsel but this would be so; and it is admitted further, that, upon a demand and refusal, the plaintiffs might maintain trover or detinue for the goods against this defendant. But it is insisted that, inasmuch as it does not appear that the defendant was a party to Sanborn's fraud, or had knowledge of it, his taking by assignment from Sanborn cannot be regarded as wrongful, although Sanborn had no title, and therefore that the present action will not lie against him. This is the important question in the case, and if it were to be decided upon authority alone, it would undoubtedly present considerable difficulties. See *Barrett v. Warren*, 3 Hill, 350, and *Stanley v. Gaylord*, 1 Cush. 536. In these two cases the authorities on both sides of the question are collected, and the whole subject very ably discussed. The New York court came out one way, holding that trespass would not lie against a person who comes to the possession of goods by delivery, and with out fault on his part, e. g., an innocent bailee of the wrongdoer, Cowen, J., dissenting; while the Massachusetts court held exactly the contrary, Wilde, J., dissenting.

To maintain trespass or replevin, there must be a wrongful taking; and the question is, whether the taking by the defendant here was wrongful in a legal sense, as against the plaintiffs. At the time of the assignment the plaintiffs were the absolute general owners, and were entitled

to the immediate possession of the goods. The assignment passed no title, and conferred no right upon the defendant in respect to the goods as against the plaintiffs, for the obvious reason that Sanborn had no right or title in them as against the plaintiffs which he could confer upon any body. This being so, the first act of possession exercised by the defendant over them was inconsistent with and in derogation of the plaintiff's right. Absolute ownership draws possession after it. If, then, the defendant's act in taking the possession was an interference with the plaintiffs' right of actual possession growing out of their ownership, it was in legal effect a disturbance of their constructive possession.

The defendant's act in assuming domination over the property was none the less an invasion of the plaintiffs' right, and none the less a trespass, because he did not intend a wrong, or know that he was committing one. An encroachment upon a legal right must constitute a legal wrong; and it is familiar law, that intention is of no account in a civil action brought by one man to recover damage for a wrongful interference with his property by another. The law gives the plaintiff compensation for the injury he has sustained, whether the defendant intended such injury or not. Indeed, a large proportion of trespasses, especially to land, are doubtless committed through inadvertence or mistake, without wrongful intent, and without knowledge on the part of the wrongdoer that he has overstepped his right.

How does this case differ in principle from that of a person who, under a mistake as to the location of the boundaries of his land, encloses a piece of adjoining land of which the real owner has never had actual possession, and cultivates it in the mistaken belief that it is his own? One act is undoubtedly as free from the taint of moral wrong as the other. In both alike there is only a disturbance of a possession purely constructive. The only distinction is, that in one case the subject is land while in the other it is a chattel; and I do not see that this makes any more difference than if the property interfered with were in one case a cow, while in the other it was a horse.

In *Stanley v. Gaylord*, before cited, the case of *Hyde v. Noble*, 13 N. H. 494, is quoted as an authority fully sustaining the doctrine there laid down. *Hyde v. Noble* was trover by the owner of a cargo of lumber against Noble and another, who had bought and taken the delivery of a portion of it from the plaintiff's bailee while transporting it under a contract from Hallowell and Gardiner in Maine to Weymouth in Massachusetts. In delivering the opinion of the court, Parker, C. J., says,—"The purchase by the defendants, taking possession as they appear to have done, and holding it as their own property, was a conversion. They received the possession from one who had no authority to deliver it to them, under a sale which purported to vest the property in them; and they, by the purchase, undertook to control it as their own property

This was an assumption of power over it, inconsistent with the rights of the plaintiff. Purchasing the property from one who had no right to sell, and holding it to their own use, is a direct act of conversion, without any demand and refusal; their possession was unlawful in its inception, by reason of the want of authority in Kenniston to make the transfer. It is only where a party obtains the possession lawfully, that it is necessary to show a demand and refusal." The same thing in substance has been said in several other cases in this state. Doty v. Hawkins, 6 N. H. 247; Lovejoy v. Jones, 39 N. H., at p. 169; Cooperv. Newman, 45 N. H. 339, and authorities cited.

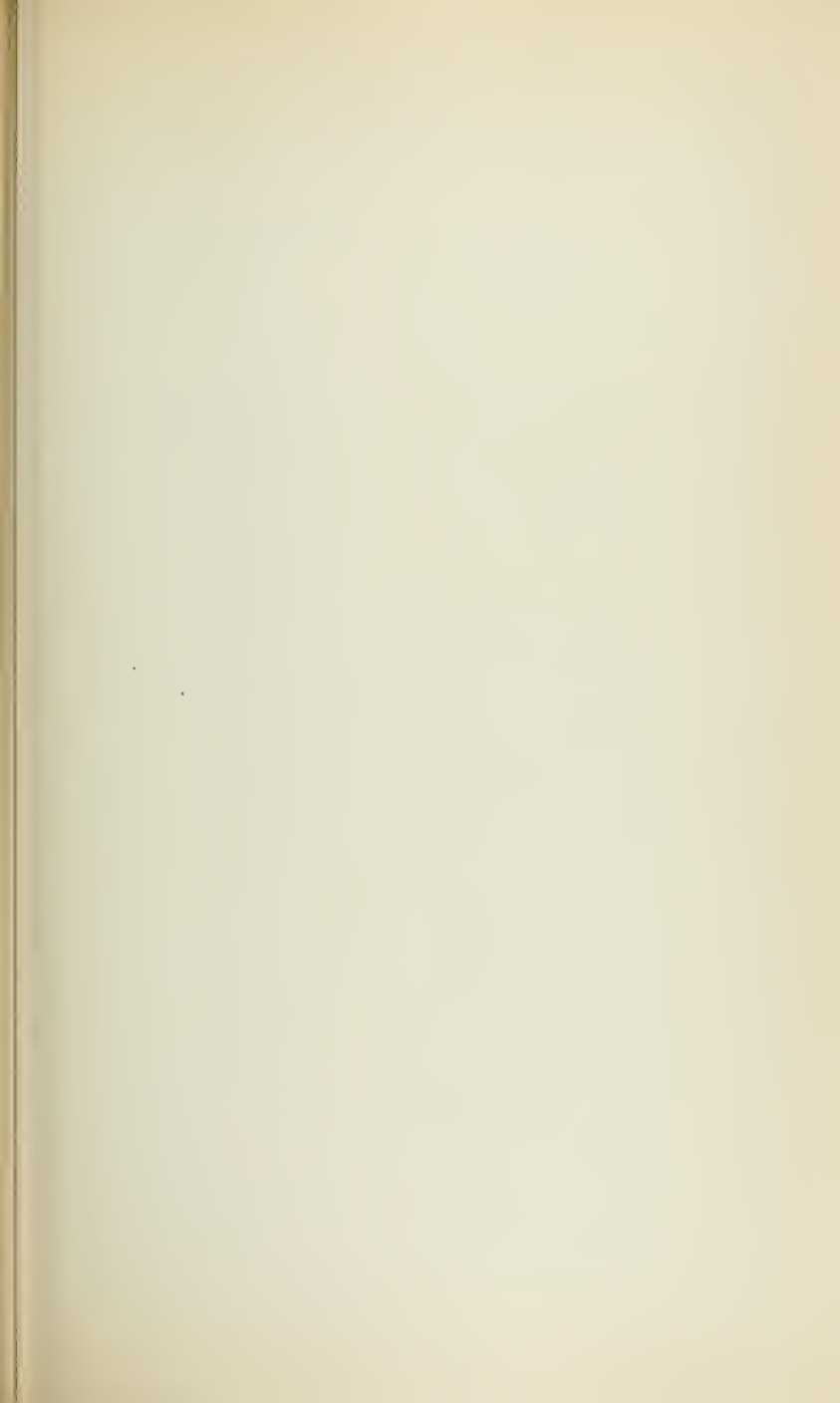
The facts stated in Hyde v. Noble show that there was a demand and refusal before the commencement of the suit; but that case has been constantly referred to, as well in this state as in other jurisdictions, to the point broadly laid down in the opinion of Chief Justice Parker, that trover without a demand lies in favor of the owner of a chattel against one who has come to the possession of it by purchase from one having no right to sell; and it would doubtless be a surprise to the profession to learn that such is not the law here. We think it is the law, and that it rests upon reasons quite satisfactory and sound. Parsons v. Webb, 8 Greenl. 38; Galvin v. Bacon, 2 Fairf. 30; Stanley v. Gaylord, 1 Cnsh. 536;—and see the able and instructive dissenting opinion of Cowen, J., in Barrett v. Warren, 3 Hill, at p. 351. But it is very obvious that there was no conversion in the case of Hyde v. Noble, unless the original taking was a conversion; and that taking was not a conversion unless it was wrongful. If, therefore, it was not wrongful, a demand and refusal would have been necessary before trover could be maintained. But "whenever the taking of goods is wrongful, trespass, replevin, and trover without a demand are concurrent remedies for the owner, if he has the right of immediate possession." Metcalf, J., in Stanley v. Gaylord, at p. 546, citing Wilkinson on Replevin, 2; Pangburn v. Patridge, 7 Johns. 143; 1 Chit. Pl. 176;

Wilbraham v. Snow, 2 Wms. Saund. 47k, note. That being so, the doctrine of Hyde v. Noble is decisive of the present case; for, according to that case, trover without a demand would lie here, and therefore the plaintiffs might bring either of the concurrent remedies, trespass or replevin, at their election.

It is undoubtedly settled that, inasmuch as a fraudulent sale is voidable only, the vendor cannot set it aside to the injury of third persons who have made expenditures under it, on the supposition that it is binding. And so a purchaser for value, without notice from the fraudulent vendee, will acquire a good title. Grout v. Hill, 4 Gray, 369; Trull v. Bigelow, 16 Mass. 406; Buffington v. Gerrish, 15 Mass. 156; White v. Garden, 10 C. B. 919; Root v. French, 13 Wend. 570; Mowrey v. Walsh, 8 Cow. 238. But no such question arises here. The defendant was not a purchaser, and had made no expenditures under the fraudulent sale. At the utmost, his rights in respect to the property could not be larger than those of an attaching or judgment creditor. And the cases all are, that such creditor acquires no title that will hold against the true owner, the vendor. Load v. Green, 15 M. & W. 216; Bristol v. Wilsmore, 1 B. & C. 514; Van Cleef v. Fleet, 15 Johns. 147; Mowrey v. Walsh, 8 Cow. 238; Root v. French, 13 Wend. 575; Buffington v. Gerrish, 15 Mass. 156. "An assignee takes the thing assigned, subject to all the equity to which the original party was subject." *Ld. Mansfield*, in *Peacock v. Rhodes*, 2 Dougl. 636.

We have not thought it necessary to go into a minute and extended discussion of the question raised in this case. The authorities to which reference has been made furnish an ample and exhaustive review of the whole subject, and all the authorities. From a careful examination, we are brought to the conclusion that the taking by the defendant was in the eye of the law wrongful, and a disturbance of the plaintiffs' constructive possession; and, therefore, that, upon the facts claimed, the action may be maintained.

Case discharged.



FARMERS' PHOSPHATE CO. v. GILL.

(16 Atl. Rep. 214, 69 Md. 537.)

Court of Appeals of Maryland. Dec. 14, 1888.

Appeal from superior court of Baltimore city.

Action of trover by the Farmers' Phosphate Company against John Gill, assignee of Symington Bros. & Co. Judgment for defendant, and plaintiff appeals.

Before MILLER, IRVING, BRYAN, and McSHERRY, JJ.

Fielder C. Slingluff, for appellant. Wm. A. Fisher and D. K. Este Fisher, for appellee.

MILLER, J. On the 4th of June, 1887, the firm of Symington Bros. & Co., of Baltimore, manufacturers of fertilizers, made an assignment of all their property to Mr. John Gill for the benefit of their creditors; and the question in this case is whether a cargo of South Carolina river stock phosphate passed to the assignee under this assignment. The question is raised by an action of trover brought by the Farmers' Phosphate Company, the vendor of the Symingtons, against Mr. Gill, their assignee, for the conversion of this property. The facts essential to be stated, and about which there seems to be no dispute, are as follows: The contract of sale, made in Baltimore on the 15th of February, 1887, by Mr. Cottman, who was the broker for both vendor and vendee, is in these terms: "Sold to Mess. Symington Bros. & Co., for account of Farmers' Phosphate Co., a cargo of about five (500) hundred tons undried river rock phosphate, delivered along-side buyer's vessel at Dale's creek at \$4.50 per ton 2,240 lbs.; for delivery latter part this month or 1st of March, 1887. Rock guaranteed 60 per cent. bone phos. of fine on dry basis. Should rock run below 60 per cent., proportionate allowance to be made. Rock to be weighed here as landed, by sworn weigher, at seller's expense. Payable by note to buyer's order at four (4) months from date of bill of lading, adding interest, or cash on arrival here. J. H. Cottman." The Symingtons then, on the 12th of March, 1887, chartered a vessel to bring this cargo from Dale's creek, Coosaw river, S. C., to Baltimore, the charterers paying freight, etc. The vessel arrived at Dale's creek the latter part of April, and completed the lading of her cargo on or before the 7th of May. On this last-mentioned day the master made out a bill of lading, whereby he acknowledged the receipt of the cargo from the Farmers' Phosphate Company, to be delivered at Baltimore "unto Symington Brothers and Co., or to their assigns." This the master delivered to the phosphate company, who indorsed it, "Deliver to the order of J. H. Cottman," (the broker who effected the sale,) and he indorsed it "Deliver to the order of Symington Brothers and Co.," and delivered it to them on the 14th of May, one week after its date. It also appears that the Symingtons insured the cargo for their own benefit. The vessel arrived at Baltimore on the 24th of May, and immediately

commenced discharging her cargo at the wharf of the Symingtons, they having paid the freight thereon. As the discharge proceeded the rock was weighed, and there was also an analysis of it made by a chemist, which showed that it was above the standard fixed by the contract. The discharge was completed on the 31st of May, and on the same day Cottman made and sent to the Symingtons a bill for the phosphate. Not receiving any reply for several days, he telephoned them on the morning of the day on which they had executed their assignment, to know whether they were going to pay for the cargo in cash or by note, and received a reply that they had something to say to him on the subject. He immediately went to their office, and was surprised to learn they had made an assignment. He then asked them to give him their note for the cargo, but they declined to do this, as they did not think it would be right for them to do so after they had assigned their property for the benefit of all their creditors. Subsequently, on the 9th of June, the phosphate company, by their counsel, made demand on Mr. Gill, the assignee, for the property, and on the following day the Symingtons wrote and mailed a letter to the company, inclosing their note for the cargo, made out in accordance with the terms of the contract of sale; but the company, declining to receive this note, returned it to the assignee, and brought this action of trover.

Upon these facts the question is, was the title to this property vested in the Symingtons when they executed their assignment, or was it still in the phosphate company, the vendor? The question is an interesting one, and has been exceedingly well argued. On the part of the appellant company it is contended that by the terms of the contract the sale is conditional, and that no title vested in the buyers because the condition of paying by note or in cash had not been complied with or waived. On the other hand, counsel for the appellee deny that such is the proper construction or effect of the contract, and contend that the title passed by delivery of the cargo on board the buyers' vessel at Dale's creek, and, if not by such delivery alone, it clearly did when accompanied or followed by insurance for the buyers' benefit, and transmission to them of the bill of lading. We think the law is well settled that where a buyer purchases or orders a specific quantity of goods to be shipped to him from a distant place, and the seller segregates and appropriates to the contract the specified quantity by delivering them to a vessel designated by the buyer, or, in the absence of such designation, to a common carrier, the mere fact that the contract contains a stipulation that they are to be paid for by note or in cash on arrival, does not prevent the title from passing, or make either payment or arrival a condition precedent thereto. In such case the goods become the property of the vendee, and are at his risk from the time they are put on board the vessel. *Magruder v. Gage*, 33 Md. 344; *Appleman v. Michael*, 43 Md. 281; *Dutton v. Solomonson*, 3 Bos. &

P. 584; *Fragano v. Long*, 4 Barn. & C. 219; *Alexander v. Gardner*, 1 Bing. N. C. 671. In the case last cited there was a stipulation in the contract that the goods were to be paid for "by a bill at two months from the date of landing." The goods were shipped from Sligo, in Ireland, to London, and while in transit were lost or damaged by shipwreck. In an action by the vendor against the vendee for goods bargained and sold, this term of the contract was relied on by the defendant; but Tindal, C. J., said "the object of that stipulation was merely to fix the time of payment, and not to make the landing a condition precedent," and added that for that point it is enough to refer to the decision in *Fragano v. Long*. In this view all the other judges concurred.

If, therefore, there was no other stipulation in the contract, the case would be free from difficulty. But there are two other clauses introduced for the purpose of ascertaining the exact amount to be paid by the vendees. The first stipulates that the cargo shall be weighed in order to find out the number of tons to be paid for at the stipulated price, and the second requires its quality to be ascertained. As to the latter provision it must be noticed that it gives the vendees no right to reject the rock if it did not come up to the prescribed standard, but simply secures to them a proportionate abatement in the price if it fell below it. What, then, is the effect of these stipulations on the transfer of title? This presents the only real difficulty in the case. Where the agreement is for the sale of goods, and also for the performance of other things, it becomes important to ascertain whether the performance of any of these things is meant to precede the vesting of title or not. This is a question of the construction of the agreement, and it may often happen that the parties have expressed their intention in a manner that leaves no room for doubt. When, however, they have not done so in express terms, the intention must be collected from the whole agreement, and for this purpose (as stated by Lord Blackburn in the recent edition of his book on Sales) the English courts have, since the beginning of the present century, adopted two rules of construction, both derived from the civil law. The first is that, where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a "deliverable" state, the performance of those things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property. The second is that where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods where the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in a state in which they ought to be accepted. The learned

author approves the first rule, but suggests that the second was hastily adopted from the civil law, without adverting to the great distinction made by the civilians between a sale for a certain price in money and an exchange for anything else; a distinction which is not recognized by the English law. He remarks that in general, weighing, etc., must, from the nature of things, be intended to be done before the buyer takes possession of the goods, but that is quite a different thing from intending it to be done before the vesting of the property; and he intimates very strongly that in his judgment this second rule has no foundation in reason. 2 Blackb. Sales, (2d Eng. Ed.) 127, 128. The view thus taken by Lord Blackburn is supported by the very vigorous opinion of Cockburn, C. J., in *Martineau v. Kitching*, L. R. 7 Q. B. 449, in which he declared he would not give way to a rule which appeared to him to militate against principle and to be inconsistent with common sense and convenience; and he insisted that if you can gather from the whole circumstances of the transaction that the buyer and seller intended that the property should pass and the price should be afterwards ascertained by measuring or weighing, there was nothing in principle, in common sense, or practical convenience to prevent that intention from having effect. The other judges did not dissent, but thought the case before them could be decided on other terms of the contract, without determining whether there was any inexorable rule of law that the property will not pass where the price or amount to be paid remains to be ascertained by weight or measurement.

In this country Mr. Newmark, in his recent work on Sales of Personal Property, after stating the English rule, subjects it to the qualification that it applies in cases where there is no evidence tending to show the intention of the parties to make an absolute and complete sale without performance of the acts of weighing or measuring. Newm. Sales, § 74. We have also American decisions, by courts of the highest authority, which hold broadly that the performance of these acts, where provided for in the contract, is not essential to the transfer of title. Such, as we understand it, is the decision of the supreme court in *Leonard v. Davis*, 1 Black, 476. In that case there was a sale by written contract of a large quantity of pine logs lying in and near a boom, which it was supposed would make about 1,444,000 feet of lumber in board measure. The contract specified one price per thousand for those logs that were afloat in the boom, and another for those on the bank and in the marsh near the boom. It was also a part of the contract that the logs should be counted, measured, and scaled by the boom master. The suit was by the vendors against the vendees upon this contract for the purchase money of all the logs. The court below instructed the jury that the contract was executory, and that the title did not pass until the logs had been measured; but the supreme court reversed this ruling, and held that it was a sale without condition, that the

measurement was simply to ascertain the amount to be paid by the vendees, and that the title to the logs passed to them as soon as the contract was signed and there had been a symbolical delivery thereunder. Again, in *Hatch v. Oil Co.*, 100 U. S. 135, the same court reiterated the doctrine that, where it appears that there has been a complete delivery of the property in accordance with the terms of sale, the title passes, although there remains something to be done in order to ascertain the total value of the goods at the rates specified in the contract. To the same effect are the New York cases of *Crofoot v. Bennett*, 2 N. Y. 258, and *Burrows v. Whitaker*, 71 N. Y. 299. But taking the rule with the qualifications stated in *Newmark on Sales*, we find in this case abundant evidence to show that it was the intention of the parties that the title should pass before the goods had been weighed and tested in Baltimore. The buyers chartered a vessel to bring the cargo from South Carolina to Baltimore, insured it for their own benefit, and became responsible for the freight. But, what is more important, and more significant, as indicating the intention of the vendor company, they had a bill of lading made out by the master as soon as the vessel was loaded at Dale's creek, stating on its face that the cargo was to be delivered to the vendees or to their assigns, and procured the same to be delivered to the Symingtons within a week from its date. Now, it may be true that the transmission of a bill of lading may not in all cases be absolutely conclusive of title as between vendor and vendee, or consignor and consignee, yet the implication is almost irresistible that the motive of the vendor, when the bill is taken in the name of the vendee, is to vest title in the latter, free from all conditions. *Key v. Cotesworth*, 7 Exch. 595, and note. As a general rule a bill of lading operates a transfer

of the property to the party in whose favor it is drawn, and to whom it is delivered. Citation of authority on this point is unnecessary. If the vendors in this case had wished to prevent the property from passing, and to retain the right to deal with it after shipment and while in transitu, they should by the bill of lading have made the cargo deliverable to their own order, and have forwarded the same to an agent of their own, with directions to retain it until the cargo had been finally delivered, weighed, tested, and paid for in Baltimore. *Ex parte Bannaer*, 2 Ch. Div. 288. But this they did not do, and all the circumstances of the transaction show it was the intention of both parties to have the cargo become the property and be at the risk of the vendees from the moment it was put on board the carrying vessel. In fact it was for the manifest interest of the vendors that this should be the case, for if the cargo had been lost by shipwreck of the vessel they could have made the vendees responsible therefor in an action for goods bargained and sold, and there would have been no insuperable difficulty in the way of their recovery. Upon the whole case, therefore, our opinion is that this cargo became the property of the Symingtons from the time it was delivered on board their vessel at Dale's creek, and consequently passed under their deed of assignment. The case is unlike that of a sale "for cash on delivery," considered in *Powell v. Bradlee*, 9 Gill & J. 220, and we think it is also distinguishable in material facts and circumstances from that of *Whitney v. Eaton*, 15 Gray, 225, so much relied on by counsel for the appellant. It follows, therefore, from the undisputed facts of the case that this action cannot be maintained, and consequently there has been no ruling prejudicial to the appellant made by the court below in its action upon the prayers. Judgment affirmed.

FIELDER v. STARKIN.

(1 H. Bl. 17.)

(Court of Common Pleas, Trinity Term, 1788.)

This was an action on the warranty of a mare, "that she was sound, quiet, and free from vice and blemish."

Plen, non-assumpsit, on which issue was joined.—

The cause came on to be tried at the last assizes at Thetford, before Mr. Justice Ashurst, and a verdict found for the plaintiff. It appeared on the trial, from the learned judge's report, that the plaintiff had bought the mare in question of the defendant at Wivelstoe fair, in the month of March, 1787, for 30 guineas, and that the defendant warranted her sound, and free from vice and blemish.—Soon after the sale, the plaintiff discovered that she was unsound and vicious (a), but kept her three months after this discovery, during which time he gave her physic and used other means to cure her. At the end of the three months he sold her, but she was soon returned to him as unsound. After she was so returned, the plaintiff kept her till the month of October 1787, and then sent her back to the defendant as unsound, who refused to receive her. On her way back to the plaintiff's stable, the mare died, and on her being opened, it was the opinion of the farriers who examined her, that she had been unsound a full twelve-month before her death. It also appeared that the plaintiff and defendant had been often in company together during the interval between the month of March, when the mare was sold to the plaintiff, and October, when he sent her back to the defendant; but it did not appear that the plaintiff had ever in that time acquainted the defendant with the circumstances of her being unsound. The jury found a verdict for the plaintiff with 30 guineas damages.

Adair, Serjt. shewed cause. Le Blanc, Serjt., in support of the rule.

Lord LOUGHBOROUGH—Where there is an express warranty, the warrantor undertakes that it is true at the time of making it. If a horse which is warranted sound at the time of sale, be proved to have been at that time unsound, it is not

necessary that he should be returned to the seller. No length of time elapsed after the sale, will alter the nature of a contract originally false. Neither is notice necessary to be given. Though the not giving notice will be a strong presumption against the buyer, that the horse at the time of the sale had not the defect complained of, and will make the proof on his part much more difficult. The bargain is complete, and if it be fraudulent on the part of the seller, he will be liable to the buyer in damages, without either a return or notice. If on account of a horse warranted sound, the buyer should sell him again at a loss, an action might perhaps be maintained against the original seller, to recover the difference of the price. In the present case it appears from the evidence of the farriers who saw the mare opened, that she must have been unsound at the time of the sale to the plaintiff.

GOULD, J.—of the same opinion, remembered many cases of express warranty, where a return was not held to be necessary.

HEATH, J.—If this had been an action for money had and received to the plaintiff's use, an immediate return of the mare would have been necessary; but as it is brought on the express warranty, there was no necessity for a return to make the defendant liable.

WILSON, J.—of the same opinion, recollected a cause tried before Mr. Justice Buller *at nisi prius*, where the defendant had sold the plaintiff a pair of coach horses and warranted them to be six years old, which were in reality only four years old. It was contended that the plaintiff ought to have returned the horses; but Mr. Justice Buller held that the action on the warranty might be supported without a return.¹ As to part of the evidence being contrary to the verdict, the jury have a right to use their discretion either in believing or disbelieving any part of the testimony of witnesses.

Rule discharged.

¹ See *Towers v. Barrett*, Term Rep. B. R. vol. 1. p. 136. [and *Buchanan v. Parshaw*, vol. 2. p. 745.]

FIRST NAT. BANK OF CAIRO v. CROCKER
et al.

(111 Mass. 163.)

Supreme Judicial Court of Massachusetts. Suffolk. Nov. 1872.

Tort against Crocker, Smith & Co. for the conversion of 100 barrels of flour. It appeared on the trial that Ayers & Co., of Cairo, Illinois, had dealt with defendant commission merchants in Boston for some years, shipping them flour on consignment, for sale in Boston, and having an open general consignment account with them. Ayers & Co., on August 23, 1870, consigned to them some flour, and drew on them for more than its value, writing them that they would make it all right in the next shipment. The defendants paid the draft, which left Ayers & Co. indebted to defendants for about \$1,500. On August 24, 1870, Ayers & Co. shipped the 100 barrels of flour in dispute to Boston, taking a bill of lading "consigned to shipper's order Boston, Mass.," but on which was written "St. Louis Mills and Blackburn. For Crocker, Smith & Co., Boston, Mass." They then drew on defendants with bill of lading attached, and discounted the draft, which defendants refused to accept, and it was returned to defendants with the bill of lading. When the flour arrived in Boston, September 12, 1870, it was accompanied by a way bill, on which, under "Consignees," was written "Crocker, Smith & Co., Boston;" and the flour was received by them and sold, and applied to the account of Ayers & Co. September 14, 1870, Ayers & Co. drew a draft on account of the 100 barrels of flour on Goodwin, Locke & Co., of Boston, in favour of plaintiffs, and attached to it the bill of lading. The draft was accepted and paid when due. The bill of lading was endorsed in blank when delivered by Ayers & Co., but when forwarded by plaintiffs the words "Deliver within-named flour to Goodwin, Locke & Company, or order," were written over the endorsement of Ayers & Co.

A. Churehill & J. E. Hudson, for plaintiffs. A. A. Ranney, for defendants.

AMES, J. It is manifest that the flour was not placed in the hands of these defendants for the purpose of securing an existing debt, or indemnifying them for any advances that they had made. It was not consigned to them in order that it might be sold, and the proceeds carried to the credit of Ayers & Company in general account current. It is true that the consignors knew that they had overdrawn their account, and that they had expressly promised to "make it all right" at the next shipment. But that was an executory contract. The proposed correction stood wholly in agreement. A general promise to make the matter right was not of itself sufficient to vest in the defendants a title as absolute owners, even of the goods forwarded at the next shipment, unless the circumstances indicated, or at least were consistent with, such an intention on the part of the shippers. But in this case, the consignment and the draft constituted one transac-

tion. The bill of lading and the draft came together; and the defendants understood that the flour was sent to them, subject to a claim of \$500 in favor of the holder of the draft. They were to receive it upon the trust that they were to pay that amount out of the proceeds. The meaning of the transaction on the part of the shippers was that the defendants were to receive it for that purpose and upon that understanding only. It was as if they had said, "You may take this flour and sell it on our account, provided you will accept this draft." A bill of lading indorsed is only prima facie evidence of ownership, and is open to explanation. *Pratt v. Parkman*, 24 Pick. 42. This bill of lading was provisional, and was not intended to vest the property in the defendants, or to authorize their taking possession of it, except upon the condition of their acceptance of the draft. *Allen v. Williams*, 12 Pick. 297.

The act of the defendants, therefore, in taking possession of the flour was wholly unauthorized, and gave them neither valid title nor lawful possession. *Allen v. Williams*, *ubi supra*. In proceeding afterwards to sell it as if it were their own, and appropriating the proceeds, they were guilty of a wrongful conversion. A carrier may be a mere bailee for the consignor; and where by the terms of the bill of lading the goods are to be delivered to the consignor's order, the carrier is his agent, and not the consignee's. *Monkes v. Nicolson*, 19 C. B. (N. S.) 290. *Baker v. Fuller*, 21 Pick. 318. *Merchants' National Bank v. Bangs*, 102 Mass. 291. On the refusal of the consignee to receive the goods upon the terms and for the purposes for which they were sent, he cannot take them for any other purpose. *Shepherd v. Harrison*, L. R. 5 H. L. 116. *De Wolf v. Gardner*, 12 Cush. 19, 23. *Allen v. Williams*, 12 Pick. 297. The title to the flour therefore remained in the shipper, wholly unaffected by the consignment. Even in the case of a contract of sale, the fact of making the bill of lading deliverable to the order of the vendor, when not rebutted by evidence to the contrary is decisive to show his intention to preserve the *ius disponendi*, and to prevent the property from passing to the vendee. *Wait v. Baker*, 2 Exch. l. *Van Casteel v. Hooker*, 1b. 691. The case of a mere consignment to an agent would be of course still stronger.

Upon the refusal of the defendants to accept the consignment upon the terms proposed, which refusal was sufficiently manifested by the protest of the draft and the return of the bill of lading, the owners of the flour, Ayers & Company, had a right to seek a new consignee, and to make another attempt to obtain an advance by a draft to be charged against the property. An arrangement was accordingly made with the plaintiffs, who discounted their draft of \$400 upon the security of the same bill of lading that had been sent to the defendants and returned by them. If this bill of lading was delivered to the plaintiffs, indorsed in blank by Ayers & Company, (and there is testimony to that effect,) the transaction would operate as a transfer of their title in the flour to the

plaintiffs, if such were the intention of the parties. As the property was at that time in Boston, it was of course incapable of actual delivery at Cairo, and the delivery of the evidence of title, with the indorsement upon the bill of lading, was all that could be done for the transfer of the property from the general owner to the new purchaser; but it would be effectual for that purpose. *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 445. *Gibson v. Stevens*, 8 How. 384. *Bryans v. Nix*, 4 M. & W. 775, 791. *Low v. De Wolf*, 8 Pick. 101. *Gardner v. Howland*, 2 Pick. 599. *Stanton v. Small*, 3 Sandf. 230. *Pratt v. Parkman*, 21 Pick. 42. In *Gibson v. Stevens*, the court say, per Taney, C. J.: "This rule applies to every case where the thing sold is, from its character or situation at the time, incapable of actual delivery." To the extent of their advance of money upon the draft, therefore, the plaintiffs would be considered as purchasers, and they would acquire a special property in the flour for the purpose of protecting the draft. At the time of this transaction, the flour remained in the possession of the defendants, and, with the exception of taking possession, nothing had been done on their part amounting to a wrongful conversion of it to their own use. They had not put it out of their power to replace the shippers in the enjoyment of their rights.

It appears from the report, that, when the bill of lading was forwarded the second time, the name of the firm of Goodwin, Locke & Company was written over the indorsement of Ayers & Company. But we do not think that this fact, whether the blank indorsement were filled up after or before the discount of the draft, would materially affect the plaintiffs' rights. The bill of lading was attached to the draft, and the substance of the transaction was that the draft was discounted upon the security of the merchandise itself. It purports to be on account of the barrels of flour described in the bill of lading. The flour, although intrusted to Goodwin, Locke & Company to sell, was appropriated to the specific purpose of the payment of this draft. The bill of lading was put in the plaintiffs' hands to enable them to hold the merchandise as their security, and the discounting of the draft was the consideration for the transfer of the property to them. It was convenient so to indorse the bill of lading, as to make it manifest that Goodwin, Locke & Company were to receive and dispose of the goods; but they were to do so as trustees and agents of the plaintiffs, and not as proprietors in their own right. They certainly acquired no title in the property until they had accepted the draft, and when that event happened the goods had been disposed of by the defendants, and had gone into the hands of bona fide holders without notice, so as to be beyond recall. The effect of this transaction between the plaintiffs and Ayers & Company was that the flour was designated to stand as collateral security for the draft. If the draft had not been accepted, the plaintiffs clearly would not have lost their title to the flour. It

is not necessary to hold that the plaintiffs became absolute owners of the property; it is enough that they had a right of property and possession to secure the payment of the draft, and the right of Ayers & Company as former owners of the specific property had become divested, leaving them only a right in the surplus money which might remain after a sale of the flour and a payment of the draft from the proceeds. *De Wolf v. Gardner*, 12 Cush. 19, has in many respects a close analogy with this case. There the general owner of the flour was the plaintiff, and the defendant was a party claiming under the new consignee, and the court held that the plaintiff had parted with the right of property, and could not maintain his action. In *Bank of Rochester v. Jones*, 4 Comst. 497, as in the case at bar, the plaintiffs had discounted a draft drawn by the owner of a quantity of flour upon the defendant, who, as in the case at bar, refused to accept the draft, and claimed to hold the flour and sold it for the payment of a balance due from the drawer. Instead of a bill of lading, there had been a carrier's receipt, which the drawer delivered, unindorsed, to the plaintiff bank. The agreement was that the bank should hold the flour as security that the draft should be accepted, but with power to sell it if the draft should not be accepted. The court of appeals held that the defendant could not acquire any property in the flour, except by performance of the condition imposed, namely, the acceptance of the draft; that the transaction between the consignor and the plaintiff bank gave to the latter a general or special property in the flour; that the transaction constituted a sale to the bank in trust for the fulfillment of the agreement; that the carrier's receipt, though not indorsed, was sufficient evidence of the plaintiff's right of possession; and that the statute of frauds was not applicable, as the delivery of the receipt, in consideration of the discount of the draft, was sufficient to transfer the title. In legal effect, and for the purpose of explaining what is to be done with the merchandise, there can be no substantial difference between a bill of lading and a carrier's receipt.

We have then in this case an intent of the general owners of the flour to make use of it as a security for an advance of money from the plaintiffs; a delivery of the bill of lading in pursuance of that intent; and a valuable and executed consideration in the discounting of the draft. The fact that the goods were in the custody of the defendants would not prevent this arrangement from having the effect to transfer the title of Ayers & Company to the plaintiffs. *Whipple v. Thayer*, 16 Pick. 25. *McKee v. Judd*, 2 Kern. 622. Whether it should be regarded as a sale, a pledge or a mortgage, there was a sufficient delivery to give to the plaintiffs a special property, which they could enforce by suit against any wrongdoer. They had a right to transfer the property, subject to the same trusts upon which they held it themselves, to their correspondent or agent in Boston, and it may well

be that, if the draft had been accepted by Goodwin, Locke & Company before the flour had been sold and placed out of their reach, they would have been the proper parties to have brought this action. But the transfer to them for that reason wholly failed to take effect, and they acquired no title to the flour specifically. If they had accepted the draft before the flour had been sold to a bona fide purchaser, the case would have been almost exactly like *Allen v. Williams*, above cited. That was a case in which the consignee of merchandise refused to accept the draft which accompanied the bill of lading, and took possession of the merchandise, claiming as in this case the right to do so in order to secure a balance due to him from the consignor. The court held that a new consignee could maintain trover against him.

Our conclusion then is, that at the time of the sale of the flour by the defendants, the plaintiffs had a right and property in it, which, whether general or special, and whether as purchasers, trustees, pledgees or mortgagees, gave them a right of possession as against all wrongdoers; and that the defendants had no title whatever and were mere wrongdoers. The fact that the draft has been paid by the new consignees does not prevent the plaintiffs from maintaining the action for the benefit and protection of the acceptors of the draft, who without fault of their own have been deprived of the security upon which it was discounted.

Judgment for the plaintiffs.

FIRST NAT. BANK OF GREEN BAY v. DEARBORN.

(115 Mass. 219.)

Supreme Judicial Court of Massachusetts. Suffolk. June 18, 1874.

Replevin of 100 barrels of flour. Case withdrawn from the jury, and reported to the supreme court. The following is the substance of the report:

R. G. Parks, of Green Bay, Wis., was manufacturing flour at Neenah, Wis., at which place the plaintiff bank was established. Parks had shipped flour to Harvey, Scudder & Co., of Boston. His drafts on them had been accepted, and paid in part. The bank advanced to Parks \$400 on the flour in controversy. Parks left with it the following draft on Harvey, Scudder & Co.: "\$400. Office of R. G. Parks & Co., Green Bay, Wisconsin, October 17, 1870, At sight, pay to the order of M. D. Peck, cash, four hundred dollars, value received, and charge the same to the account of R. G. Parks & Co." Across the face of the draft was written in pencil, "Hold this till tomorrow, when I will give you B. L." The next day Parks gave the bank the following writing: "Chicago & Northwestern Railway Company, Neenah, October 17, 1870. Received from R. G. Parks and Co. 100 barrels of flour branded W.-Rec. in train, consigned to Harvey, Scudder & Co., Boston, Mass., via Green Bay. To be forwarded to the Ft. Howard Station upon the terms and conditions of the published tariff of this company. A. H. Boardman, Agent." The bank then placed \$1,400 to the credit of Parks. The defendant admitted that the draft and receipt were delivered by Parks to the bank to secure the \$400 advanced, and that it was the intention to transfer the flour for the same purpose. The flour was in Parks' mill at Neenah until its delivery to the railway company, by Parks' agent, before the signing of the receipt, but had not been seen by Parks or the bank. The receipt and draft were forwarded to Boston by the bank. Harvey, Scudder & Co. refused to accept the draft because no bill of lading accompanied it, and they never made any advance on the flour or received it. One of the firm of Harvey, Scudder & Co. informed a creditor of Parks & Co., in Boston, that the flour was likely to arrive, and that his firm had no claim on it; and defendant, a deputy sheriff, levied an attachment on it on its arrival as the property of Parks & Co.

R. M. Morse, Jr., and R. Stone, Jr., for plaintiff. J. W. Hubbard, for defendant.

AMES, J. It appears that when the draft was discounted and the receipt delivered to the plaintiff, both parties understood that it was an advance by the bank, "on the flour." Both parties intended that the property should be, and understood that it was, by that transaction, transferred to the bank, as security for that advance. The discounting of the draft was a sufficient consideration for such a conveyance. If there was a sufficient delivery of the property to the plaintiff, there was nothing to hinder the inten-

tion of the parties from going into full effect.

The character and situation of the property at the time of this transaction were such that an actual delivery was impossible. A constructive or symbolical delivery was all that the circumstances allowed, but a delivery of that nature, if properly made, would have been sufficient to give to the plaintiff corporation the title to the property, and an immediate right of possession, which it could maintain, not only against Parks himself, but also against his creditors. *Taxworth v. Moore*, 9 Pick. 347. *Fettyplace v. Dutch*, 13 Pick. 388. *Whipple v. Thayer*, 16 Pick. 25. *Carter v. Willard*, 19 Pick. 1. The delivery of the evidences of title, with orders upon them, would be equivalent to the delivery of the property itself. *Gibson v. Stevens*, 8 How. 384. *Nathan v. Giles*, 5 Taunt. 558. *National Bank of Cairo v. Crocker*, 111 Mass. 163, and cases there cited. All that would be necessary in such a case would be that the thing actually delivered should have been intended as a symbol of the property sold.

In this case, the only thing which was delivered to the plaintiff, as the representative or symbol of the property intended to be transferred to the plaintiff, was the written acknowledgment of the railroad corporation that they had received the merchandise for transportation, consigned to Harvey, Scudder & Co., of Boston. No order of any kind was indorsed upon this receipt, and no attempt was made to transfer it to the plaintiff in any mode, other than by mere manual delivery. But the receipt was evidence of ownership in Parks, and the only voucher which he had in order to show his right to the goods after parting with their actual possession. It was the means which he had of calling the carrier to account if the goods should be lost or injured, and it might well be supposed that the carrier would not ordinarily give up the goods except upon the production and surrender of that receipt. Whatever right Scudder & Co. might have had to take the flour into their own hands, if they had accepted the draft, it is certain that on their refusal to receive the consignment, the property remained in the hands of the carrier, as the property of the consignor, or any person deriving title from the consignor; the carrier would not be wholly relieved of responsibility by the refusal of Scudder & Co. to receive the property, but would continue to be liable, at least for reasonable care in its custody, to the true owner.

It is true that a receipt of this kind does not purport on its face to have the quasi negotiable character which is sometimes said to belong to bills of lading in the ordinary form; neither does it purport in terms to be good to the bearer. But independently of any indorsement or formal transfer in writing, the possession and production of it would be evidence indicating to the carrier that the bank was entitled to demand the property, and that he would be justified in delivering it to them. There are cases in which the delivery of a receipt of this nature, though not indorsed or formally transferred, yet

intended as a transfer, has been held to be a good symbolical delivery of the property described in it. In *Haille v. Smith*, 1 B. & P. 563, Eyre, C. J., uses this language: "I see no reason why we should not expound the doctrine of transfer very largely, upon the agreement of the parties, and upon their intent, to carry the substance of that agreement into execution." In *Allen v. Williams*, 12 Pick. 297, 301, Shaw, C. J., in delivering the judgment of the court, says: "Even a sale or pledge of the property without a formal bill of lading, by the shipper, would operate as a good assignment of the property; and the delivery of an informal or unindorsed bill of lading, or other documentary evidence of the shipper's property, would be a good symbolical delivery, so as to vest the property in the plaintiffs." It is true that he adds that it was not necessary to place the case upon that ground. But this dictum was cited with entire approbation, in a case raising that exact point, in the court of appeals of the state of New York. *Bank of Rochester v. Jones*, 4 Comst. 497. In that case, as in this, the plaintiff had discounted a draft drawn against a quantity of flour, and its title, as in this case, depended upon a carrier's receipt, delivered to it without any written indorsement. The court held that the plaintiff thereby acquired a sufficient title to the property, and could call the consignee to account for it, he having converted the property to his own use, without accepting the draft. It is not necessary to hold

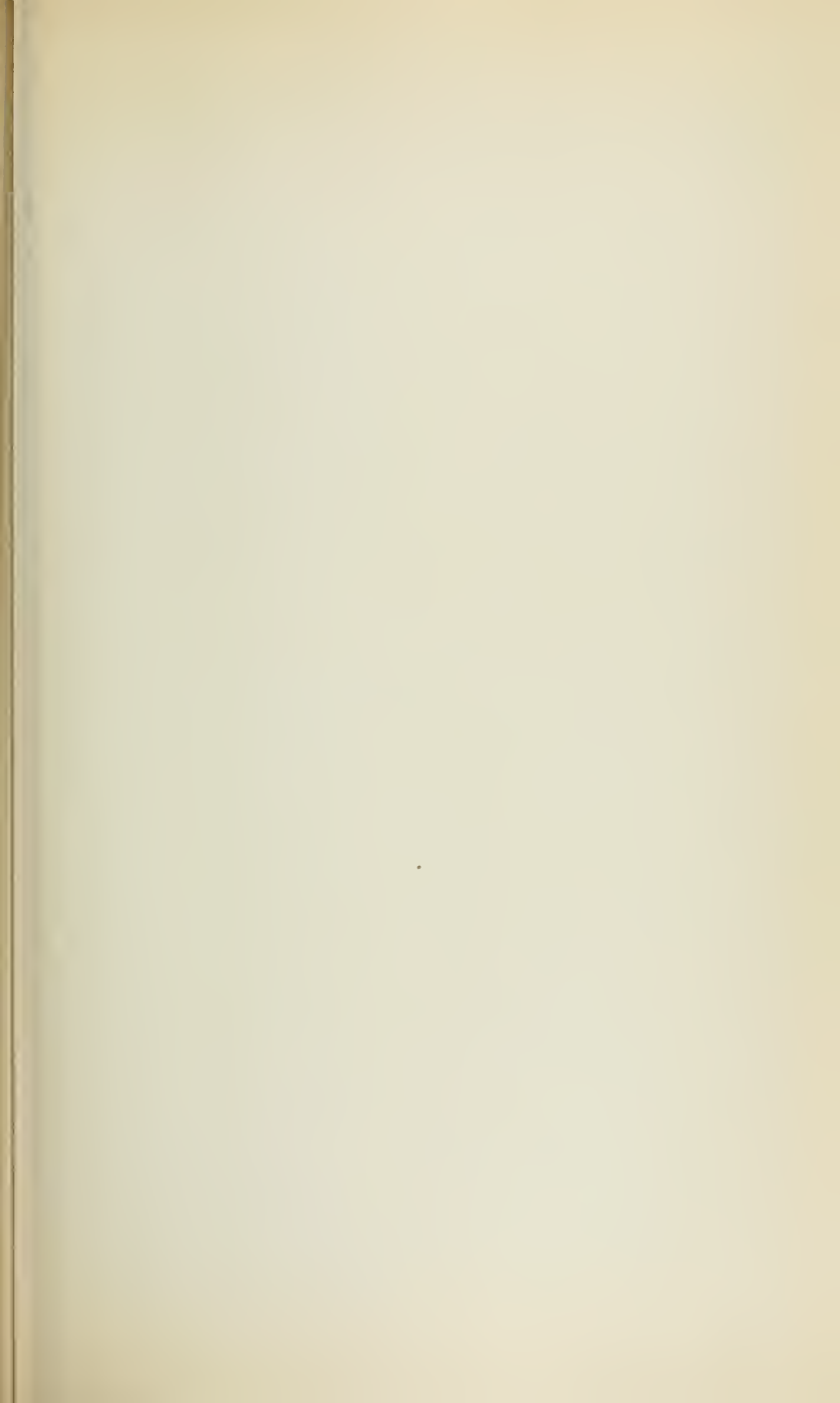
that the plaintiff was absolute owner of the property; it is enough that it had a right of property and of possession to secure the payment of the particular draft; and the right of the former owner, Parks, in the specific property, had become divested, leaving him only a right in the surplus money which might remain after a sale of the flour, and a payment of the draft from the proceeds. *De Wolf v. Gardner*, 12 Cush. 19, 24.

Some reliance was placed by the defendant's counsel upon certain local statutes and judicial decisions of the state of Wisconsin. But, if applicable at all, they do not in our judgment affect the decision of the case. If we are right in holding that there was a sufficient delivery to pass the property to the plaintiff corporation, the carrier must be considered, after that time, as its bailee, and as holding the property for it, and not in any adverse relation. His possession would be the possession of the plaintiff.

Our conclusion therefore is that the clear intent of the parties, that the property should stand as security to the plaintiff in discounting the draft, was carried into effect in a manner sanctioned by sound authorities, and that there are no special equities in favor of an attaching creditor that make it desirable to defeat that intent.

Judgment for the plaintiff.

COLT, ENDICOTT, and DEVENS, J.J., absent.



FIRST NAT. BANK OF TOLEDO v.
SHAW.

(61 N. Y. 283.)

Commission of Appeals of New York. Sept.
Term, 1874.Edward Bissell, for appellant. George
W. Parsons, for respondents.

DWIGHT, C. The plaintiff in this case, under the bill of lading executed at Toledo, had the legal title to the property. True, it held this not as absolute owner, but to secure its advances, the ultimate interest appertaining to Griffin & Co., still the title was in the plaintiff. So long as the advances were not paid there was no theory whereby Griffin & Co. could claim title. It had never been in them. At the moment their interest, whatever it was, accrued to them, it came to them burdened with the formal ownership of the plaintiff. The bank held the title in trust for Griffin & Co., after its own claim was satisfied.

This would be the result of the transaction as between the parties, even though no bill of lading had been executed. Bank of Rochester v. Jones, 4 N. Y. 497; 55 Am. Dec. 290. The bill of lading was merely an instrument to carry out the true intent of the transaction, as evinced by their dealings.

Before entering in detail into the question of the plaintiff's title, it is important to notice whether the bill of lading was drawn in such a way as to accomplish the parties' intent, or whether it was in any proper sense of the term ambiguous. Instruments of this kind are familiar to the legal profession, and the construction of some of the clauses in the one under consideration has been settled ever since the case of Dows v. Perrin, 16 N. Y. 325. In that case there were bills of lading of corn by two canal-boats, to the order of Dows & Carey, for account of one Mack. The court said that this language vested the title in Mack. The regular method of setting forth his title, as the consignee or party entitled to control the goods on their arrival, would have been for the owner who shipped it to have indorsed the bill, making the corn deliverable to him or his order. This however was done in substance by stating upon the face of the paper that the shipment was made on his account. When the document thus prepared was delivered to Mack, it purported to be a transfer from Niles & Wheeler (the consignors) to him of the corn, and to be a contract on the part of the proprietors of the transportation line to carry it to New York, and deliver it there to Dows & Carey, according to his directions, for the price of freight mentioned in it. Page 329. Dows v. Greene, 24 N. Y. 638, 640, reiterates this ruling under an instrument having substantially the same terms as were employed in the case at bar. The effect of these words showing that the title was in the bank, and that Kidd, Pierce & Co., and A. L. Griffin & Co., were its agents, was not changed by the fact that there were additional words, "B'k n/c

to T. W. Griffin & Co." There is nothing in those words on their face to show that the title was in Griffin & Co. As far as they can be interpreted by a mere perusal of them, and considering the abbreviations to mean "bank account," they refer to some relation between the bank and Griffin & Co., and not to any dealings between the owners of the grain and the bank. Evidence however was given to explain the commercial meaning at Toledo, Ohio, of the words, the result of which was that they were a mere notation to show that the bank held title to secure the payment of a debt due from Griffin & Co. It was objected by the defendants that this evidence was not legitimate, on the ground that this was not an Ohio but rather a New York contract. The advance of money was made in Ohio, the transfer of the grain took place there, and the bank, as between itself and the persons with whom it dealt, Carrington & Casey, were entitled to repayment there. The drafts on Griffin & Co., and the bills of lading, were merely a mode of re-imbursement. The contract is, in substance, an Ohio contract. Story Conf. Laws, § 287. It is there held down that when advances are made in such a case, the undertaking is to replace the money at the same place at which the advances are made, even though the mode of re-imbursement be by drafts on a foreign country. Lanusse v. Barker, 3 Wheat. 101, 146; Grant v. Henley, 3 Sumn. 523; Boyle v. Zacharie, 6 Pet. 635, 643, 644. In the more general case, where a contract is made in one country and to be performed in another, it is not always easy to determine, according to the authorities, whether the interpretation of words is to be governed by the law of the place where the contract is made, or by that where it is to be performed. The general principle is, that the law of the place where the contract is made is to govern, unless it is positively to be performed elsewhere. The fact that acts are to be done abroad under a contract does not necessarily make it a contract to be performed there, in a legal sense. Thus it has been said that a policy of insurance executed in England on a French ship for a French owner, on a voyage from one French port to another, is to be interpreted as an English contract. Don v. Lupmann, 5 Cl. & F. 1, 19. The true inquiry is, what was the intent of the parties. It would seem that in a case like the present, where the contract was made in Ohio, by Toledo parties, the money being advanced there and the security there, that they had in view, in employing words, their own usages, even though the goods were to be sent to another state, and ultimately sold there if the advances were not repaid. The result is, that the bill of lading executed at Toledo was intended to vest the title in the grain in the plaintiff; that A. L. Griffin & Co. were its agents to forward the cargo to New York; that Kidd & Pierce were its agents in New York to receive the goods, and that when the advances were repaid the bills of lading were to be assigned to T. W. Griffin & Co.

The authorities clearly sustain these

conclusions. *Bank of Rochester v. Jones*, supra; *Haille v. Smith*, 1 Bos. & Pull. 563; *Tooke v. Hollingworth*, 5 T. R. 215; *Allen v. Williams*, 12 Pick. 297; *City Bank v. Rome, W. & O. R. Co.*, 44 N. Y. 136; *Rawls v. Deshler*, 3 Keyes, 572. The subject is set forth in a clear light in the case of *Haille v. Smith*, supra. In that case a cargo was consigned to bankers, to secure them for advances, and a bill of lading indorsed to them. It was also understood that the cargo was to be sold for the account of the consignors, who received the advances. Subsequent to the consignment the bankers applied for directions respecting the disposal of the cargo, and the price to be asked. The court held that this arrangement did not create the relation of principal and factor, but that the bankers held the title in trust to effectuate the intent of the parties. The consignors had a residuary interest so as to gain by a rise or lose by a fall of the market value of the goods. This fact however only related to the mode in which the trust was to be carried into execution. The title to the cargo was in the bankers, who had the evidence of it in the bill of lading, which was of itself upheld by the valuable consideration paid for the transfer.

Bank of Rochester v. Jones is to the same effect, though the apparent title was not so clear as in *Haille v. Smith*. In that case one Foster applied to a bank to borrow \$950 for the purpose of buying two hundred barrels of flour, and proposed to leave a forwarder's "receipt" for the flour so purchased, as security for the acceptance of a draft to be drawn on the defendant Jones. This proposition having been accepted, the "receipt" was delivered, and purported that the forwarder was to forward two hundred barrels of flour to B. P. Jones, Albany. The proceeds of the draft as discounted by the bank were paid over to the seller of the flour. It was the understanding that if Jones accepted the draft the "receipt" was to be made over to him. Jones declined to accept the draft, but got possession of the flour. In an action of trover brought by the bank against Jones, the question was whether it had such a property as to maintain the action. It will be observed that there was no bill of lading in the bank's name. The receipt was drawn in favor of Jones. The title of the bank did not rest upon any form, but on the substance of the transaction. After deciding that Jones had no title under all the circumstances of the case, the court held that the bank had either the special or general property in the flour. It said: "The true ground on which to sustain this transfer of property to the bank is by regarding the transaction as a sale to the bank in trust, to deliver the property to Jones in case he accepted the draft, and if he refused to accept the draft then to sell the flour and retain out of the proceeds the amount of the draft, and to pay the surplus to Foster." 4 N. Y. 502. The case of *City Bank v. Rome, W. & O. R. Co.* follows the case just cited, and holds that the delivery of a bill of lading by an owner, with intent to pass the title, actu-

ally passes it, whether drawn to "assigns" or not, and if drawn to "assigns," whether it be indorsed or not. In this case again the substance of the transaction is regarded rather than the form. The only material point is, whether there was an intent to pass the title to the goods for a consideration. The intent may be either to pass it absolutely or conditionally, or in trust. Whatever the intent may be the court will carry it into effect. Following these authorities, it is necessary to hold that when the goods were shipped at Toledo the plaintiff held the title to the grain included in the bill of lading, charged with a trust in favor of T. W. Griffin & Co., to whom it was to be made over, if they accepted and paid the drafts drawing against it.

It is now necessary to examine the acts of A. L. Griffin & Co., at Buffalo. It is plain that it was the intent of the parties that the grain should be trans-shipped at Buffalo to New York. This is shown by the Toledo bill of lading, as well as by the known course of business. The words "care A. L. Griffin & Co." made those parties consignees at Buffalo only provisionally, and as incidental to the main object of the transit, which was to end in New York. Their authority was limited by the object sought to be accomplished. It was in writing disclosed on the face of the bill of lading, and according to well-settled principles must be strictly pursued. Their whole power was to forward the goods to the same consignees on the same terms as stated in the Toledo bill of lading. On the face of the canal bill of lading it was apparent that the grain had come to Buffalo by way of the lakes; and any one taking that bill would be put upon inquiry as to the authority of A. L. Griffin & Co.

But without pursuing this line of inquiry it is enough that the canal bill of lading did not differ in substance from the Toledo bill. It mentioned the same consignees, the same owners, the bank, and had the same memorandum as to the interest of T. W. Griffin & Co. The statement that the "freight charges and demurrage were payable to Young Brothers," etc., was of no material significance. That only showed with whom the freight was to be settled on behalf of the carriers. It cannot be considered that any holder of the grain could possibly be misled by an entry, the object of which was so plain and unequivocal. In the aspect of the case most unfavorable for the plaintiff, there were indications on the canal bill which, under the rulings in *Dows v. Perlin*, supra, and in *Dows v. Greene*, were sufficient to lead to the conclusion that the plaintiff had an interest, and to put any person who took the goods upon inquiry as to its rights. Griffin & Co., accordingly, had no right whatever to meddle with the grain, or to warehouse it. The entire control was vested in Kidd, Pierce & Co., for the use of the plaintiff. The warehousemen, Shaw & Co., were bound to inquire whether a bill of lading accompanied the shipment. Their custom to make no inquiries but to ware-

house grain for any one who had the possession could not, in any respect, prejudice the rights of the plaintiff. Having warehoused it, they were bound to hold the grain for the rightful owner. *City Bank v. Rome, W. & O. R. Co.*, 41 N. Y. 141. Their receipt given for the grain was no protection to the Guaranty and Indemnity Co. Shaw & Co. simply trusted to a person having the naked possession, without any title or indicia of it. If on that bare possession they issued evidences of title, they were mere waste paper, under which the guaranty company can make no claim. A mere possessor cannot confer ownership by falsely asserting, through bills of lading or warehouse receipts, that he has a title. *Saltus v. Everett*, 20 Wend. 267; 32 Am. Dec. 541.

It is however claimed on the part of the company, that it is protected by the provisions of the so-called "Factors Act." Before considering the terms of that act it will be proper to notice the rules of the common law as to the power of factors and others having possession of the goods of third persons, having documentary evidence of title to such goods, to pledge them. This rule has been tersely stated by Baron Parke (Lord Wensleydale), in *Phillips v. Huth*, 6 M. & W. 596. He said: "Before the passing of the factors act it was clearly settled that a factor or agent for sale had no power to pledge whether he was in possession either of the goods themselves or of the symbol of the goods, and even though the symbol might bear on the face of it some evidence of the property being in himself, as in the case of a bill of lading in which he was consignee or indorsee. This was in accordance with the general rule, that he who deals with one *ex mandato* can obtain from him no better title than his mandate enables him to bestow."

However logical this rule may have been, it was found in practice to bear hard on the interests of commerce. To remedy some of the inconveniences caused by it, the English Parliament enacted a number of statutes. 4 Geo. IV, chap. 83; 6 Geo. IV, chap. 94 (commonly known as the Factors Act), 5 and 6 Vict., chap. 39. The New York act, with some modifications, is a reproduction of that of 6 George IV.

In so far as these statutes have not changed the law, the former rule of course prevails; and the holder of the goods of another, with or without documentary evidence of title, has no greater power to pledge them than they confer. *Paterson v. Tash*, 2 Strange. 1178; *Daubigny v. Duval*, 5 T. R. 604; *Lamb v. Attenborough*, 1 Best & Smith, 831.

There are two sections of our "Factors Act" to be considered in their relations to the present case, the first and the third. The first provides that every person in whose name any merchandise shall be shipped shall be deemed the true owner so far as to entitle the consignee of such merchandise, acting in good faith, to a lien thereon, (1) for any money advanced or negotiable security given by such consignee for the use of the person in whose name the shipment is made; and (2) for

any money or negotiable paper received by the person in whose name such shipment shall have been made for the use of the consignee. It is plain that this section has no application to the present case, as it has been shown that the shipment cannot be deemed to be made in the name of Griffin & Co.

The third section of the act provides that every factor or other agent intrusted with the possession of any bill of lading, customhouse permit or warehouse keeper's receipt for the delivery of any "such" merchandise (referring to the first section); and every such factor or agent not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise, for any money advanced, etc., by such other person on the faith thereof. Laws 1839, chap. 179.

It is urged by the defendants that the fact that the forwarding house at Buffalo sent the canal bill of lading to T. W. Griffin & Co. brings the case at bar within this section.

To sustain this view, it is necessary to show that Griffin & Co. were factors or agents, that they were "intrusted" with the bill of lading for the delivery of such merchandise as was provided for in the first section, and that an advance was made to them on the faith of the document with which they were intrusted.

It needs no argument to show that Griffin & Co. were not factors of the plaintiff. The statute presupposes that the relation of principal and factor already subsists when the trust or confidence is reposed in him. In other words, the relation of factor is not created by the mere possession of the instrument, though that may raise a presumption when in the alleged factor's name, otherwise the relation is to be proved aliunde. *Cook v. Beal*, 1 Bosw. 497. Nor can Griffin & Co. be regarded as agents of the plaintiff. No power was given in the lake bill of lading to make them the agents of the plaintiff, and if the Buffalo house, without authority, sent the canal bill of lading to them, they did not thereby become agents, since that relation could only be created by the act of the plaintiff. *Lamb v. Attenborough*, 1 Best & Smith, 831.

It cannot be claimed that Griffin & Co. were intrusted with the possession of the merchandise. If "intrusted" with any thing, it must have been with the bill of lading. It is accordingly necessary to give a construction to the statutory words "intrusted with the possession of a bill of lading of any such merchandise," etc. The word "intrusted" here implies confidence reposed. If the bill had been stolen, there would have been no intrusting. The consent of the owner is necessary. True, it may be obtained by fraud. *Sheppard v. Union Bank of London*, 7 H. & N. 661; *Dows v. Greene*, 24 N. Y. 638. But

it must in some form be had. There was here no trust by the owner; the lake bill of lading gave no authority to A. L. Griffin & Co. to repose any confidence in T. W. Griffin & Co. Again, the same word "intrusted" refers to a bill of lading in the name of the factor or other agent. This is assumed in all the English cases. It was expressly so defined in the first factors act, 4 Geo. IV, § 1. The court, in *Phillips v. Huth*, supra, said: "The first section of the act shows that the word 'intrusted,' was not unimportant, and was advisedly introduced, for it provides that the person in whose name the goods shall be shipped shall be deemed to be intrusted therewith for the purposes of the act, unless the contrary thereof shall appear or be shown in evidence by the person disputing the fact." Page 596. This construction is strengthened by the words "such merchandise." The language is that every factor, etc., intrusted with the possession of any bill of lading, etc., for the delivery of any "such" merchandise (referring to the first section), * * * shall be deemed to be the owner thereof. On examining the first section, it is found to apply only to cases where the merchandise is shipped in the name of the person who assumes to control it. *Cartwright v. Wilmerding*, 24 N. Y. 521. On the other hand, when the case of a factor, etc., not having any documentary evidence of title, but having possession, is provided for in the statute, the word "such" is omitted, and the word "any" is substituted in its place. Section 3 thus provides for two entirely distinct classes of cases; one, where the factor, etc., has documentary evidence of such merchandise as is referred to in the first section, running to himself; the other, where he is intrusted with the possession of any merchandise whatever, for the purpose of sale. In the first of these cases the evidence must be complete, pointing to himself as owner, and with no notice, by the bill of lading or otherwise, that he is not the actual and bona fide owner. See § 2, and *Cartwright v. Wilmerding*, 24 N. Y. 521; *Bonito v. Mosquera*, 2 Bosw. 401.

Moreover, the defendant, the guaranty company, did not advance the money to Griffin & Co. on the faith of the bill of lading, etc. This is one of the requirements of the factors act. *Jennings v. Merrill*, 20 Wend. 9. It acted on the warehouse receipt of Shaw & Co., which was itself issued without any reference to documentary title, and relying only on the manual and unauthorized possession of Griffin & Co. Even if the bill of lading had been before the defendant, it could not properly be said to act on the faith of it, as it would have had constructive notice that the goods were not "intrusted" to Griffin & Co., not being in their names. *Bonito v. Mosquera*, 2 Bosw. 401; *Pegram v. Carson*, 10 id. 505; *Cartwright v. Wilmerding*, 24 N. Y. 533. The only explanation consistent with good faith that can be given of the possession by Griffin & Co. of the canal bill of lading is, that they were mere bailees of it to hand to Kidd, Pierce & Co., or that they received it by mistake. There

was no evidence to show fraud or collusion on the part of the Buffalo house, and these are not to be presumed. Nothing could be more contrary to established and elementary principles than to hold that a mere bailee of a bill of lading, such as a finder or depositary, having no apparent title to it, could make a valid transfer of it or create a lien upon the goods which it represents, in favor of a third person who might make advances to the possessor, with or without knowledge of the actual state of facts.

The defendants take an additional ground. It was urged that the plaintiff has lost his rights under the bill of lading "through his negligence in not observing the arrival of the canal-boat." It is not perceived how any remissness subsequent to the advances made by the guaranty company would affect the plaintiff's rights. Whatever interest the defendant acquired accrued on the 17th of October, when the advance was made. The boat arrived on the 16th. This theory of negligence must rest on the view that the plaintiff's claim was a mere lien. It has already been shown that this was not the case, but that the plaintiff had the title. The court below laid some stress on the fact that the plaintiff's cashier stated in his testimony that the transaction was a pledge. His version of a transaction entered into by written instruments is not binding on the court. However, even if the transaction constituted a pledge, the rule which holds that a mere lienor may lose his lien by negligence, etc., is not applicable. A pledgee has something more than a mere lien. He has a property in the goods and not simply a right to hold them as in the case of a lien. The negligence of the plaintiff, under the circumstances, is wholly immaterial. The rights of the defendants depend on the question whether Griffin & Co. were in any form held out by the owners as entitled to control the grain. That point can only be determined by the fair construction of the bill of lading. If the guaranty company saw fit to act on the so-called warehouse receipt, which itself had no solid foundation, it acted at its peril. It should have inquired into the title and have examined the documentary evidence accompanying the shipments of the grain. *City Bank v. Rome, W. & O. R. Co.*, supra. It cannot shield itself from this obligation by imputing negligence to the plaintiff, which was not bound toward mere strangers to be diligent in looking after its property while in the possession of the carrier. Even if there was some evidence of negligence, it depended so much on a variety of circumstances that it should have been left to the jury to determine whether the plaintiff had been guilty of it. Without dwelling upon this point, it is enough to say that the question of negligence does not enter into the case.

The defendant further claims, that as Griffin & Co. had paid for the grain, on account, \$1,945.80, and as the guaranty company had acquired Griffin's interest, it was absolutely necessary to the maintenance of this action that this amount should have been tendered by the plaintiff.

This is a misconception. If Griffin & Co. had detained the property, no such payment would have been necessary, as the possessory right of the plaintiff would have continued superior to that of Griffin & Co. until the entire debt was paid. The guaranty company, standing in Griffin's position and acquiring his rights, can have no greater claim.

The court below were requested to instruct the jury that as far as the defendants were concerned, if a verdict was rendered in their favor, the value of the property should only be assessed at the advances made by the guaranty company, and interest. This instruction was refused under exception, and an instruction was given that the entire value of the property should be found. This ruling was erroneous. In any aspect of the case, the plaintiff had not lost its lien as between it and Griffin & Co. The case is governed by the rule in *Townsend v. Barge*, 57 N. Y. 665. This is, that the value to be assessed as against the owner or his representatives is the creditor's claim, with interest.

The result of the discussion may now be summed up. The title to the grain in controversy was held at Toledo by the plaintiff in trust, and after its own advances were paid any residuary interest was to be made over to T. W. Griffin & Co. The canal bill of lading recognized the true relation of the parties and left the title in the same way. The fact that this bill came into the hands of Griffin & Co., through the act of Young Brothers, was of no importance, as the bill did not import a delivery to the former firm. Shaw & Co. could not safely repose on the mere possession of Griffin & Co., but were bound to look into the shipping documents, and are accordingly chargeable with constructive notice of their contents. The guaranty company are in the same position with Shaw & Co. The warehouse receipt being mere waste paper, that company can claim no rights under it. Such a "warehouse receipt" is not one intended by the factors act. That refers to the receipts given in foreign trade or importation. *Cartwright v. Wilmerding*,

24 N. Y. 524. Even if it were within the intent of the act, it would not help the defendants, as it did not rest on any confidence or trust reposed by the owner in them, or in those from whom they received possession.

The plaintiff accordingly could maintain an action of replevin against these defendants based on its property, whether general or special, in the goods.

Considerable stress was laid at the argument, by counsel on either side of the case, on the great consequences to commerce of a decision in this case adverse to their respective views. Finding the principles of law clearly settled, we are bound to administer them as they have come down to us from our predecessors. We however believe that a decision cannot, on the whole, be adverse to commercial interests, which, while it recognizes the convenience of merchants and the great value and importance of the factors act, requires of those who advance money on commercial documents the observance of reasonable diligence and the obligation to make reasonable inquiry, and enables owners of property on the great transportation lines of inland commerce to secure it from the frauds and depredations of mere custodians and bailees, in whom no special confidence is reposed. While commercial convenience must be respected, the rights of property must not be sacrificed. It is not a case for the application of the rule, that where one of two persons must suffer, that one must sustain the loss who has reposed the confidence. No confidence has been reposed in the person under whom the defendants claim. On the other hand, great care was taken to keep the title to the property and the indicia of ownership regularly in the plaintiff. The true interests of commerce demand that the claims under bills of lading and other such instruments should be scrupulously protected, since commerce will not flourish where the rights of property are not respected.

The judgment of the court below should be reversed and a new trial ordered.

All concur.

Judgment reversed.

FOOT v. MARSH.

(51 N. Y. 283.)

Commission of Appeals of New York. Jan. Term, 1873.

Action by N. B. Foot & Co against Marsh, Delaye & Rogers to recover for a breach of a contract for the sale of certain oil. Defendants had an option to purchase 150 barrels of oil of three different grades, and offered 100 barrels to plaintiffs, showing them a sample taken from the middle-grade oil. As the barrels contained different quantities, it was agreed that they should contain an average of 40 gallons. The evidence was conflicting as to whether the purchasers should assume the risk of leakage, and defendants agreed to set apart 100 barrels, averaging 40 gallons each. After the agreement for the sale was made, plaintiffs gave defendants their note for \$750, and received from them the following receipt: "N. B. Foot & Co. bought of Marsh, Delaye & Rogers 100 barrels, at twelve shillings, \$150; 4,000 gallons of oil, at eighteen cents, \$720—\$870. Received payment by note at three months from June 7, 1862. Marsh, Delaye & Rogers. The above oil is to be delivered when called for, subject to twenty shillings per month storage, and the quality of the oil is to be like the sample delivered. Marsh, Delaye & Rogers." Defendants accepted the option for the 150 barrels. Plaintiffs paid their note, and were shown 100 barrels, containing about 1,800 gallons, worth from 5 to 10 cents a gallon less than the sample by which they bought. The court charged that if there was an agreement to set aside 100 barrels of 40 gallons each, equal in quality to the sample, and defendants did so, the oil was thenceforth at plaintiffs' risk; but, if there was no such agreement, plaintiffs were bound to deliver 4,000 gallons when called for. Judgment was rendered for plaintiffs.

D. M. K. Johnson, for appellants. J. D. Kernan, for respondents.

GRAY, C. The principal question presented for our consideration arises upon the defendants' exception to that portion of the charge given by the judge to the jury, in which he stated, in substance, that if no agreement was made or authority given to the defendants to set apart for the plaintiffs the oil described in the contract, then the contract, from its terms, became a contract to deliver four thousand gallons of oil when called for, and that the defendants, in order to comply with the call, were bound to have that quantity on hand whenever the call should be made. This case is by the defendants likened to the case of *Kimberly v. Patchin*, 19 N. Y. 330; 75 Am. Dec. 334; and the ground upon which this portion of the charge is claimed to be erroneous is, that the contract, when read by the light of the circumstances surrounding it, is in principle, like the contract in that case for the sale of six thousand bushels of

wheat, parcel of six thousand two hundred and forty-nine bushels, at seventy cents per bushel, of which no separation or manual delivery was made, but as a substitute for a manual delivery, and to constitute the contract for its sale an executed, not an executory contract, the vendor gave to the purchaser his receipt for it, agreeing to deliver it to his order, free of all charges, whereupon the vendor was held to have constituted himself the bailee of the wheat, and to have thenceforth stood in that relation to the purchaser and the property; to render the contract effectual as an executed contract from the time it was made, the purchaser must have been invested with the right, after demand, to take the property. This was a right the defendants at the time of making the sale had no power to confer, they not being at the time the owners of any portion of it; nor did they, in the place of a manual delivery, give to the plaintiffs their receipt for it, and thus attempt to constitute themselves the bailees of the plaintiffs and of the oil, as did the vendor of the wheat in *Kimberly v. Patchin*. If the one hundred and fifty barrels of oil of which the one hundred barrels and the four thousand gallons were understood to be a part, were, like the wheat, all of the same quality, so that nothing but the quantity, without reference to quality, was to be taken from the larger amount, the extrinsic facts that the sale was at a profit of only two cents per gallon, and the risk of leakage during the summer months so largely exceeded the profits of the sale, it might be urged, with more plausibility than it now can, that the agreement of the defendants to deliver the barrels and oil when called for was like the agreement contained in the receipt in *Kimberly v. Patchin* to deliver the wheat to the order of the purchaser, and that the defendants should, under the circumstances, as was the vendor in that case, be regarded as the bailees of the plaintiffs. But in order to substitute an arrangement between the parties for a manual delivery of a parcel of property mixed with an ascertained and defined larger quantity, it must be so clearly defined that the purchaser can take it, or as the assignee of the purchaser did in *Kimberly v. Patchin*, maintain replevin for it. In this case the larger quantity, parcel of which was understood to be contracted to the plaintiffs, consisted of one hundred and fifty barrels containing three different qualities of oil, but sixty-eight of which (forty-seven of the Buffalo and Erie oil and twenty-one barrels, marked V. B. 1) corresponded with the sample by which the one hundred barrels were sold. The residue, forty-six barrels of the Murray oil, was superior to the sample; and thirty-six, known as the Lemon oil, were inferior to the sample. The plaintiffs would not have the right to take the Murray or superior oil, and could not be compelled to take the Lemon or inferior oil. And if the sample was, as the witness at one time stated, a poor sample of the most inferior oil, then but thirty-six bar-

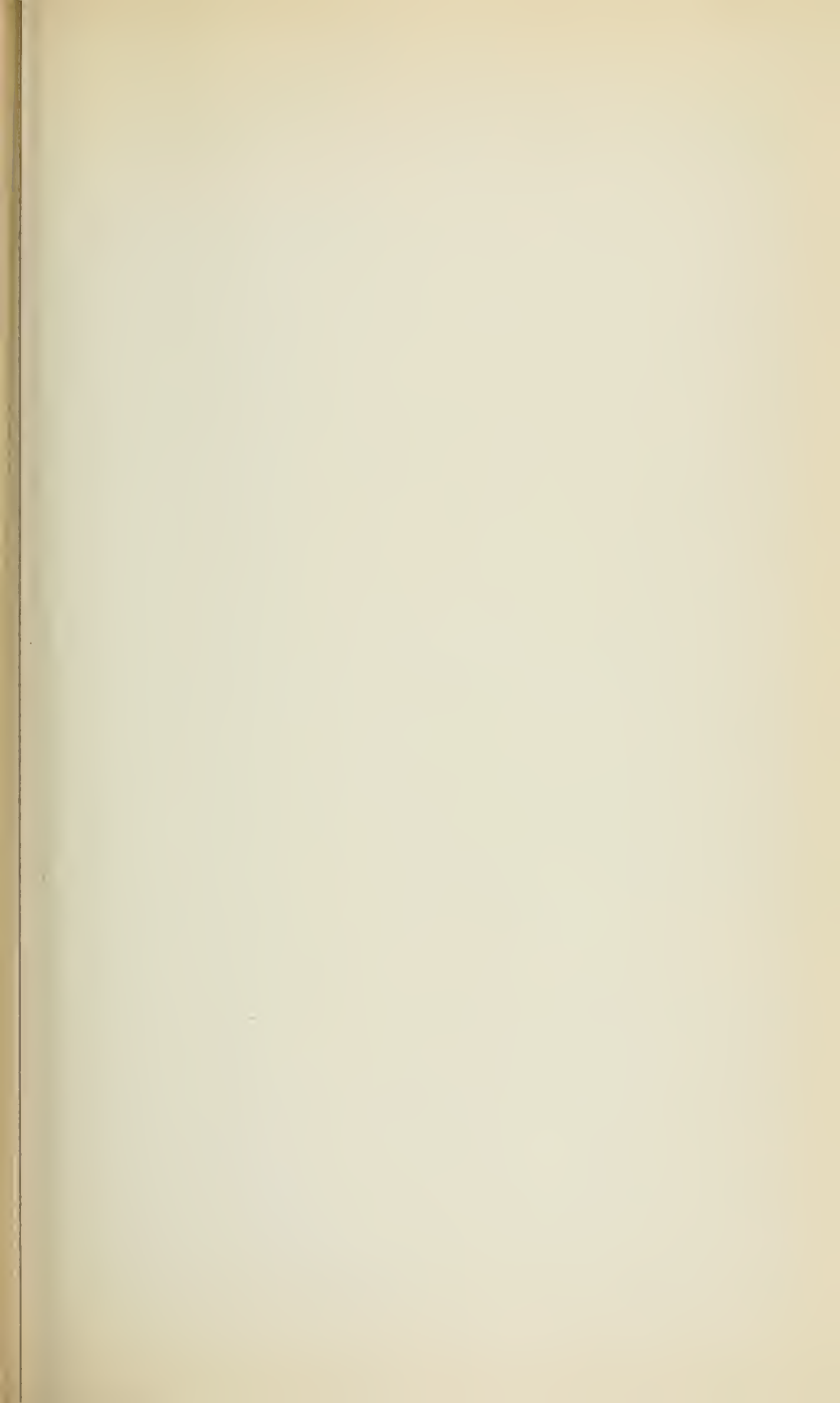
rels of that description, containing less than one thousand five hundred gallons, could have been selected from the whole quantity, and hence the plaintiffs were without adequate means of redress, unless by action for failing to deliver the quantity of oil sold conforming to the sample. The fact that the oil, which was the subject of the sale, was understood by the plaintiffs to be a parcel of a larger quantity, and that the sale was made at a profit of only two cents per gallon, while the risk of loss by leakage and evaporation was very large, are circumstances that would go far to prove that the defendants did not understand the legal import of the writing drawn and subscribed by them, or that they were overreached by the plaintiffs, who suggested their terms after, as one of them had testified, they refused to purchase, unless the defendants would guarantee them against leakage, which the defendants refused to do. But as no question was raised by the pleadings, or elsewhere, as to a reformation of the contract, we must regard it as expressing the intentions of

the parties and give it the interpretation which, under the circumstances, its language plainly imports. The charge was more favorable to the defendants than a fair construction of the written contract warranted. The conversations, out of which the defendants sought to establish an agreement between the parties that the defendants might set apart the one hundred barrels of oil for the plaintiffs, as well as the conversations as to the guaranty against loss by leakage, were all prior to the reduction of their agreement to writing and should have been excluded from the consideration of the jury, leaving the writing as the only evidence of the agreement to be interpreted by the aid of extrinsic facts. No error was committed in the instructions to allow interest. The verdict was more favorable to the defendants than the charge warranted; of that however they cannot upon this appeal complain.

The order appealed from should be reversed.

All concur.

Order reversed.



GANSON et al. v. MADIGAN.

(15 Wis. 144.)

Supreme Court of Wisconsin. January Term, 1862.

Appeal from circuit court, Dodge county.

Action by Ganson, Huntley & Co. against one Madigan to recover for the price of a reaping machine alleged to have been delivered on his written order. Madigan signed an order in February, 1855, requesting Ganson, Huntley & Co. to manufacture and deliver to him on or before July 1, 1855, at Milwaukee, at Douseman & Co.'s, a patent self-raking reaper, warranted with one man and a good team to cut and rake from 12 to 20 acres a day, for which he agreed to pay on delivery \$50, and \$110 December 1st following. The order provided that, if the reaper at the next harvest did not perform as specified, the purchaser "will store it safely, and deliver it to Ganson, Huntley & Co., or their agent, subject to the refunding of the \$50." When he called for the reaper at the time and place specified, he was shown the separate pieces of a number of reapers of identical form and size, and was told by Douseman & Co. that one of them was for him, and they would put one up for him if he would take it, but he refused. In giving instructions to the jury, the judge said: "After an examination of all its parts, the contract between the parties in this action is unambiguous; and your first duty will be to ascertain, from the contract and from oral evidence which has been received to explain it, what this contract really means. You are to construe the term 'a good team,' as used by the parties in this contract, and find from all the evidence on that subject, whether it means a good two-horse team, or, if not, what kind of team it does mean. If you find that the plaintiffs did deliver a machine according to agreement, then they are entitled to recover whatever damages they have sustained by the defendant's refusal to receive. The rule of damages is the difference between the contract price and the actual value of the reaper on the 1st of July, 1855, the day specified for the delivery, together with any expenses incurred by the plaintiff." At the request of the defendant, the judge also instructed the jury "that, if the machine did not answer the terms of the order as to capacity and power, the defendant was not obliged to take it; it being a condition precedent to the reception of the machine and the payment of the \$50 mentioned in the order that the plaintiffs should manufacture and deliver, or offer to deliver, for defendant, a machine of the power and capacities designated in the order. If the jury believe from the testimony that the team referred to means one good pair of horses, and that the reaper furnished at Douseman & Co.'s, July 1, 1855, for the defendant, was a four-horse machine, and required four horses to work it up to the warranty of twelve to twenty acres a day, the defendant was under no obligation to receive it. If the jury believe that the words 'good team'

mean two horses, and that it is proved that these machines could not be operated with two horses up to the warranty at all reasonable times, then the verdict must be for the defendant. The fact that said machines were occasionally operated with two horses is not sufficient proof to establish that the capacity of the machine was equal to the warranty." The plaintiffs requested the judge to give the following instructions, all of which were refused: "(1) If the jury believe, from the evidence, that the plaintiffs fulfilled the contract on their part by the manufacture of a reaper, and the delivery of the same to Douseman & Co., on or before the 1st of July, 1855, as called for by the contract, the plaintiffs are entitled to recover in this action the contract price, with interest. (2) That it was not necessary that the plaintiffs should mark or set apart any particular reaper for the defendant to entitle them to recover the contract price; that if the jury believe, from the evidence, that the plaintiffs manufactured and delivered to Douseman & Co., for the defendant, on or before the 1st day of July, 1855, such a reaper as the contract called for, the plaintiffs performed the contract on their part, and are entitled to recover the contract price, with interest, though the reaper for the defendant was not separated from other reapers sent to Douseman & Co. by the plaintiffs, or any particular reaper tendered to the defendant. (3) That this action is brought to recover the contract price of the reaper; and, if entitled to recover at all, the plaintiffs are entitled to recover therein the contract price, with interest. (4) That if the plaintiffs, on or before the 1st day of July, 1855, delivered to Douseman & Co., for the defendant, a reaper of the kind ordered, and such a one as the contract called for, the title to the reaper so delivered vested in the defendant. (5) That, whatever may be the verdict of the jury in this action, the defendant, upon the pleadings, is entitled to the possession of the reaper, and may call at Douseman & Co.'s, and demand and receive the same." Verdict and judgment for the defendant.

Conger & Hawes, for appellants. Smith & Ordway, for respondent.

DIXON, C. J. In cases like this, we fully concur with Judge Bronson in saying, that "it is an elementary principle that an erroneous decision is not bad law—it is no law at all;" and could we become satisfied that our last decision (13 Wis., 67) was in this unfortunate predicament, or was an unauthorized dictum, we should hasten with alacrity to retrace our steps. Subsequent investigations have only confirmed the views which we there took of the law.

The rights and liabilities of the parties under the contract were, in substance, these: The plaintiffs were bound to manufacture and deliver the machine in the manner specified, at the city of Milwaukee, on or before the first day of July. The defendant was bound, on the same day (or before, if notified of its earlier delivery, and he chose to do so), to be pres-

ent to receive it, and pay the fifty dollars and the storage. The obligation of the plaintiffs to manufacture and deliver, and that of the defendant to be present and receive and pay, were mutual and concurrent. The presence of both parties, by themselves or agents, at the time and place designated, was necessarily contemplated, since the obligations resting upon them respectively could not otherwise be discharged. The plaintiffs, if they had manufactured and furnished ready for delivery by their agents at Milwaukee, such a machine as the contract called for, would have so far performed the duty imposed upon them as to be entitled to damages for the defendant's violation of duty in neglecting to be present, accept and pay the sums stipulated. For this purpose it was not necessary for them to set apart the machine so as to vest the title in him subject to their lien for the purchase money and charges. Having manufactured and forwarded the machine upon the faith of his promise to receive and pay for it, it would be most unreasonable and unjust to say that they should not have compensation for any actual loss or expense which they had thus incurred. The defendant, by his failure to appear and perform the contract on his part, would have been in no situation to insist upon an actual delivery or separation of the machine. Delivery and payment were concurrent acts, the one dependent on the performance of the other, and the neglect of the latter effectually excused the former. It would have been enough to have enabled the plaintiffs to recover their actual loss and expenses, if they had shown that they were ready and willing to perform the contract on their part. *Chitty on Con.*, 633. As stated by Mr. Parsons (2 *Parsons on Con.*, 484.) they had under the circumstances, three courses open to them; to consider the machine as their own (which they did, by not setting it apart, so as to constitute a delivery), and sue for the damages occasioned by the non-acceptance; or to consider it as the defendant's (which they might have done, by separating it from the others so as to be capable of identification), and sell it, with due precaution, to satisfy their lien on it for the price, and then sue and recover only for the unpaid balance of the price; or in the latter case, also, to hold it subject to defendant's call or order, and then recover the whole price which he agreed to pay. We deem these principles to be sound and well supported by the authorities, and are willing to stand by them. The rule of damages given by the court below was therefore correct, and the judge was right in refusing the instruction asked by the appellants on that subject.

The case is clearly distinguishable from those in which the counsel suppose a different rule was established. They will all be found, on examination, to have been cases where the articles purchased or manufactured were, from their nature, susceptible of being distinctly known and identified, or where they were set apart by the vendors, so that the vendees, on paying the price, could receive and dispose of them

if they desired. Such was the case of the wood work of the wagon, in *Crookshank v. Burrell*, 18 *Johas.*, 58; the earriage, in *Mixer v. Howarth*, 21 *Pick.*, 205; the sulky, in *Bement v. Smith*, 15 *Wend.*, 493; and the promissory note, in *Des Arts v. Leggett*, 16 *N. Y.*, 582. As was decided in the last case, the vendor, choosing to go for the price, becomes, after a valid tender of the chattel in performance of the contract, a bailee for the vendee. But we know of no principle of law which would allow the vendor to keep the goods as his own, and at the same time come upon the vendee for the price—compel the latter to pay for, and yet not get the property; which would be the case were the present plaintiffs to be permitted to recover the price irrespective of the amount of damages which they had sustained in consequence of the defendant's nonacceptance. The machine here was brought to Milwaukee in pieces, its several parts separated and packed with those of a great number of other machines of identical form and pattern, so that the same part of one machine was equally suited to every other. It remained in this condition until after the day fixed for its delivery and acceptance. It is idle, therefore, to talk about there having been such a delivery as would have vested the title in the defendant, provided the jury had found that the machine was such as the contract called for. The property in all the machines remained in the plaintiffs, subject to their absolute dominion and right of disposal. Nothing could have changed it as to the defendant, short of a separation or distinct ascertainment, by mark or otherwise, of the machine intended for him, so that he could afterwards, on paying the price, have obtained it if he chose.

If the defendant's had been the only contract for a machine to be delivered in Milwaukee, and his the only machine delivered, or if it had been unlike all the others, the question would have been very different. The authorities cited by counsel would then have afforded some foundation for their position.

And here we may correct another mistake on the part of the counsel. They seem to suppose that the delivery of several machines in Milwaukee, in whatever form, so that one could have been obtained by the defendant within the time prescribed, was all that was necessary under the contract to pass the title; and that this court so decided when the cause was here for the first time. 9 *Wis.*, 146. But this was not so. The delivery there spoken of was a delivery in the general sense of bringing the machine to Milwaukee, in pursuance of the contract, so as to entitle the plaintiffs to recover damages for the defendant's nonacceptance,—not that specific delivery made necessary by law, to transfer title. The contract of the defendant was distinct and independent of that of every other person, and a compliance with its terms, as well as the law, required a distinct and independent delivery, in order to vest the title in him. He never agreed to receive his machine in fragments, commingled with those of the machines of a hundred other persons, in

such manner that nothing could be identified. The way in which the machines came to the hands of the consignees, was the plaintiffs' fault, or at least, not the fault of the defendant.

The word "team," as used in the contract, is of doubtful signification. It may mean horses, mules or oxen, and two, four, six or even more of either kind of beasts. We look upon the contract and cannot say what it is. And yet we know very well that the parties had some definite purpose in using the word. The trouble is not that the word is insensible, and has no settled meaning, but that it at the same time admits of several interpretations, according to the subject matter in contemplation at the time. It is an uncertainty arising from the indefinite and equivocal meaning of the word, when an interpretation is attempted without the aid of surrounding circumstances. It appears on the face of the instrument, and is in reality a patent ambiguity. The question is, can extrinsic evidence be received to explain it? We think it can. There is undoubtedly some confusion in the authorities upon this subject, especially if we look to the earlier cases; but the later decisions seem to be more uniform. As observed by Chancellor Desautsures, in *Dupree v. McDonald*, 4 Des., 209, the great distinction of ambiguities latens, in which parol evidence has been more freely received, and of ambiguities patens, in which it has been more cautiously received, has not been sufficient to guide the minds of the judges with unerring correctness; some of the later cases show that there is a middle ground, furnishing circumstances of extreme difficulty. Judge Story was of opinion (*Peisch v. Dickson*, 1 Mason, 11), that there was an intermediate class of cases, partaking of the nature both of patent and latent ambiguities, and comprising those instances where the words are equivocal, but yet admit of precise and definite application by resorting to the circumstances under which the instrument was made, in which parol testimony was admissible. As an example, he put the case of a party assigning his freight in a particular ship by contract in writing; saying that parol evidence of the circumstances attending the transaction would be admissible, to ascertain whether the word "freight" referred to the goods on board of the ship, or an interest in the earnings of the ship. This distinction seems to be fully sustained by the later authorities, and we can discover no objection to it on principle. *Reay v. Richardson*, 2 C. M. & R., 422; *Hall v. Davis*, 36 N. H., 569; *Emery v. Webster*, 42 Maine, 204; *Baldwin v. Carter*, 17 Conn., 201; *Drake v. Gorce*, 22 Ala., 409; *Cowles v. Garrett*, 30 Ala., 348; *Waterman v. Johnson*, 13 Pick., 261; *Mechanics' Bank v. Bank of Columbin*, 5 Wheat., 326; *Jennings v. Sherwood*, 8 Conn., 122; 1 Greenl. Ev., §§ 286, 287 and 288. The general rule is well stated by the supreme court of New Hampshire, in *Hall v. Davis*, as follows: "As all written instruments are to be interpreted according to their subject matter, and such construction gives them as will carry out the intention of the par-

ties, whenever it is legally possible to do so, consistently with the language of the instruments themselves, parol or verbal testimony may be resorted to, to ascertain the nature and qualities of the subject matter of those instruments, to explain the circumstances surrounding the parties, and to explain the instruments themselves by showing the situation of the parties in all their relations to persons and things around them. Thus, if the language of the instrument is applicable to several persons, to several parcels of land, to several species of goods, to several monuments, boundaries or lines, to several writings, or the terms be vague and general, or have divers meanings, in all these and the like cases, parol evidence is admissible of any extrinsic circumstances tending to show what person or persons, or what things, were intended by the party, or to ascertain his meaning in any other respect; and this without any infringement of the general rule, which only excludes parol evidence of other language, declaring the meaning of the parties, than that which is contained in the instrument itself."

If evidence of surrounding facts and circumstances is admitted to explain the sense in which the words were used, certainly proof of the declarations of the parties, made at the time of their understanding of them, ought not to be excluded. And so it was held in several of the cases above cited. 2 C. M. & R., 422, 42 Maine, 204; 13 Pick., 261. Such declarations, if satisfactorily established, would seem to be stronger and more conclusive evidence of the intention of the parties than proof of facts and circumstances, since they come more nearly to direct evidence than any to be obtained, whilst the other is but circumstantial.

And though in general the construction of a written instrument is a matter of law for the court—the meaning to be collected from the instrument itself; yet, where the meaning is to be judged of by extrinsic evidence, the construction is usually a question for the jury. *Jennings v. Sherwood*, and other cases above. The circuit judge was therefore right in receiving parol evidence, to ascertain the sense in which the word was used by the parties, and in submitting that question to the decision of the jury.

But he was clearly wrong in receiving evidence of the statements of the plaintiffs' agent to the witness Gunn, at the time of making the contract with him. The occasions were different—the two contracts entirely disconnected, and though both concerned a medicine of the same pattern and manufacture, yet what was said in the one case was not a part of the transaction in the other. It was no part of the *res gestæ*. If the agent Chase, in negotiating with Gunn, had made an admission of his representations to the plaintiff, evidence of such admission could not have been received. *Mil. and Miss. R. Co. v. Finney*, 10 Wis., 388. It would be going much too far, were we to hold that it was proper to give the jury the agent's statement to Gunn, as evidence tending to prove that a similar statement was

made to the plaintiff. If it has any such tendency, it is so remote that the law cannot lay hold of and apply it.

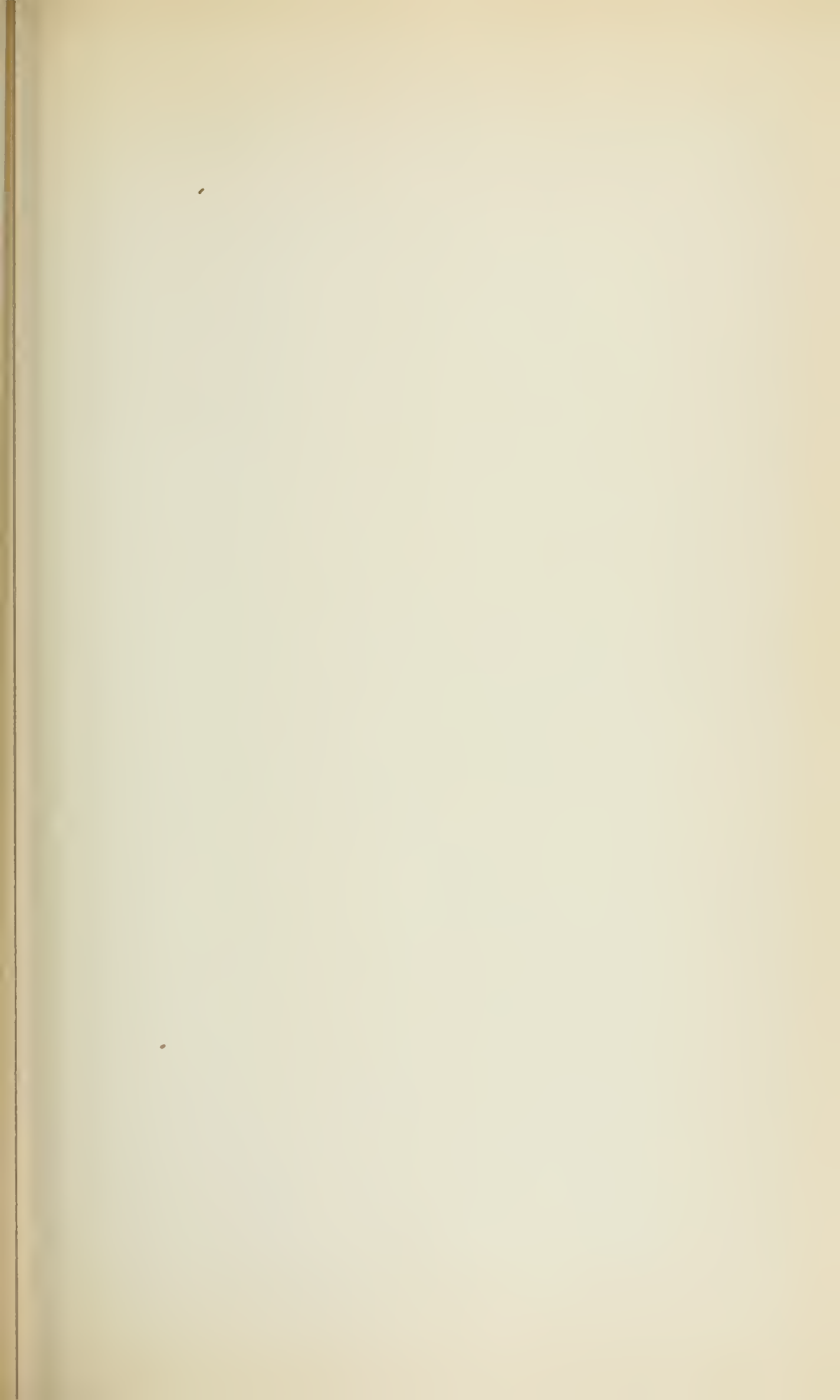
The question then comes up, must the judgment, for this reason, be reversed? The defendant's counsel insist not—that the evidence before the jury was sufficient without this, and if it had been rejected, the verdict must have been the same. We are inclined to take the same view. The defendant's testimony was clear and positive as to the kind of team—that the agent said "one span of horses" would work the machine up to the warranty. In this he was not contradicted, but rather corroborated by the agent, who was himself upon the stand. We would naturally expect, if the fact had been otherwise, the agent would have said so. On the other hand, he testifies very frankly that the defendant said he had but one team; and that he told him one good team would work the machine. The ad-

mission of the improper evidence could not, therefore, have affected the finding of the jury upon this point; and consequently the plaintiffs were not prejudiced by it.

We can hardly believe that the argument of the plaintiffs' counsel upon the construction of the warranty, that it referred to the capacity of the machine without regard to the kind of team employed, and was satisfied, if, under any circumstances, and with any number of horses, it could be made to perform as alleged, was urged with any real hope of success. Such a construction would be directly opposed to the manifest intention of the parties.

The jury, upon proper evidence and under proper instructions, having found that the machine delivered at Milwaukee was not such as the contract called for, the judgment upon their verdict must be affirmed.

Ordered accordingly.



GARDNER v. LANE.

(9 Allen, 492.)

Supreme Judicial Court of Massachusetts. Essex. January Term, 1865.

Replevin. The writ commanded the officer to replevy the goods and chattels following, to wit: "One hundred and thirty-five barrels of No. 1 mackerel, forty-six barrels of No. 3 mackerel, and forty-eight barrels filled with salt, together with the salt contained therein." The officer's return showed that he took thirty-two barrels and fifteen half barrels of No. 1 mackerel, forty-nine barrels and two half barrels of No. 3 mackerel, and forty-eight barrels of salt. The answer averred that the defendant had the property in his possession as attaching officer under a writ of attachment against George F. Wonson and others, to whom the same belonged. It appeared that in November, 1862, George F. Wonson & Brothers owed the plaintiff \$1,328.66, and bargained to him in payment one hundred and thirty-five barrels of No. 1 mackerel, at ten dollars a barrel, amounting, with inspector's fees, to \$1,397.25, and gave him a bill of sale thereof, whereupon he gave them a release, and paid them the difference, \$58.59; that on the 5th of January, 1863, he called upon them for the mackerel, and George F. Wonson went with him to a wharf, where a large quantity was stored, and counted out eighty-five barrels of mackerel, which both supposed to be No. 1, which were delivered to the plaintiff and left there; that they then went to a store where Wonson counted off two rows of barrels, containing, as he said, fifty barrels, marked the barrel at the end of each row, and gave plaintiff a storage receipt in the name of George F. Wonson & Brothers, and, before the same were removed, the attachment by the defendant was made. The two rows in the store in fact contained only forty-eight barrels, and the barrels contained salt. A portion of the quantity in the shed was No. 1 mackerel, and a portion was No. 3. The defendant introduced evidence that two half barrels would exceed one whole barrel in price by fifty-four cents, for inspector's fees; and the plaintiff introduced evidence that, when the replevin suit was served, the defendant agreed that two half barrels should be considered as equivalent to one whole one, and that the officer serving the replevin acted under such agreement. The defendant then asked the court to rule inasmuch as the eighteen half barrels of mackerel replevied by the defendant were not embraced in the bill of sale nor in the storage receipt, nor was there any evidence introduced that any half barrels were ever sold or attempted to be delivered to the plaintiff, the plaintiff had established no title or right of possession to the half barrels; and that inasmuch as there were replevied by the plaintiff's writ forty-five barrels of No. 3 mackerel and forty-eight barrels of salt, and inasmuch as the bill of sale and the storage receipt were of No. 1 mackerel, and if the attempted delivery was to consist of No. 1 mackerel only, and by mistake in such delivery

there were No. 3 mackerel and salt, the bill of sale, receipt, and delivery did not convey to the plaintiff the No. 3 mackerel and the salt; and that, the writ not directing the officer to replevy any half barrels, the officer serving it would not be entitled to replevy such half barrels. The judge instructed the jury that if plaintiff had a bill of sale of one hundred and thirty-five barrels of No. 1 mackerel, and if substantially that number of barrels was in fact delivered to him, the bill of sale would amount to a warranty that the barrels so delivered contained No. 1 mackerel. If it afterwards proved on examination that some of the merchandise delivered was of inferior quality and a lower brand, and known as No. 3, and also that a portion of the barrels delivered contained only salt, the plaintiff would have the right to rescind the sale in part, and return the articles which did not answer the description; or, if he saw fit to keep what was so delivered, and to rely upon his warranty for recovering back whatever he had overpaid beyond a fair value, he could do so, and that a third person, not a party to the contract, could not impeach the plaintiff's title under the bill of sale; and that it was agreed between the plaintiff and the defendant that in the service of the replevin two half barrels should be treated and considered as one whole barrel, and that the term "barrel" should be taken as a measure of quantity, and not as describing the mode in which the property was put up, the plaintiff could replevy the half barrels, provided they were in fact included among the goods which were delivered to him. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

J. C. Perkins, for plaintiff. J. G. Abbott and L. Child, for defendant.

BIGELOW, C. J. 1. The evidence offered by the defendant and rejected was clearly incompetent. This is not an action in which an assignee in insolvency is seeking to recover property belonging to the insolvent debtor for the purpose of distribution among all the creditors. It is controversy between two creditors, each of them striving to hold property of their debtor against the other for the purpose of appropriating it in payment of their pre-existing debts, by way of preference over other creditors. Neither of them can claim any rights in this action under the proceedings in insolvency. The provisions of the insolvent laws for the avoidance of sales, transfers and attachments, which may operate as a preference, are designed exclusively for the benefit of those who come in under the assignee or otherwise to obtain an equal share of the property of the insolvent in the mode provided by law; and these provisions cannot be invoked in aid of a person who stands only in the position of a creditor, endeavoring to secure his whole debt, either by means of a sale or by an attachment. *Penniman v. Cole*, 8 Met. 496, 500. *Burt v. Perkins*, 9 Gray, 320. The rights of creditors under the insolvent proceedings can in no way be af-

feeted by the result of the issue between the parties to this suit. If the property in controversy can be rightfully claimed by the assignee in insolvency for the benefit of creditors, his title to it can be asserted with like effect, whether the plaintiff or the defendant succeeds in establishing a right of possession and property in this action.

2. Other and more interesting questions were raised at the trial, and remain to be considered. The first and most important one is, whether on the evidence adduced at the trial any title passed to the plaintiff, under the contract of sale set up by him, to that part of the property relieved which is described in the writ "as forty-six barrels of No. 3 mackerel, and forty-eight barrels filled with salt." The facts in regard to the articles are few and simple. The plaintiff entered into a contract of sale with the original owners of the property, under whom both parties claim, for one hundred and thirty-five barrels of No. 1 mackerel, at ten dollars per barrel, amounting with inspector's fees to \$1,397.25, for which payment was made by the plaintiff by releasing claims against the vendors for about thirteen hundred and fifty dollars, and by money to the amount of about fifty-five dollars. This transaction took place on the 26th day of November, 1862. No delivery, however, of the mackerel included in the contract of sale then took place, but subsequently, five or six weeks afterwards, a delivery was made of certain barrels supposed to contain No. 1 mackerel, in pursuance of the contract; of the barrels so delivered, a large number did not contain No. 1 mackerel, but instead thereof, forty-five barrels contained No. 3 mackerel, and forty-eight contained salt only, and these were delivered by mistake as a part of the one hundred and thirty-five barrels of No. 1 mackerel which were agreed to be sold to the plaintiff.

On these facts it seems to us to be inconsistent with elementary principles to hold that any property in the barrels of No. 3 mackerel and of salt passed to the plaintiff. To constitute a valid sale of goods, wares and merchandise, complete and consummate, so as to pass the property to them, there must be an agreement or contract of sale by which the vendor agrees that the articles shall pass to and become the property of the vendee. Without such contract or agreement, there can be no sale. Delivery is not always essential. As between the vendor and vendee of specific chattels, in esse, the title will pass when the contract of sale is complete without delivery. But the minds of the parties must meet, and there must be a mutual assent to the transfer of certain specified property, before any change of title to it can be effected. Until this takes place, that is, until there is an agreement to sell certain specific, identical goods, there can be no actual sale or change of ownership. So strictly is this held, that where goods, part of an entire bulk or mass, are agreed to be sold, the contract of sale is deemed to be incomplete and no property passes, if such part has not been separated or designated in such manner that it may be distinguished from the

mass or bulk with which it is mingled. Until the parties are agreed as to the specific, identical goods, the contract can be no more than an agreement to supply goods of a certain kind, or answering a particular description. The reason of this is obvious. There can be no transfer of property until the parties have ascertained and agreed upon the articles sold. Before they are designated and set apart in some form, there is nothing to which the contract of sale can attach, or on which it can operate. *Chit. Con.* (10th Amer. Ed.) 3. -398. *Aldridge v. Johnson*, 7 El. & Bl. 885. *Scudder v. Worcester*, 11 Cush. 573. It necessarily follows from these familiar principles, that where parties to a contract of sale agree to sell and purchase a certain kind or description of property not yet ascertained, distinguished or set apart, and subsequently a delivery is made by mistake of articles differing in their nature or quality from those agreed to be sold, no title passes by such delivery. They are not included within the contract of sale; the vendor has not agreed to sell nor the vendee to purchase them; the subject matter of the contract has been mistaken, and neither party can be held to an execution of the contract to which he has not given his assent. It is a case where, through mutual misapprehension, the contract of sale is incomplete. Delivery, of itself, can pass no title; it can be effective and operative only when made as incidental to and in pursuance of a previous contract of sale. Such a case seems clearly to fall within that class in which, through mistake, a contract which the parties intended to make fails of effect; as where in a negotiation for a sale of property, the seller has reference to one article and the buyer to another, or where the parties supposed the property to be in existence when in fact it had been destroyed. In such cases the contract is ineffectual, because the parties did not in fact agree as to the subject matter, or because it had no existence. *Rice v. Dwight Manuf. Co.*, 2 Cush. 86. So in the case at bar. The contract of sale did not pass the property, as against attaching creditors, because there was no delivery to the vendee of that which constituted the subject matter of the contract; the delivery of different articles from those embraced in the contract is inoperative, for the reason that there is no agreement for their purchase and sale. And this is the precise distinction which marks the line between the case at bar and those cited by the learned counsel for the plaintiff. In all of the latter, the particular articles which formed the subject of the sale and delivery were mutually agreed upon; there was no mistake or misapprehension concerning them; the same goods which the vendor agreed to sell and the vendee to buy, were delivered. The mistake was only as to the quality of the article; it was the same identical thing in specie as that respecting which the parties had negotiated. Although in such cases there can be no doubt of the right of the vendee to rescind the sale and return the property, by reason of a breach of warranty or fraud, there is as little doubt that the title to

the property passes, subject only to such disaffirmance by the vendee. The error at the trial consisted in losing sight of the distinction between cases of this character and the one at bar; between an agreement to sell and deliver a specified article, concerning the quality of which the parties were deceived or mistaken, and an agreement to sell one article and a delivery by mistake of a wholly different article, which did not form the subject matter of the agreement. In the former the title passes at the election of the vendee; in the latter it does not. This view of the principles of law applicable to the facts developed at the trial shows very clearly that the second instruction asked for by the defendant was in substance correct, and should have been given to the jury, as the ruling by which they were to be governed in considering and applying the testimony.

3. It is somewhat difficult to understand the precise posture of the case at the trial, on the point raised in the third prayer for instruction submitted by the defendant. We are by no means sure that the point is open on the pleadings; but assuming it to be so, we do not think it tenable. It is certainly true as any abstract proposition, that an officer in serving a writ of replevin can take only such property as properly comes within the terms of the description contained in the writ. But it is an error to suppose that the term "barrels" necessarily imports a definite and precise description of a particular article or thing. It may and often is used to designate a certain quantity, and not the vessel or cask in which an article is contained. There is nothing on the face of the writ to show that it was used in the latter sense; on the contrary, the evidence tended very clearly to show, and the jury have found under the instructions of the court, that the term "barrel" was not intended as a precise and definite description of the specific articles which the

sheriff was commanded to replevy, but as a designation of the quantity of a particular kind or quality of mackerel which he was to take, irrespective of the mode in which it was packed, or the particular vessels or casks in which it was contained. Nor does the case stop here. It appears that the defendant so understood the description in the writ, and assented that it should be served by taking a sufficient number of half barrels to make up the quantity which the sheriff was required to replevy. After such assent the defendant cannot be permitted to say that the description in the writ was imperfect or insufficient to warrant the service of the writ. The plaintiff having acted on the strength of the assent of the defendant, and incurred the expense of completing the service and prosecuting the suit for the purpose of litigating the title to the property which was actually replevied, it would be unjust and unreasonable to allow the defendant now to defeat the right of the plaintiff to hold a part of the property on the ground of any defect or ambiguity in the description of the property in the writ.

4. The only remaining point of exception arises on the first prayer for instruction. It seems to us the verdict rendered under the instructions given leaves no question open to the defendant on this point of the case. The jury must have found that the half barrels of mackerel were included in the sale and delivery. A mere mistake in the bill of sale, or the description of the mode in which the property was packed, would not prevent the property passing by the delivery, if it was of the same kind and quality as that which the parties intended to include in their agreement.

The result is, that the case must go to a new trial, in consequence of misdirection on the point raised in the second prayer for instructions submitted by the defendant.

Exceptions sustained.

GILES v. SIMONDS.

(15 Gray, 441.)

Supreme Judicial Court of Massachusetts.
Boston. June, 1860.

Tort for breaking and entering defendant's close, and cutting trees thereon. Defendant alleged a verbal sale of the trees to his father, and a payment of the price, and that, after his father had cut some of the trees, a transfer of all his interest, with plaintiff's consent, to defendant. Plaintiff requested a charge that an oral license to go on his lands and cut the trees was revocable, except so far as it had been acted on, and that the license after revocation was no defense, although the price of the trees had been paid. The judge refused the instruction, and the jury found for defendant.

C. Allen and S. T. Field, for plaintiff. A. Brainard, for defendant.

BIGELOW, J. If the plaintiff had a right to revoke the license to enter upon his land, under which the defendant seeks to justify the acts of trespass alleged in the declaration, it is entirely clear that the verdict rendered in favor of the defendant cannot stand. The decision of the case turns therefore on the question whether an owner of land, who has entered into a verbal contract for the sale of standing wood or timber to be cut and served from the freehold by the vendee, can at his pleasure revoke the license which he thereby gives to the purchaser to enter on his land and cut and carry away the wood or timber included in the contract. That such a contract is not invalid as passing an interest in the land is too well settled to admit of doubt. It is only an executory contract of sale, to be construed as conveying an interest in the trees when they shall be severed from the freehold and shall become converted into personal property. Nor does the permission to enter on the land, which such a contract expressly or by implication confers on the vendee, operate to create or vest in him any estate or interest in the premises. It is only a license or authority to do certain acts on the land, which, but for such license or authority, would be acts of trespass. If it were otherwise, if under such a contract a right were conferred on the vendee to enter on the land and then to exercise a right or privilege at his own pleasure, free from the control of the owner of the land, during the continuance of the contract, it would clearly confer on the vendee a right or interest in the premises, which would contravene the statute of frauds. Rev. Sts. c. 74, § 1. There can be no doubt that a valid license to enter on land may be given by parol. But this rule rests on the distinction that a license is only an authority to do an act or series of acts on the land of another, and passes no estate or interest therein.

The nature and extent of the right or authority conferred by a license, and how far it is within the power of the licensor to modify or revoke it, have given rise to much discussion and many nice and subtle distinctions in the books, as well as con-

flicting decisions in the courts of common law. Certain principles, however, seem now to be well settled. If the owner of land sells chattels or other personal property situated on his land, the vendee thereby obtains an implied license to enter on the premises, and take possession of and remove the property. In such case the license is coupled with and supported by a valid interest or title in the property sold, and cannot be revoked. *Wood v. Manley*, 11 Ad. & El. 31. *Henth v. Randall*, 4 Cush. 195. So, too, if the owner of chattels or other personal property, by virtue of a contract with or the permission of the owner of land, places his property on the land, the license to enter upon it for the purpose of taking and removing the property is irrevocable. *Patrick v. Colerick*, 3 M. & W. 483. *Russell v. Richards*, 1 Fairl. 429, and 2 Fairl. 371. *Smith v. Benson*, 1 Hill (N. Y.) 176. The right of property in the chattels draws after it the right of possession; the license to enter on land to obtain possession of them is subsidiary to this right of property, which cannot be enjoyed if the license be withdrawn or terminated. This right in the chattels is not derived from the license, but exists in the owner by virtue of a distinct and separate title, the validity of which in no way depends on any right or interest in the land. But with the assent of the owner of the land the property has been placed in a situation where it cannot be used or enjoyed except by a license to enter upon his land. The continuance of this license is therefore essential to the enjoyment of the right. It would be a manifest breach of good faith to permit such a license to be revoked. No man should be permitted to keep the property of others by inducing them to place it upon his land, and then denying them the right to enter to regain its possession. A party is therefore not permitted to withdraw his consent, by setting up his title to the land, after it has been acted on by others, and when their rights will be impaired or lost by its withdrawal. In like manner and for similar reasons, a license to enter on land for the purpose of removing trees or timber therefrom, which have been felled in pursuance of a contract of sale, cannot be recalled. So far as it has been executed, the license is irrevocable. By virtue of the contract, and with the express or implied consent of the owner of the soil, the vendee has been induced to expend his money and services. The trees, so far as they have been severed from the freehold, have become converted into personal property, and vested in the vendee. A revocation of the license would, to the extent to which it had been executed, operate as a fraud on the vendee, and deprive him of property to which he had become legally entitled. Besides, the owner of land cannot, by a subsequent revocation of his license, render that unlawful which, with all its incidents and necessary consequences, was lawful at the time it was done, by virtue of his own authority and consent.

The true distinction between an executory verbal license to enter on land under a contract for the sale of timber or trees

growing thereon, and a similar license executed, seems to be this: The former confers no vested interest or property no money or labor is expended on the faith of it, and no right or title is impaired or lost by its revocation. If the party to whom it is granted is injured by its withdrawal, his remedy is by an action against the licenser for a breach of the contract. It cannot be held to extend further, so as to confer a right to use the land of another without his consent, because it would thus confer *ex proprio vigore*, an interest in land, which cannot be created except by a writing. But such a license executed, to the extent to which it has been acted on, has operated to induce the vendee to expend money and services on the property, and thereby to convert it into personal chattels which have become vested in him. The revocation of the license in such case would deprive the vendee of his property. It has therefore been

held that such a license, while it is executory, may be countermanded, but that when executed it becomes irrevocable. *Cook v. Stearns*, 11 Mass. 533. *Cheever v. Pearson*, 16 Pick. 273. *Ruggles v. Lesure*, 24 Pick. 190. *Chadlin v. Carpenter*, 4 Met. 580. *Nettleton v. Sikes*, 8 Met. 34.

Applying these principles to the case before us, it is clear that the defendant could not justify the acts of trespass charged in the declaration. Before his entry on the land for the purpose of cutting trees, the plaintiff revoked the license which he had given by the verbal contract of sale under which the defendant claimed to act. So far as the license was executory it was revocable, and the entry of the defendant after its revocation was unlawful.

The view which we have taken of the case seems to render a decision of the other questions raised by the exceptions unnecessary.

Exceptions sustained.



GILL et al. v. BENJAMIN.

(25 N. W. Rep. 445, 64 Wis. 362.)

Supreme Court of Wisconsin. Nov. 3, 1885.

Appeal from county court, Milwaukee county.

The facts fully appear in the following statement by CASSODAY, J.:

The plaintiffs were engaged in the business of furnishing wood by contract at Gill's Pier, Michigan. The defendant was a wood and coal dealer at Milwaukee. March 1, 1884, the plaintiffs sent to the defendant the following written proposition, which was accepted in writing by the defendant, as follows: "Gill's Pier, Mich., March 1, 1884. H. M. Benjamin, Milwaukee, Wis. — Dear Sir: We will sell and deliver to you one thousand cords maple wood, to be delivered from Gill's Pier, Leelenaw county, Mich., over the rail of the vessel, at three dollars and twenty-five cents (\$3.25) per cord; all the wood to be sound body, marketable maple wood, and to be delivered from time to time to your vessel as wanted during the season of navigation of 1884. The said wood to be piled as taken from vessel, and to be measured and paid for when piled on your dock in Milwaukee, Wis. Yours, respectfully, William Gill & Son. I accept the above. Milwaukee, March 10, 1884. H. M. Benjamin."

The undisputed evidence was to the effect that the captain of the schooner Surprise, a vessel owned by the defendant, took the first cargo of wood from the plaintiffs' pier on June 30, 1884, and at various times thereafter chartered certain other vessels to transport cargoes to the defendant's dock in Milwaukee; that there were in all, aside from the one in dispute, six of these cargoes, aggregating 833¾ cords of wood, which were loaded at Gill's Pier, carried across Lake Michigan, unloaded, assorted, piled, and measured on the defendant's dock at Milwaukee, and then paid for; that two of the six cargoes were delivered and received after October 7, 1884; that the defendant paid the freight for such transportation, and the expense of unloading, culling, and piling the wood, and part of the expense of measuring; that the plaintiffs paid the expense of placing the wood over the rail of the vessel at their pier, and employed and paid one Saveland, residing at Milwaukee, as their agent in doing whatever was necessary to be done in such measurement, and sending a statement thereof to the plaintiffs; that in the six cargoes so delivered 26 cords were treated as culls, and paid for at a less rate than the contract price; that good sound, marketable maple wood could be culled; that the per cent. of culls in the six cargoes mentioned was very small—unusually so; that the defendant always dealt fairly about culling wood; that the J. E. Bailey, chartered by the captain of the Surprise for that purpose, was present at Gill's Pier, Michigan, October 7, 1884, to get a cargo of wood for the defendant under the contract, when the plaintiffs delivered over the rail of the Bailey at that place 155 cords of "good

sound, marketable, body maple wood, sawed ends," aside from the wood herein before mentioned, which 155 cords of wood the vessel's crew, and the men they hired, piled and stowed on the Bailey; that the last was put on board about half past six in the evening of October 7, 1884; that the 155 cords did not constitute a full cargo for the Bailey, as she was capable of carrying 195 to 200 cords of such wood; that the captain thereof gave the plaintiffs a receipt therefor a day or two after in these words: "Gill's Pier, Mich., October 7, 1884. Shipped in good order and condition, by William Gill & Son, at the risk of whom it may concern, on board the J. E. Bailey, whereof Berenson is master, now in port at Gill's Pier, bound for Milwaukee, Wis., 155 cords maple wood. Henry Berenson." The night after the wood was so put on board the Bailey it began to rain quite heavily and the wind blew, and the next morning the Bailey was ashore, and the 155 cords of wood was partly washed overboard, and the balance thrown overboard by those in charge of the vessel, and became a total loss; the captain thereupon telegraphed the defendant to the effect that the schooner Bailey was ashore with 155 cords of his wood; the plaintiff admitted that the wood placed on the Bailey was of the same kind and character in general as the other wood delivered, except the latter had a part cargo of dry wood; this action is to recover for the 155 cords of wood at the contract price, and interest from November 1, 1884. Upon the facts stated the court directed a verdict for the plaintiffs, and from the judgment entered thereon the defendant appeals.

Markham & Noyes, for appellant. J. E. Wildish, for respondents.

CASSODAY, J. The facts are undisputed. Does the law put the loss of the 155 cords of wood upon the plaintiffs or the defendant? The contract when made was executory. The plaintiffs thereby agreed to sell and deliver to the defendant 1,000 cords of wood. The wood was to be of the kind and quality named in the contract. No particular 1,000 cords of wood was then designated nor described therein. It was all "to be delivered from Gill's Pier * * * over the rail of the vessel." It was, moreover, "to be delivered from time to time" at that place, "as wanted, during the season of navigation of 1884." The Bailey was chartered by the captain of the defendant's vessel, and for the purposes of the contract must be regarded the same as though it were the property of the defendant. True, each cargo was "to be piled on the defendant's dock in Milwaukee" as taken from the vessel, and to be measured and paid for at the price named when so piled. This raises the question whether, by the terms of the agreement, the title of each cargo became vested in the defendant when delivered to and "over the rail of the" defendant's vessel at Gill's Pier, or remained vested in the plaintiffs while being carried across the lake on the defendant's vessel, and until taken from his vessel and piled

on his dock in Milwaukee. If the title to each cargo remained vested in the plaintiffs until piled on the defendant's dock in Milwaukee, then did it continue to be vested in them until measured; and if until measured, then did it remain vested in them until paid for? The piling on the dock was apparently to facilitate the measurement, and the measurement was apparently to ascertain the amount to be paid. But can it be that the title of a cargo so piled upon the defendant's dock and measured did not become vested in the defendant until he had paid for it; and if it became vested in him before he paid for it, then why not before it was measured or piled on his dock or taken from his vessel? The words "sell and deliver to you * * * from Gill's Pier, * * * over the rail of the vessel," clearly designated that as the place of delivery.

On the delivery of any cargo being made in that way at that place, the possession of such cargo was manifestly intended by the contract to immediately pass entirely from and beyond the control of the plaintiffs into the absolute and exclusive possession and control of the defendant. The vessel upon which such cargo was so piled belonged to the defendant, and was controlled by his captain; or else the vessel was chartered by his captain for his service in the transportation of such cargo, and hence was, so far as the contract was concerned, his vessel for that voyage for the purposes of such transportation. The plaintiffs had no control over the management of the vessel, nor the direction in which it should go, nor the port at which it should land. The contract, though executory when made, yet as it contemplated a delivery from time to time, as wanted, in separate cargoes, each of which was to be paid for as indicated, it was clearly severable. *Scott v. Kittanning Coal Co.*, 89 Pa. St. 231; *Goodwin v. Merrill*, 13 Wis. 658; *Sawyer v. Chicago & N. W. Ry. Co.*, 22 Wis. 385. This being so, it necessarily follows that, as each cargo was delivered on board the defendant's vessel, the contract as to such cargo became an executed sale, so far as the plaintiffs were concerned, unless the mere fact that their man was expected to participate in the measurement of such cargo when piled on the defendant's dock prevented the title to such cargo from becoming vested in the defendant until so measured. *Morrow v. Reed*, 30 Wis. 81; *Morrow v. Campbell*, Id. 90; *Fletcher v. Ingram*, 46 Wis. 191, 50 N. W. Rep. 424; *Scott v. Kittanning Coal Co.*, supra.

Such being the wording and effect of the contract, we must hold that each cargo, on being delivered "over the rail of the vessel" sent for that purpose by the defendant or his captain, became at once the property of the defendant, unless the stipulation for piling and measuring on the defendant's dock, before payment, prevented the title from so vesting in him. Of course the 155 cords, being lost, was not so piled on the defendant's dock in Milwaukee, nor measured; and therefore it is claimed there is no obligation to pay. The contract contemplates no such loss. It contains no stipulation as to any one

taking the risks of the perils of the lake. Without such stipulation, such risk would necessarily fall upon the owner of the cargo at the time of loss. It will be observed that the contract contains no stipulation for any inspection or sorting of the wood on the defendant's dock. The wood was to be taken from the vessel, piled and measured on the dock; but it is silent as to who should do the piling or the measuring. It seems to be conceded that the defendant was to do the piling. It may be inferable that the plaintiffs' man was expected to witness or participate in the measurement of every cargo, as he did of each that was so piled on the dock. Was such piling and measuring a condition precedent to the vesting of the title thereof in the defendant? Where the manifest intention of the parties is to transfer the title, the sale may be complete, notwithstanding the property is yet to be measured, and the amount of the price yet to be ascertained. *Sewell v. Eaton*, 6 Wis. 490; *McConnell v. Hughes*, 29 Wis. 537; *Morrow v. Campbell*, supra; *Fletcher v. Ingram*, supra. So held where, by the agreement, the vendee was to have the title to saw-logs as soon as the vendor deposited them in a certain place. *Morrow v. Reed*, supra. These principles are fully recognized and sanctioned in *Pike v. Vaughn*, 39 Wis. 505, relied upon by counsel for the defendant. Thus, in *Dixon v. Baldwin*, 5 East, 175, A. & B., traders in London, ordered goods from the defendants at Manchester to be sent to M. & Co., at Hull, for the purpose of being afterwards sent to the correspondents of A. & B. at Hamburg, and the defendants sent the goods to M. & Co. at Hull to be shipped by them to Hamburg, as usual, pursuant to the order; and it was held as between the buyer and seller, the right of the defendants to stop as in transitu was at an end when the goods came to the possession of M. & Co. at Hull; for they were for this purpose the appointed agents of the vendees, and received orders from them as to the ulterior destination of the goods; and the goods, after their arrival at Hull, were to receive a new direction from the vendees. To the same effect, *Kendal v. Marshall*, 11 Q. B. Div. 356; *Ex parte Miles*, 15 Q. B. Div. 39.

We must hold that the intention of the parties, as expressed in the contract, was that the title to each cargo should immediately vest in the defendant on being placed on board of the defendant's vessel at Gill's Pier. True, the contract provides, in effect, that each cargo was to be "paid for when piled on" the defendant's dock in Milwaukee, and that the cargo of 155 cords was never so piled on that dock. But the undisputed evidence shows that the failure to so pile on the defendant's dock was in no way attributable to the plaintiffs. It may be conceded, also, that it was not the fault of the defendant nor his agents, although the cargo was in the exclusive possession of the defendant at the time it was lost. Assuming that the loss of the cargo was not the fault of the defendant's agents, then such piling on the defendant's dock was rendered impossible solely by the act of God, and

hence the defendant, upon its loss, thereupon became liable for its value. *Powers v. Dellinger*, 54 Wis. 389, 11 N. W. Rep. 597; *Nugent v. Smith*, 1 C. P. Div. 423; 2 *Benj. Sales*, § 861.

It appears from the undisputed evidence that the 155 cords of wood lost was of the kind and substantially of the quality called for in the contract, and the same as the other wood which had been received by the defendant without any objection, although a deduction was made in the price of 26 cords called culls. The title to the 155 cords of wood having become vested in the defendant when the same was placed on board of the *Bailey*, and the captain of the *Bailey* being in law the agent of the defendant for the purpose of receiving the wood, and having received the same on board the *Bailey* without any objection as to quality, and the wood having been lost, as indicated, it may be very doubtful whether any damages could be recovered in this action, even had there been a counter-claim for such damages in the answer. *Locke v. Williamson*, 40 Wis. 377. But here there

was no such counter-claim, and hence the question need not be determined. The defendant does claim damages by way of counter-claim, however, for the failure to deliver the balance of the 1,000 cords called for by the contract, including the 155 lost. But the contract only required that the plaintiffs should deliver the wood at their pier to the defendant's vessel from time to time, "as wanted, during the season of navigation of 1884." There is no evidence of any failure to deliver any wood "as wanted" by the defendant during that season, nor of any unreasonable delay in furnishing wood to any vessel calling for it at the plaintiff's pier in behalf of the defendant.

We discover no ground upon which the defendant is entitled to any damages under his counter-claim. *Simpson v. Tripplin*, L. R. 5 Q. B. 14; *Higglus v. Delaware, L. & W. R. Co.*, 60 N. Y. 553; *Scott v. Kittinging Coal Co.*, supra; *Haines v. Tucker*, 50 N. H. 307.

BY THE COURT. The judgment of the county court is affirmed.



GIROUX v. STEDMAN et al., (three cases.)

RECORD v. SAME.

(14 N. E. Rep. 538, 145 Mass. 439.)

Supreme Judicial Court of Massachusetts.
Hampden. Jan. 4, 1888.

Exceptions from superior court, Hampden county: Pitman, Judge.

These were actions brought by Richard Giroux, Mary Giroux, Joseph Pecord, and Mary Giroux, (by her next friend,) against Phineas Stedman and another, to recover damages for torts committed by them in selling to the plaintiffs pork unfit for food. The plaintiffs claimed to have purchased from the defendants certain provisions, to wit, certain quantities of dressed pork; that said pork was tainted, and unfit for food; that they ate of said pork, and were made sick thereby. At the trial in the superior court, the evidence showed that the defendants were farmers carrying on a farm in Chicopee, and jointly interested in raising pigs; that about the middle of September, 1885, the defendants found that an infectious disease, known as "hog cholera," existed upon their farm, and that their entire herd had been exposed to the disease; that on October 3, 1885, the defendants killed two of their hogs, dressed them, and sold one-half of one of them to the plaintiff Richard Giroux, and one-half of the other hog to the plaintiff Joseph Pecord; that on October 5th the defendants killed and dressed two other hogs, one of which was sold to the plaintiff Pecord. The evidence showed, further, that, at the time of the several sales to the plaintiffs, no representations as to the quality of the meat were made, and no notice given to the plaintiffs, at the times of the sales, of the existence of the disease among the herds owned by the defendants; but it appeared that the defendants knew, at the time of the several sales to the several plaintiffs, that the meat so sold by them to the plaintiff was to be used by the plaintiffs for provisions. The presiding judge instructed the jury in terms, the substance of which appears in the opinion. The jury returned a verdict for the defendants, and the plaintiffs alleged exceptions.

W. W. McClench, for plaintiffs. E. W. Chaplin, for defendants.

DEVENS, J. It was known to the defendants that the plaintiffs purchased the meat to be used as provisions, but it was held by the presiding judge that, in order that they should recover, they must prove the allegations in their declarations that the defendants knew that the meat sold by them was unwholesome, and improper to be used as provisions. He instructed the jury that, at common law, the general rule is that where personal property is sold in the presence of buyer and seller, each having an opportunity to see the property, and there is nothing said as to the quality, the only implied warranty on the part of the seller is that he has a valid title in, or has a right to sell, the chattel.

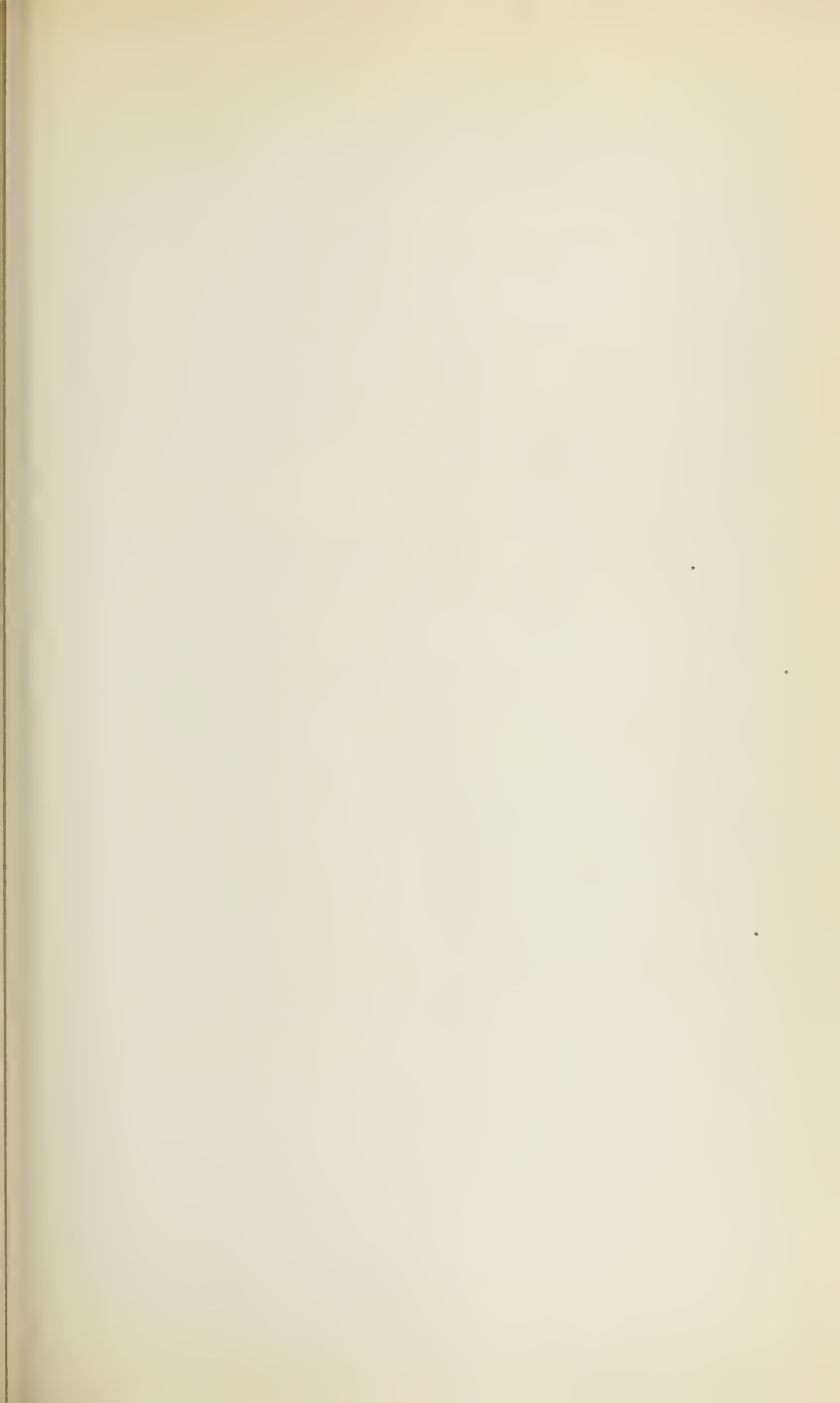
He added that there is an exception to this general rule, where a provision dealer or market-man sells provisions, as meat and vegetables, to his customers for use; and that in such case there would be an implied warranty that they were fit for use, and wholesome. Whether this exception exists or not it is not important, in the case at bar, to inquire, as it cannot be, and was not contended, that the defendants were brought within it. The contention of the plaintiffs is that, even if the rule is well established that where there is no express warranty, and no fraud, no warranty of the quality of the thing sold is implied by law, and that the maxim of caveat emptor applies, there is a more general exception, which excludes from its operation all sales of provisions for immediate domestic use, no matter by whom made. That in a sale of an animal by one dealer to another, even with the knowledge that the latter dealer intends to convert it into meat for domestic use, or that, in the sale of provisions in the course of commercial transactions, there is no implied warranty of the quality, appears to be well settled. *Howard v. Emerson*, 110 Mass. 320, and cases cited; *Barnby v. Bollett*, 16 Mees & W. 645.

While occasional expressions may be found (as in *Van Bracklin v. Fonda*, 12 Johns. 465) which sustain the plaintiffs' contention, we have found but one decided case which supports it. In *Van Bracklin v. Fonda*, *ubi supra*, it is said that, in a sale of provisions, the vendor is bound to know that they are sound at his peril; but the case shows that the defendant, who had sold beef for domestic use, knew the animal from which it came to be diseased. This had been found by the jury, and the remark is made in connection with the facts proved. The case of *Hoover v. Peters*, 18 Mich. 51, does sustain the plaintiffs' contention, as it is there held that where articles of food are bought for domestic consumption, and the vendor sells them for that express purpose, the law implies a warranty that they are fit for such purpose, whether the sale be made by a retail dealer or by any other person. This case imposes a heavier liability on a person not engaged in the sale of provisions as a business than he should be called on to bear. The opinion is not supported by any citation of authorities. In a dissenting opinion by Mr. Justice Christiancy, it is said: "Had it appeared that he [the defendant] was the keeper of a meat market or butcher shop, and was engaged in the business of selling meat for food, and therefore bound or presumed to know whether it was fit for that purpose, I should have concurred in the opinion my brethren have expressed." If there is an exception to the rule of caveat emptor which grows out of the circumstances of the case, and the relations of buyer and seller, where the latter is a general dealer, and the former a purchaser for immediate use, there appears no reason why it should be further extended.

In the case at bar, the defendants were not common dealers in provisions or

market-men. They were farmers, selling a portion of the produce of their farms. No representations of the quality of the meat sold were made by them. In making casual sales from a farm of its products, to hold the owner to the duty of ascertaining, at his peril, the condition of the articles sold, and of impliedly warranting, if sold with the knowledge that they are to be used as food, that they are fit for the purpose, imposes a larger liability than should be placed upon one who may often have no better means of knowledge than the purchaser. The plaintiffs contend that the case of *French v. Vining*, 102 Mass. 132, is decisive in their favor, but it appears to us otherwise. In that case, the defendant sold hay, which he knew had been poisoned, for the purpose of being fed to a cow, although he had carefully endeavored to separate the damaged portion from the rest, and supposed he had succeeded. From the effects of eating the hay the cow died, and the defendant was held liable. His knowledge of the injury to the hay was certain and positive; his belief that he had remedied

the difficulty was conjectural and uncertain, and proved to be wholly erroneous. In the case at bar, while the defendant's herd had been exposed to hog cholera, there was evidence that a portion of it only had been affected; and, further, that, even if affected, the meat of the animals was not necessarily unwholesome. There was no evidence that the animals whose meat was sold had ever, so far as the defendants knew, actually had the disease, and the verdict of the jury has established that they were ignorant that the meat sold by them was unwholesome. In *French v. Vining* the defendant knew what the condition of the hay had been, and this is a vital part of the case. He sold an article which he knew had been poisoned, and from which he had taken no effectual means to remove the poison. His belief or supposition that his effort had been successful could not relieve him from liability for the consequences that ensued because it had been unsuccessful, if he sold the hay without informing the purchaser of the dangerous injury which it had received. Exceptions overruled.





GODDARD v. BINNEY.

(115 Mass. 450.)

Supreme Judicial Court of Massachusetts. Suffolk. Sept. 4, 1874.

Contract to recover the price of a buggy built by plaintiff for defendant. Plaintiff agreed to build a buggy for defendant, and to deliver it at a certain time. Defendant gave special directions as to style and finish. The buggy was built according to directions. Before it was finished, defendant called to see it, and in answer to plaintiff, who asked him if he would sell it, said no; that he would keep it. When the buggy was finished, plaintiff sent a bill for it, which defendant retained, promising to see plaintiff in regard to it. The buggy was afterwards burned in plaintiff's possession. The case was reported to the supreme judicial court.

C. A. Welch, for plaintiff. G. Putnam, Jr., for defendant.

AMES, J. Whether an agreement like that described in this report should be considered as a contract for the sale of goods, within the meaning of the statute of frauds, or a contract for labor, services and materials, and therefore not within that statute, is a question upon which there is a conflict of authority. According to a long course of decisions in New York, and in some other states of the Union, an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, (such as flour from wheat not yet ground, or nails to be made from iron in the vendor's hands), is not a contract of sale within the meaning of the statute. *Crookshank v. Burrell*, 18 Johns. 58. *Sewall v. Fitch*, 8 Cow. 215. *Robertson v. Vaughn*, 5 Sandf. 1. *Downs v. Ross*, 23 Wend. 270. *Eichelberger v. McCauley*, 5 Tarr. & J. 213. In England, on the other hand, the tendency of the recent decisions is to treat all contracts of such a kind intended to result in a sale, as substantially contracts for the sale of chattels; and the decision in *Lee v. Griffin*, 1 B. & S. 272, goes so far as to hold that a contract to make and fit a set of artificial teeth for a patient is essentially a contract for the sale of goods, and therefore is subject to the provisions of the statute. See *Maberley v. Sheppard*, 10 Bing. 99; *Howe v. Palmer*, 3 B. & Ald. 321; *Baldey v. Parker*, 2 B. & C. 37; *Atkinson v. Bell*, 8 B. & C. 277.

In this commonwealth, a rule involving both of these extremes was established in *Mixer v. Howarth*, 21 Pick. 205, and has been recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and

upon his special order, and not for the general market, the case is not within the statute. *Spencer v. Cone*, 1 Met. 283. "The distinction," says Chief Justice Shaw, in *Lamb v. Crafts*, 12 Met. 353, "we believe is now well understood. When a person stipulates for the future sale of articles, which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement." In *Gardner v. Joy*, 9 Met. 177, a contract to buy a certain number of boxes of candles at a fixed rate per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale and within the statute. To the same general effect are *Waterman v. Melgs*, 4 Cush. 497, and *Clark v. Nichols*, 107 Mass. 547. It is true that in "the infinitely various shades of different contracts," there is some practical difficulty in disposing of the questions that arise under that section of the statute. Gen. Sts. c. 105, § 5. But we see no ground for holding that there is any uncertainty in the rule itself. On the contrary, its correctness and justice are clearly implied or expressly affirmed in all of our decisions upon the subject matter. It is proper to say also that the present case is a much stronger one than *Mixer v. Howarth*. In this case, the carriage was not only built for the defendant, but in conformity in some respects with his directions, and at his request was marked with his initials. It was neither intended nor adapted for the general market. As we are by no means prepared to overrule the decision in that case, we must therefore hold that the statute of frauds does not apply to the contract which the plaintiff is seeking to enforce in this action.

Independently of that statute, and in cases to which it does not apply, it is well settled that as between the immediate parties, property in personal chattels may pass by bargain and sale without actual delivery. If the parties have agreed upon the specific thing that is sold and the price that the buyer is to pay for it, and nothing remains to be done but that the buyer should pay the price and take the same thing, the property passes to the buyer, and with it the risk of loss by fire or any other accident. The appropriation of the chattel to the buyer is equivalent, for that purpose, to delivery by the seller. The assent of the buyer to take the specific chattel is equivalent for the same purpose to his acceptance of possession. *Dixon v. Yates*, 5 B. & Ad. 313, 340. The property may well be in the buyer, though the right of possession, or lien for the price, is in the seller. There could in fact be no such lien without a change of ownership. No man can be said to have a lien, in the proper sense of the term, upon his own property, and the seller's lien can only be upon the buyer's property. It has often been decided that assumpsit for the price of goods bargained and sold can be maintained where the goods have been selected by the buyer, and set apart for him by the seller, though not actually delivered to him, and where nothing remains to be

done except that the buyer should pay the agreed price. In such a state of things the property vests in him, and with it the risk of any accident that may happen to the goods in the meantime. *Noy's Maxims*, 89. 2 *Kent. Com.* (12th Ed.) 492. *Bloxam v. Sanders*, 4 B. & C. 941. *Tadling v. Baxter*, 6 B. & C. 360. *Hinde v. Whitehouse*, 7 East, 571. *Macomber v. Parker*, 13 Pick. 175, 183. *Morse v. Sherman*, 106 Mass. 430.

In the present case, nothing remained to be done on the part of the plaintiff. The price had been agreed upon; the specific chattel had been finished according to order, set apart and appropriated for the defendant, and marked with his initials. The plaintiff had not undertaken to deliver it elsewhere than on his own premises. He gave notice that it was fin-

ished, and presented his bill to the defendant, who promised to pay it soon. He had previously requested that the carriage should not be sold, a request which substantially is equivalent to asking the plaintiff to keep it for him when finished. Without contending that these circumstances amount to a delivery and acceptance within the statute of frauds, the plaintiff may well claim that enough has been done, in a case not within that statute, to vest the general ownership in the defendant, and to cast upon him the risk of loss by fire, while the chattel remained in the plaintiff's possession.

According to the terms of the reservation, the verdict must be set aside, and judgment entered for the plaintiff.

COLT and ENDICOTT, J.J., absent.



GOMPERTZ v. BARTLETT.

(2 El. & Bl. §19.)

Court of Queen's Bench. Nov. 14, 1853.

Action for money had and received. Plea: Never indebted. Issue thereon. On the trial, before Lord Campbell, C. J., at the sittings at Guildhall after last Trinity term, it appeared that the defendant, in London, sold to the plaintiff a bill of exchange purporting to be drawn at Sierra Leone by Jolly & Co., of that place, on Bellot & Co., of London, and accepted by Bellot & Co., payable to the order of a third person in London. The instrument was endorsed in blank by the payee; it was unstamped, but both parties believed it to be a foreign bill and consequently to require no stamp. The defendant did not endorse the bill; and it was a sale without recourse. The plaintiff paid £815 to the defendant, as the price of the bill, which was handed to plaintiff; and he, in like manner, sold the bill to another person, also without recourse. Before the bill attained maturity, all the parties to the bill became bankrupt. On the holder seeking to prove against the estate of the acceptor, it was discovered that the bill, though bearing the genuine signature of a Sierra Leone firm, had, in fact been drawn by one of the partners in this kingdom, and consequently was unavailable for want of a stamp. The commissioners in bankruptcy refused to allow the proof. The holder demanded back from the plaintiff the price paid to him; and the plaintiff, under threat of legal proceedings, paid him. The plaintiff now sought to recover from the defendant £815, the price of the bill, as money paid on a consideration which had failed. It was admitted that the defendant, at the time of the sale, bona fide believed the bill to have been drawn at Sierra Leone; and neither fraud nor negligence was imputed to him. The lord chief justice directed a nonsuit, with leave to move to enter a verdict for the plaintiff.

Petersdorff, in this term, obtained a rule nisi accordingly. M. Chambers and Pearson now showed cause. Petersdorff, contra.

Lord CAMPBELL, C. J.—At the trial, I was impressed with the consideration that this was a transaction of pure sale, and that the vendor really had title to the bill which he sold, and was perfectly ignorant of the latent defect. Besides, the bill would probably have in fact been paid had the parties to it continued solvent; and on the whole I was then inclined of think that the defect was merely one in the quality, which the vendor did not warrant. But, now, having heard the argument, I think that the action is maintainable, on the ground that the article does not answer the description of that which was sold, viz., a foreign bill. There was no written statement or direct assertion that this bill was drawn at Sierra Leone;

but it purported to be so drawn; and it must be taken that it was sold by the description of a bill drawn at Sierra Leone. In fact it was drawn in London; and, on that account, it could not be enforced. If it really had been a foreign bill, any secret defect would have been at the risk of the purchaser; but this is not a case in which an article answering the description by which it is sold has a secret defect, but one in which the article is not of the kind which was sold. I think, therefore, that the money paid for it may be recovered as paid in mistake of facts. The law is, I think, accurately laid down in the passage cited from Addison on Contracts. If, being what was sold, the bill was valueless because of the insolvency of the parties, the vendor would not be answerable; but he is answerable if the bill be spurious. *Jones v. Ryde*, 5 Taunt. 488, and *Young v. Cole*, 3 New Cas. 724, 730, are strongly in point. *Young v. Cole* is indeed a very strong case; for the things sold there as Guatemalan bonds were in one sense of the words Guatemalan bonds; but they were not what was professed to be sold, viz., bonds binding on the Guatemalan government. The case is precisely as if a bar was sold as gold, but was in fact brass, the vendor being innocent. In such a case the purchaser may recover.

COLERIDGE, J.—I am of the same opinion. What took place at the time of the sale was merely that the vendor did not endorse the bill, and stipulated in effect that this should be a sale without warranty. That being so, the vendor was not bound to see that he sold a bill of good quality, or to answer for the insolvency of the parties; but the vendee is still entitled to have an article answering the description of that which he bought. Here he bought, as a foreign bill, what turns out not to be a foreign bill, and therefore valueless. Common justice requires that he should have back the price.

WIGHTMAN, J.—I agree upon this ground, that what was sold purported to be a bill drawn at Sierra Leone and available against the parties to it, but, so far from answering that description, was a bill not drawn at Sierra Leone, but in England, and, being unstamped, was unavailable. Wherever the article answers the description by which it is sold, and it turns out that there is a latent defect, in the absence of fraud and warranty, the vendee must take it with all faults. But this is a case in which it does not answer the description. And therefore on the authorities, more especially on that of *Jones v. Ryde*, the plaintiff is entitled to recover.¹ Rule absolute.²

¹ Erle, J., had gone to Chambers.

² See the Digest, lib. xviii. tit. 1. De Contrah. Empt.; laws 9, 10, 11, and 14, where the subject of the principal case is discussed. The civilians seem to have come to the conclusion, "Si res pro auro veniat non valet," aliter "si aurum quidem fuerit, deterior autem quam emptor existimaret: tunc enim emptio valet."



GOODWIN v. HOLBROOK.

(4 Wend. 377.)

Supreme Court of New York. May, 1830.

Demurrer to declaration. On the 20th March, 1816, at Aurelius, an agreement under seal was entered into between H. Goodwin, of Aurelius in Cayuga county, and J. Matthews, of Salina in Onondaga county, whereby Goodwin agreed to sell and convey unto Matthews all his right, interest and claim in and to certain salt works, described as salt lot No. 9; and Matthews agreed to pay for the same \$1,000 in first quality Onondaga salt; \$200 to be paid on the 1st October, 1816, \$400 on the 1st October, 1817, and the residue in one year thereafter, with interest from the 1st October, 1816. He further agreed to pack all the salt in barrels in the usual way of packing salt, the barrels to be furnished by Goodwin and delivered at the salt works. It was further stipulated that Matthews should take possession within three days from the date of the agreement, and that the writings should be executed within sixty days; there was also a stipulation in relation to the then occupants of the lot. On the 27th June, 1816, the time for completing the writings was extended, by an endorsement on the agreement signed by Goodwin and Matthews, to the 1st October, 1816. On the 8th April, 1818, Matthews assigned all his title to the salt works agreed to be conveyed by Goodwin to the defendant Holbrook, in consideration whereof Holbrook, by an instrument under seal, bearing date at Salina on the same day agreed to make to Goodwin the payments then due, and which should thereafter become due on the contract between Goodwin and Matthews. In February term, 1829, Goodwin commenced a suit against Holbrook, and declared against him in covenant. The declaration set forth that on, &c., an article of agreement was entered into by and between Goodwin and Matthews whereby Matthews agreed to pay to Goodwin \$1,000 in first quality Onondaga salt, specifying the proportions and times of payment, as contained in the agreement; that on, &c., Matthews assigned the agreement to Holbrook, in consideration whereof Holbrook covenanted and agreed to pay all such sums of money as were then due and owing by Matthews to Goodwin upon the said agreement thus assigned, and all such sums as should become due thereon. Then follows an averment that at the time of the assignment of the agreement there was due to Goodwin on the agreement \$500, payable in salt, after which follows the breach. The defendant prayed over of the instruments declared on, which being read, he put in a general demurrer to the declaration.

C. P. Kirkland, for plaintiff. J. A. Spencer, for defendant.

MARCY, J.—It is said that the execution of the writings relative to the salt lot was a condition precedent to the payments to be made by the defendant, and that the declaration is defective in not

averring that this was done. It is very evident, from an inspection of the agreement, that the covenant for the conveyance by the plaintiff is independent of the covenant on the part of the defendant. By the first agreement, the conveyance was to be made at a time prior to that on which the consideration, or any part of it, was to be paid; and, though it was extended afterwards to a time when a portion of the consideration became payable, there is nothing to show that the payment was to depend on the execution of the writings. There would have been more reason for inferring such an intent in the parties if the payment of the whole consideration and the execution of the writings had been simultaneous acts.

The plaintiff, to whom the payment was to be made, lived at Aurelius, where the covenants were entered into, and Matthews, to whose rights and liabilities the defendant has succeeded, lived at Salina, where the premises contracted for were situated, and where the article which was to be taken as payment was manufactured.

It will be observed that the contract is to pay one thousand dollars in salt. If the payment had been to be made in money, there could have been no doubt as to the place of performance, it would have been the duty of the defendant to seek the plaintiffs in order to make the payment. Is the place of performing the contract changed by substituting a commodity for money? The implied place of performance is sometimes changed by the nature of the article to be delivered. If a merchant or manufacturer engages to pay on demand in the articles of his trade, and no place is specified in the contract, the store of the merchant or the workshop or place of deposit of the fabrics of the manufacturer is the place where the payment must be demanded before an action accrues for the nonperformance of the contract (Chip. on Cont. 28, 9.) It is said by the same author, that "if a note of hand be given for cattle, grain or other portable articles, and no place of payment be designated in the note, the creditor's place of residence is the place of payment" (Id. 25.) These two positions may seem to be contradictory; but one or two considerations can not fail to show that they are not so. The peculiar circumstances and course of business of the promissors in the first case warrant the inference that the parties intended that the articles should be delivered at the promissors' usual place of making and delivering of the articles sold by them. The engagement is that the articles shall be delivered on demand. This seems to imply that the creditor must go to the debtor to make the demand, before the latter can be in default. But the last proposition supposes the place omitted, but the time for delivery fixed. It presents a case like the one under consideration, and contains the rule of law that ought to be applied to it. Salt is as much a portable article as grain, and the time for the delivery of it in this case being specified in the contract, the defendant's engagement must be construed to be for its

delivery to the plaintiff at his residence in Aurelius, unless a different construction is authorized by the clause relative to packing the salt in barrels to be delivered by plaintiff at the salt works in Salina. This clause does not, in my opinion, weaken—it rather strengthens the legal inference that Aurelius was the place of delivery. If the barrels were to be furnished at the place where the salt was to be delivered, why was it deemed necessary to specify that place? The salt was to be packed at the place of manufacture; this act necessarily was to precede the delivery, but it could not be done till the plaintiff had furnished the barrels. There was something then to be done by the plaintiff before the delivery, and the defendant is not in default for making delivery as long as this act remains unperformed by the plaintiff; it does not appear by the pleadings that it was ever performed by him.

But it is said that what relates to pack-

ing and furnishing the barrels is a distinct agreement, solely for the benefit of the plaintiff, and that he was at liberty to dispense with its performance. I view it as a part of the contract, and I do not know that it would not be less expensive to the defendant to pack the salt in barrels, and deliver it in them, than to deliver it in bulk; if it would be less expensive, that part of the agreement was beneficial to the defendant and without his consent the plaintiff could not dispense with it. But whether this be so or not is in no wise material; for if the plaintiff could have dispensed with it, the record does not show that he did so; and I hold the defendant excused for waiting until the plaintiff performed the act which necessarily preceded the delivery, or distinctly waived the part of the agreement relative to that act.

Judgment on demurrer for defendant, with leave for plaintiff to amend.



GOULD v. BOURGEOIS.

(18 Atl. Rep. 64, 51 N. J. Law, 361.)

Supreme Court of New Jersey. June 17, 1889.

Rule to show cause.

Error to circuit court, Atlantic county; before Justice REED.

Argued at February Term, 1889, before BEASLEY, Chief Justice, and Justices DEPUÉ, VAN SYCKEL, and KNAPP.

Leaming & Black, for the rule. *D. J. Pancoast, contra*.

DEPUÉ, J. This suit was upon a promissory note made by the defendant. The defense was the want or failure of consideration. The city council of Holly Beach City proposed to build a breakwater. The defendant was an applicant for a contract to do the work, and prepared and sent to the city council an agreement with the city to that effect. Members of the city council sent word to the defendant that the city had already entered into a contract for the building of the breakwater with Gould & Downs, that these parties could not fulfill their contract, and that, if the defendant would make a satisfactory arrangement with Gould & Downs, the city would give him the contract. The parties thereupon entered into negotiation, the conclusion of which was a contract in writing and under seal, whereby Gould & Downs, for the consideration of a note for \$375 and \$500 in city bonds, assigned to the defendant "all our right, title, and interest in a certain contract entered into by the authorities of Holly Beach City and ourselves to build a certain breakwater ordered built by a resolution passed April 14, 1887." Subsequently, the city council, having obtained the opinion of counsel that the city had no power to build the breakwater, refused to ratify the arrangement of the defendant with Gould & Downs, and abandoned the project of constructing the work. The note sued on was given in compliance with the terms of this assignment. There was no proof of an express warranty by Gould & Downs of the validity of their contract, nor any evidence from which fraud, either in representation or concealment on their part, could be inferred. The power of the city to make the contract was not mooted until after these parties had concluded their arrangement and the assignment had been made; and, if the contract was invalid, its invalidity arose from the city charter,—a public act equally within the knowledge of both parties. The defendant's contention was that, inasmuch as there was a sale of the contract, a warranty that the contract was a valid contract was implied, and that, the contract being *ultra vires* on the part of the city, and void, the consideration entirely failed. If the proposition on which the defense was rested be sound in law, the defense was appropriate in this suit. The doctrine of implied warranty of title in the sale of goods applies as well to

the sale of a chose in action, and extends not merely to the paper on which the chose in action is written, but embraces also the validity of the right purported to be transferred. *Wood v. Sheldon*, 42 N. J. Law, 421. Nor is there anything in the nature of the alleged infirmity of the contract that would bar the defense. In the ordinary case of a suit on a breach of warranty of title the validity of the vendor's title against the adverse claimant is triable, if the purchaser has in fact lost title, although the transactions which determine the vendor's title are *res inter alios acta*. If the contract which was the subject-matter of the assignment was in fact *ultra vires*, a foundation was laid for this defense, the city having repudiated the contract *in limine* on that ground.

The validity of the defense offered and overruled depends upon the fundamental proposition whether, under the circumstances of this sale, a warranty of title is implied in law. The theory on which a warranty of title is implied upon the sale of personal property is that the act of selling is an affirmation of title. The earlier English cases, of which *Medina v. Stoughton*, 1 Salk. 210, 1 Ld. Raym. 593, is a type, adopted a distinction between a sale by a vendor who was in possession and a sale where the chattel was in the possession of a third person; annexing a warranty of title to the former, and excluding it in the latter. In the celebrated case of *Pasley v. Freeman*, 3 Term R. 51, BULLER, J., repudiated this distinction. Speaking of *Medina v. Stoughton*, this learned judge said that the distinction did not appear in the report of the case by Lord Raymond, and he adds: "If an affirmation at the time of the sale be a warranty, I cannot feel a distinction between the vendor's being in or out of possession. The thing is bought of him, and in consequence of his assertion; and, if there be any difference, it seems to me that the case is strongest against the vendor when he is out of possession, because then the vendee has nothing but the warranty to rely on." Nevertheless the English courts continue to recognize the distinction, with its incidents, as adopted in *Medina v. Stoughton*, to some extent, at least so far as to annex the incident of an implied warranty of title on a sale by a vendor in possession. Later decisions have placed the whole subject of implied warranty of title on a more reasonable basis. Mr. Benjamin, in his *Treatise on Sales*, after a full examination and discussion of the late English cases, states the rule in force in England at this time in the following terms: "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold." 2 Benj. Sales, (Corbin's Ed.) §§ 945-961. In this country the distinction between sales

where the vendor is in possession and where he is out of possession, with respect to implied warranty of title, has been generally recognized; but the tendency of later decisions is against the recognition of such a distinction, and favorable to the modern English rule. *Id.* § 962, note 21. *Bid. War.* §§ 246, 247. The American editor of the ninth edition of Smith's Leading Cases, in the note to *Chandelor v. Lopus*, after citing the cases in this country which have held that the rule of *caveat emptor* applies to sales where the vendor is out of possession, remarks that in most of them what was said on that point was *obiter dicta*, and observes "that there seems no reason why, in every case where the vendor purports to sell an absolute and perfect title, he should not be held to warrant it." 1 Smith, Lead. Cas. (Edson's Ed.) 344. In *Wood v. Sheldon*, supra, Chief Justice BEASLEY, in delivering the opinion of the court, adopted, in terms, the rule stated by Mr. Benjamin, and made it the foundation of decision. The precise question now under discussion did not then arise. In *Eichholz v. Bannister*, 17 C. B. (N. S.) 708-721, ERLE, C. J., said: "I consider it to be clear upon the ancient authorities that, if the vendor of a chattel by word or conduct gives the purchaser to understand that he is the owner, that tacit representation forms part of the contract; and that if he is not the owner his contract is broken."

* * * In almost all the transactions of sale in common life, the seller, by the very act of selling, holds out to the buyer that he is the owner of the article he offers for sale." In that case it was held that on the sale of goods in an open shop or warehouse, in the ordinary course of business, a warranty of title was implied; but there is a line of English cases holding that, where the facts and circumstances show that the purpose of the sale, as it must have been understood by the parties at the time, was not to convey an absolute and indefeasible title, but only to transfer the title or interest of the vendor, no warranty of title will be implied. In this proposition the fact that the vendor is in or out of possession is only a circumstance of more or less weight, according to the nature and circumstances of the particular transaction. Thus in *Morley v. Attenborough*, 3 Exch. 500, the holding was that on a sale by a pawnbroker at public auction of goods pledged to him in the way of business there was no implied warranty of absolute title, the undertaking of the vendor being only that the subject of the sale was a pledge, and irredeemable by the pledgee. In *Chapman v. Speller*, 14 Q. B. 621, the defendant bought goods at a sheriff's sale for £18. The plaintiff, who was present at the sheriff's sale, bought of the defendant his bargain for £23. The plaintiff was afterwards forced to give up the goods to the real owner. He then sued the defendant, alleging a warranty of title. The court held that there was no implied

warranty of title nor failure of consideration; that the plaintiff paid the defendant, not for the goods, but for the right, title, and interest the latter had acquired by his purchase, and that this consideration had not failed. In *Bagueley v. Hawley*, L. R. 2 C. P. 625, a like decision was made, where the defendant resold to the plaintiff a boiler the former had bought at a sale under a distress for poor-rates, the plaintiff having knowledge at the time of his purchase that the defendant had bought it at such sale. In *Hall v. Conder*, 2 C. B. (N. S.) 22, the plaintiff, by an agreement in writing by which, after reciting that he had invented a method of preventing boiler explosions, and had obtained a patent therefor within the United Kingdom, transferred to the defendant "the one-half of the English patent" for a consideration to be paid. In a suit to recover the consideration the defendant pleaded that the invention was wholly worthless, and of no public utility or advantage whatever, and that the plaintiff was not the true and first inventor thereof. On demurrer the plea was held bad, for that, in the absence of any allegation of fraud, it must be assumed that the plaintiff was an inventor, and there was no warranty, express or implied, either that he was the true and first inventor within the statute of James, or that the invention was useful or new; but that the contract was for the sale of the patent, such as it was, each party having equal means of ascertaining its value, and each acting on his own judgment. A like decision was made in *Smith v. Neale*, 2 C. B. (N. S.) 67.

Chief Justice ERLE, in his opinion in *Eichholz v. Bannister*, describes *Morley v. Attenborough*, *Chapman v. Speller*, and *Hall v. Conder*, as belonging to the class of cases where the conduct of the seller expresses, at the time of the contract, that he merely contracts to sell such title as he himself has in the thing. The opinion is valuable, in that, while it rescues the common-law rule of implied warranty of title from the assaults of distinguished judges who held that *caveat emptor* applied to sales in all cases, and that in the absence of express warranty or fraud the purchaser was remediless, it also placed the rule under the just limitation that it should not apply where the circumstances showed that the sale purported to be only a transfer of the vendor's title. Expressions such as "if a man sells goods as his own, and the title is deficient, he is liable to make good the loss," (2 Bl. Comm. 451.) or "if he sells as his own, and not as the agent of another, and for a fair price, he is understood to warrant the title," (2 Kent, Comm. 478.)—as a statement of the principle on which the doctrine of implied warranty of title rests, is not inconsistent with the principle adopted by Chief Justice ERLE. Stating the principle in the negative form adopted in *Morley v. Attenborough*, that there is no undertaking by the vendor for title unless there be an express warranty of title, or an equivalent to it

by declaration or conduct, affects only the order of proof. It was conceded in that case that the pawnbroker selling his goods undertook that they had been pledged, and were irredeemable by the pledgee, and if it be assumed, as I think it must be, that the act of selling amounts to an affirmation of title of some sort, but that its force and effect may be explained, qualified, or entirely overcome by the facts and circumstances connected with the transaction, the difference between *Morley v. Attenborough* and *Eichholz v. Bannister* will rarely be of any practical importance.

The limitation above mentioned upon the doctrine that the act of selling is an affirmation of title has been adopted in this state. In *Bogert v. Chrystie*, 24 N. J. Law. 57-60, this court held that the general rule that the vendor of goods having possession, and selling them as his own, is bound in law to warrant the title to the vendee, did not apply where the vendor sells with notice of an outstanding interest in a third party, and subject to that interest. In *Hoagland v. Hall*, 38 N. J. Law, 351, the vendor agreed in writing to assign a lease he held upon certain premises, and to sell and transfer goods and chattels mentioned in a schedule. The premises were a licensed inn and tavern, and in the schedule of the articles sold were enumerated "the licenses of the house." The law under which the license was granted prohibited the transfer of a license, and in the purchaser's hands it would be void and valueless. The court held that that circumstance did not justify the purchaser in withdrawing from his contract; that there was no warranty by the vendor that the license, when assigned, would be of any value to the purchaser; and that the latter, having obtained by the assignment what he had bargained for, could not annul his contract unless he showed fraud or misrepresentation with respect to the subject-matter of the contract. In *Bank v. Trust Co.*, 123 Mass. 330, the defendant had a contract with B., pledging to

him certain tobacco, in which it was recited that the tobacco was B.'s own property, and free from all incumbrances, and made an assignment to the plaintiff "of all his right, title, and interest in and under the contract, with all the property therein mentioned." The tobacco was then in the defendant's possession, and was delivered by him to the plaintiff. Afterwards a third person demanded and recovered of the plaintiff part of the tobacco as his property, which had been pledged to the defendant without right. The plaintiff then sued the defendant on an alleged implied warranty of title. The court ruled adversely to the plaintiff's claim. In the opinion the court said that the written assignment did not purport to be a sale of the goods, but of all the defendant's right under the contract, and its obvious purpose was to substitute the plaintiff in the place of the original pledgee, and that the fact that at the time of the transfer to the plaintiff the goods were in the actual possession of the defendant did not vary the case.

In the case in hand the circumstances connected with the assignment, independent of the words "all our right, title, and interest," etc., contained in it, preclude the implication of a warranty of the validity of the contract. Taken in connection with the words of the assignment, the intention of the parties is free from doubt.

The contention that the plaintiff was in fault in that he made no delivery of the contract to the defendant is without substance. The contract was neither produced at the negotiation between the parties, nor was it required. The transaction was the purchase of Gould & Downs' interest to consummate an arrangement whereby those parties were to be got rid of, that the city might give the defendant a contract. The defendant obtained by the assignment all he bargained for. The defense was properly overruled, and the rule to show cause should be discharged.



GOULD et al. v. STEIN et al.

(22 N. E. Rep. 47, 149 Mass. 570.)

Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 4, 1889.

Exceptions from superior court, Suffolk county; ROBERT C. PRYMAN, Judge.

Action by Henry A. Gould and others against Abe Stein and others for breach of warranty on the sale of certain rubber. Judgment for plaintiffs. Defendants except.

J. B. Warner and H. E. Warner, for plaintiffs. *J. H. Dougherty and G. A. King*, for defendants.

C. ALLEN, J. The determination of this case depends upon the construction to be given to the bought and sold notes, which were similar in their terms. It does not admit of doubt that these notes were intended to express the terms of the sale. They were carefully prepared and were read to the parties line by line, as they were written. Of course all the existing circumstances may be looked at, but the contract of the parties is to be found in what was thus written, when read in the light of those circumstances. The goods respecting which the controversy has arisen were a certain lot of rubber which the defendants had on hand, and which could be identified. The transaction was a present sale, and not an agreement to deliver rubber in the future. The defendants now contend that the contract was executory, and that, if there was any warranty, there was none which survived the acceptance of the goods by the plaintiffs; but the argument that it was not an executed present sale finds no support in the bill of exceptions, and no such point was taken at the trial; and there is no occasion to consider the further question whether, in case of an executory agreement to sell, a warranty will survive the acceptance of the goods. The bought note, which the plaintiffs put in evidence, was of "148 bales Ceara scrap rubber, as per samples, viz., 46 bales of first quality marked 'A'; 102 bales of second quality." The controversy relates only to the 102 bales. It appeared that there was no exact standard by which the grade of rubber could be fixed, but that it was a matter of judgment. The court also found that Ceara rubber of second quality is well known in the market as distinct from a third or inferior grade; and there was evidence which well warranted this finding. The parties in their contract recognized the existence of different grades or qualities, though all of the rubber properly classified as of first quality or of second quality might not be of an exactly uniform standard or grade.

The plaintiffs at the trial claimed damages merely on the ground that the 102 bales were not of second quality, and made no claim of inferiority to the samples shown, as a distinct ground, but waived all claim founded on the exhibition of samples, and the court found damages for the plaintiffs

solely on the ground that the defendants failed to deliver rubber of the second quality; ruling that the broker's note contained an absolute warranty of second quality rubber. If this ruling was right, it disposes of the defendants' second and third requests for instructions. The general rule is familiar and admitted that a sale of goods by a particular description imports a warranty that the goods are of that description. *Henshaw v. Robins*, 9 Metc. 83; *Harrington v. Smith*, 138 Mass. 92; *White v. Miller*, 71 N. Y. 118; *Osgood v. Lewis*, 2 Har. & G. 495; *Randall v. Newson*, L. R. 2 Q. B. Div. 102; *Jones v. Just*, L. R. 3 Q. B. 197; *Josling v. Kingsford*, 13 C. B. (N. S.) 447; *Bowes v. Shand*, L. R. 2 App. Cas. 455. And where goods are described on a sale as of a certain quality, which is well known in the market as indicating goods of a distinct, though not absolutely uniform, grade or standard, the description imports a warranty that the goods are of that grade or standard. In such cases, the words denoting the grade or quality of the goods are not to be treated as merely words of general commendation, but they are held to be words having a specific commercial signification. Thus, in *Hastings v. Lovering*, 2 Pick. 214, the words, in a sale-note, "Sold Mr. E. T. Hastings 2,000 gallons prime quality winter oil," were held to amount to a warranty that the article sold agreed with the description; and in *Henshaw v. Robins*, 9 Metc. 87, it was said that the doctrine laid down in that case has ever since been considered as the settled law in this commonwealth. So in *Chisholm v. Proudfoot*, 15 U. C. Q. B. 203, it was held that where a manufacturer of flour marked it as of a particular quality, viz., "Trafalgar Mills Extra Superfine," it amounted to a warranty of its being of such a quality. A similar doctrine may be found in *Hogins v. Plympton*, 11 Pick. 97; *Winsor v. Lombard*, 18 Pick. 57, 60; *Forcheimer v. Stewart*, 65 Iowa, 593, 22 N. W. Rep. 886; *Mader v. Jones*, 1 N. S. Law R. 82. In *Gardner v. Lane*, 9 Allen, 492, 12 Allen, 39, it appeared that the statutes provided for the preparation, division into different qualities, packing, inspecting, and branding of mackerel, and it was held that if a certain number of barrels of No. 1 mackerel were sold, and by mistake barrels of No. 3 mackerel were delivered, no title passed to the purchaser, and that the barrels of No. 3 mackerel thus delivered by mistake might be attached as property of the vendor, and that each different quality, after being thus prepared for market, was to be regarded as a different kind of merchandise, so that no title passed to the vendee; there being no assent on the part of the vendee to take the No. 3 mackerel in place of those which he agreed to buy.

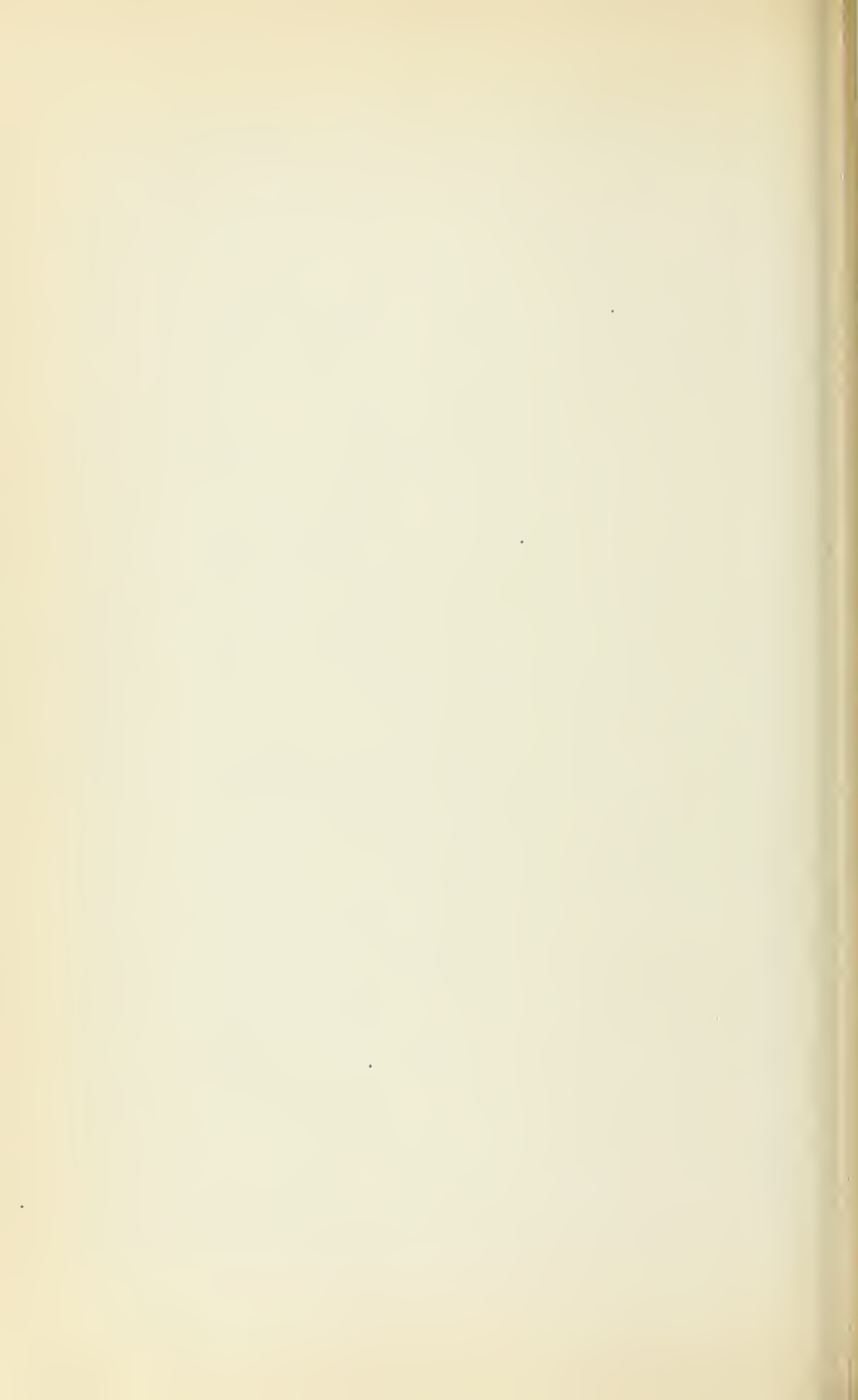
Now, if the words "as per samples" had not been in the bought note, it would be quite plain that the present case would fall within the ordinary rules above given. But the insertion of those words raises the inquiry

whether they limit the implied warranty of the vendor, so that if the rubber sold was equal in quality to the sample he would be exonerated from liability, though it was not entitled to be classed as of the second quality. If no other meaning could be given to the words "as per samples" except that they alone were to be considered as showing the quality of rubber to be delivered, the argument in favor of the defendants' view would be irresistible. So if there was a plain and necessary inconsistency between the two descriptions of the rubber, it might perhaps be successfully contended that the vendor's obligation was only to deliver rubber which would conform to the inferior quality described; that is to say, that in case of such inconsistency, the words "as per samples" should prevail, and the words "of second quality" be rejected. If it were to be held that the vendor's obligation was fulfilled by delivering rubber of a quality equal to the samples, though it was not of the second quality, then the words "of second quality" would mean nothing, or they would be overborne by the words "as per samples." But if it is found that the bought note admits of a reasonable construction by which a proper significance can be given both to the words "as per samples" and also to the words "of second quality," there will be no occasion to disregard either. Cases are to be found in the books where such a construction has been given to contracts of sale. Thus, in *Whitney v. Boardman*, 118 Mass. 242, a sale of Cawnpore buffalo hides, with all faults, was held to mean with such faults or defects as the article sold might have, retaining still its character and identity as the article described; and the court cited with approval the case of *Shepherd v. Kain*, 5 Barn. & Ald. 240, where there was a sale of a copper-fastened vessel, to be taken "with all faults, without allowance for any defects whatsoever," and this was held to mean only all faults which a copper-fastened vessel might have, the court saying by way of illustration: "Suppose a silver service sold with all faults, and it turns out to be plated." So, in *Nichol v. Godts*, 10 Exch. 191, an agreement for the sale and delivery of certain oil, described as "foreign refined rape oil, warranted only equal to samples," was held to be not complied with by the tender of oil which was not foreign refined rape oil, although it might be equal to the quality of the samples. The decision of this case has stood in England, though not without some questioning at the bar. See *Wieler v. Schilizzi*, 17 C. B. 619; *Josling v. Kingsford*, 13 C. B. (N. S.) 447; *Mody v. Gregson*, L. R. 4 Exch. 49; *Jones v. Just*, L. R. 3 Q. B. 197; *Randall v. Newson*, L. R. 2 Q. B. Div. 102. In the present case, by a fair and reasonable construction of the bought note, effect can be given to both of the phrases used to describe the rub-

ber. Construed thus, the article sold was 102 bales of Ceara rubber, of the second quality, and as good as the samples. The rubber delivered was in fact Ceara rubber. There was no question that it was of the right kind; but it was not of the second quality. There is no necessity to disregard the words describing the rubber as of the second quality. They signified a distinct and well-known, though not absolutely uniform, grade of rubber. There was no exact standard or dividing line between rubber of the second quality and of the third quality, any more than there is between daylight and darkness. But nevertheless a decision may be reached, and it may be easy to reach it in a particular case, that certain rubber is or is not of the second quality. This general designation being given, the specification "as per samples" being also included in the note, the rubber must also be equal to the samples. It must be rubber of the second quality, and it must be equal to the samples. If it fails in either particular, it is of no consequence that it conforms to the other particular. There is no inconsistency in such a twofold warranty; and, this rubber having been found to be not of the second quality, the warranty was broken, without regard to the question whether or not it was equal to the samples.

The fact that the plaintiffs had an opportunity to examine the rubber, and actually made such examination as they wished, will not necessarily do away with the effect of the warranty. The plaintiffs were not bound to exercise their skill, having a warranty. They might well rely on the description of the rubber, if they were content to accept rubber which should conform to that description. *Henshaw v. Robins*, 9 Metc. 83; *Jones v. Just*, L. R. 3 Q. B. 197. And the exhibition of a sample is of no greater effect than the giving of an opportunity to inspect the goods in bulk. Notwithstanding the sample or the inspection, it is an implied term of the contract that the goods shall reasonably answer the description given, in its commercial sense. *Drummond v. Van Ingen*, L. R. 12 App. Cas. 284; *Mody v. Gregson*, L. R. 4 Exch. 49; *Nichol v. Godts*, 10 Exch. 191. In the two former of these cases it was held that there might be, and that under the circumstances then existing there was, an implied warranty of merchantable quality notwithstanding the sale was by a sample, which sample was itself not of merchantable quality, the defect not being discoverable upon a reasonable examination of the sample.

The point urged in the defendants' argument, that the plaintiffs' remedy was destroyed by their acceptance of the goods, was not taken at the trial, and no ruling was asked adapted to raise the question as to the effect of such acceptance. For these reasons, in the opinion of a majority of the court, the entry must be: Exceptions overruled.



GREGORY v. MORRIS.

(96 U. S. 619.)

Supreme Court of the United States. Oct. Term, 1877.

Error to the supreme court of Wyoming territory.

On Feb. 26, 1873, W. A. Morris and A. J. Gregory made a written contract at Austin, Tex., for the sale to the latter of a large number of cattle. The contract provided that Morris was to retain a lien on the cattle until the price, \$8,000, should be paid, and authorized him to designate some person as his agent to go along with and retain possession of the cattle. If the balance of the price was not paid on or before October 1st following, such agent was to sell all or such portion of the cattle as would pay the purchase money then due, as well as the wages and other expenses of the agent. After the contract was signed, Morris executed to one Poteet a power of attorney, authorizing him to accompany the cattle, and retain the lien provided for. The cattle arrived on the Laramie Plains in September. October 4th, the price not having been paid by Gregory, Poteet took forcible possession of the cattle, and drove them from the ranch where they were grazing to that of one Alsop, some distance off. Gregory then brought replevin against Morris and Poteet to recover possession of the cattle. The defendants, in their answer, denied all the allegations of the petition, and especially that they wrongfully detained the cattle. At the trial, the plaintiff having introduced evidence to prove possession and ownership, the value of the cattle, the taking and detention of them, and his demand for their return, the defendants offered the written contract and other documentary evidence, which offer was objected to by the plaintiff, and the objection sustained. The defendants, having amended their answer, were permitted to introduce the special matter which, under their original answer, had been excluded by the court. The plaintiff thereupon excepted.

The court, without objection, charged the jury that, "there being no question of title to the cattle put in issue by the pleadings, but of possession only, if you find for the defendants, you will find 'that they had the right of possession,' and will assess such damages as they have sustained by reason of being deprived of that possession, and the opportunity of selling the cattle according to the contract." The plaintiff prayed for certain instructions, which were refused by the court. They are stated in the seventh assignment of error. The jury found for the defendants, and assessed their damages \$7,454.90. A motion by the plaintiff for a new trial was overruled, and judgment rendered, which was affirmed by the supreme court of the territory. Plaintiff sued out this writ, and assigns for error that said supreme court erred,—

1. In sustaining the ruling of the district court in instructing the jury as follows, to wit, "The jury must compute the damages, and return their verdict on that computation in dollars and cents; and, if the

jury find the contract on the part of the plaintiff was to pay a certain sum of money in gold, they will compute the difference between gold and currency, and render their verdict in dollars and cents in currency."

2. In sustaining the ruling of said district court in giving to the jury the following instruction: "That the written contract between Morris and Gregory, in connection with the bill of sale, the receipt, and the power of attorney to Poteet, necessarily explain and define the rights and interests of the parties to this action in the property in question."

3. In sustaining the ruling of said district court in giving to the jury the following instruction: "That by and under those papers the defendants had a legal right to take possession of the cattle in question on or after the first day of October last, and retain such possession, for the purpose of selling them, according to the terms of said contract."

4. In sustaining the ruling of said district court in giving to the jury the following instruction: "That if the jury find that Poteet, in pursuance of his power of attorney, took possession of said cattle, and removed them to Alsop's ranch for the purpose of selling them, according to the terms of said contract, then they must find the right of possession in the defendants at the commencement of this action, and must assess such damages for the defendants as are just and proper."

5. In sustaining the ruling of said district court in giving to the jury the following instruction: "That the pleadings in this case put in issue only the right of possession at the time of the service of the writ of replevin, and you are instructed that the right of the plaintiff in these cattle at that time was only a right of redemption as a mortgagor after condition broken; and that he had no right to the possession of the cattle, and no right to take them, by replevin or otherwise, from these defendants, or either of them, until he had paid or tendered the amount due on the contract."

6. In sustaining the ruling of said district court in giving to the jury the following instruction: "If the jury find that by the terms of the written contract, which must govern in this case, that the defendants, on the first day of October, 1873, had a right to sell these cattle, the right to sell necessarily carries with it the right of possession."

7. In sustaining the ruling of the said district court in refusing to give to the jury the following instructions: "If the vendor, Morris, made an agreement of sale and delivery, and, in conformity therewith, did sell and deliver cattle to Gregory, the vendee, and by the terms of the agreement made between the parties the vendor was to have and maintain a lien upon the chattels, or cattle, for the balance of the purchase price, by keeping the said cattle in the possession of the vendor during the journey from Texas to Wyoming, until the first day of October, 1873, the vendee, Gregory, after receiving the cattle from Morris, must have first redelivered the said cattle to Morris, and

placed them in his hands as a pledge before the agreed lien of Morris for balance of purchase price could vest; and, second, if such redelivery was made by Gregory, the vendee, to Morris, the vendor, and thereafter the vendor, Morris, by himself or his agents, by his own fault, carelessness, or negligence, permitted the possession of the said cattle to again pass to Gregory, the vendee, Morris, the vendor, thereby lost his lien, and all right of possession and right of property, and possession must thereafter rest and remain in Gregory."

8. In sustaining the ruling of the district court in overruling the motion of the plaintiff to set aside the verdict as defective in form.

10. In sustaining the ruling of said district court in overruling the plaintiff's motion to grant a new trial.

11. In sustaining the action and ruling of the district court in admitting in evidence written instruments, the execution of the same not having been proved.

Mr. W. W. Corlett, for plaintiff in error, Mr. J. M. Wilson, contra.

Mr. Chief Justice WAITE delivered the opinion of the court.

The second, third, fourth, fifth, sixth, seventh, and tenth assignments of error may be considered together. They relate entirely to the construction and effect given the contract between Gregory and Morris, as shown by the several instruments in writing put in evidence. There was no real controversy as to the facts; but Gregory claimed that he was the purchaser of the cattle in dispute from Morris, and that the lien provided for in favor of Morris was one which a delivery of the property under the contract extinguished. There was no pretence of payment on his part further than that shown by the contract itself, or of title, except such as was acquired through this purchase.

The lien at common law of the vendor of personal property to secure the payment of purchase money is lost by the voluntary and unconditional delivery of the property to the purchaser; but this does not prevent the parties from contracting for a lien which, as between themselves, will be good after delivery. So, ordinarily, when the possession of a pledge is relinquished, the rights of the pledgee are gone. In this case, however, Morris was not willing to rely upon the lien which the law gave him as vendor, or upon a mere pledge of the property, but required a special contract on the part of Gregory, securing his rights. This contract created a charge upon the property, not in the nature of a pledge, but of a mortgage. The lien, as between the parties, was not made to depend upon possession, but upon a contract, which defined the rights both of Morris and Gregory, and the power of Morris for the enforcement of his security. When Poteet assumed the exclusive possession of the property, no rights of third persons had intervened, and there was nothing to prevent the execution of the agreement according to its terms. This clearly gave Morris the right, after

Oct. 1, if the purchase money was not paid, to take the cattle into his own possession, detain them until the balance due him was discharged, and sell them if necessary to obtain his money. We think the court defined correctly the rights of the parties, and that there was no error in this particular, either in the charge or the refusal to charge.

The first assignment of error brings up for consideration the rule of damages laid down by the court. By the laws of Wyoming territory, property taken in replevin is delivered to the plaintiff upon his entering into an undertaking to the defendant, with one or more sufficient sureties in at least double the value of the property taken, to the effect that the plaintiff shall duly prosecute his action, and pay all costs and damages which may be awarded against him. Civil Code, 1869, sect. 190. If the property is so delivered, and the jury find for the defendant upon the issues joined, they are also required to find "whether the defendant has the right of property or the right of possession only; . . . and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant; for which, with costs of suit, the court shall render judgment for the defendant." Sect. 195. The delivery of the property to the plaintiff passes the title to him as against the defendant, who must look for his protection to a recovery in damages, if the writ is wrongfully sued out.

In this case, the finding for the defendant is, under the pleadings, in effect, that Morris was the mortgagee of the property in possession after condition broken, and that Gregory had by the replevin wrongfully deprived him of his possession. That rendered Gregory liable for such damages, in consequence of his wrongful act, as were "right and proper" under the circumstances. The obligation secured by the mortgage or lien under which Morris held was for the payment of gold coin, or, as was said in *Bronson v. Rodes* (7 Wall. 229), "an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight," and is not distinguishable "from a contract to deliver an equal weight of bullion of equal fineness." In that case, it was held that judgment might be rendered upon such a contract payable in coined dollars; but here the suit is not upon the contract for the recovery of the amount agreed to be paid, but, in effect, for damages on account of the wrongful detention of property mortgaged to secure the debt. Gregory himself asked the court to charge that "the jury must compute damages and return their verdict in dollars and cents." This was undoubtedly correct, and it was done; but he further asked the court to say that "no agreement or contract to pay a certain number of dollars in gold can be enforced. The national currency is by law a legal tender at its face value for all debts and demands, public or private, except duties on imports and interest on the public debt." This was in conflict with *Bronson v. Rodes*, and therefore properly refused.

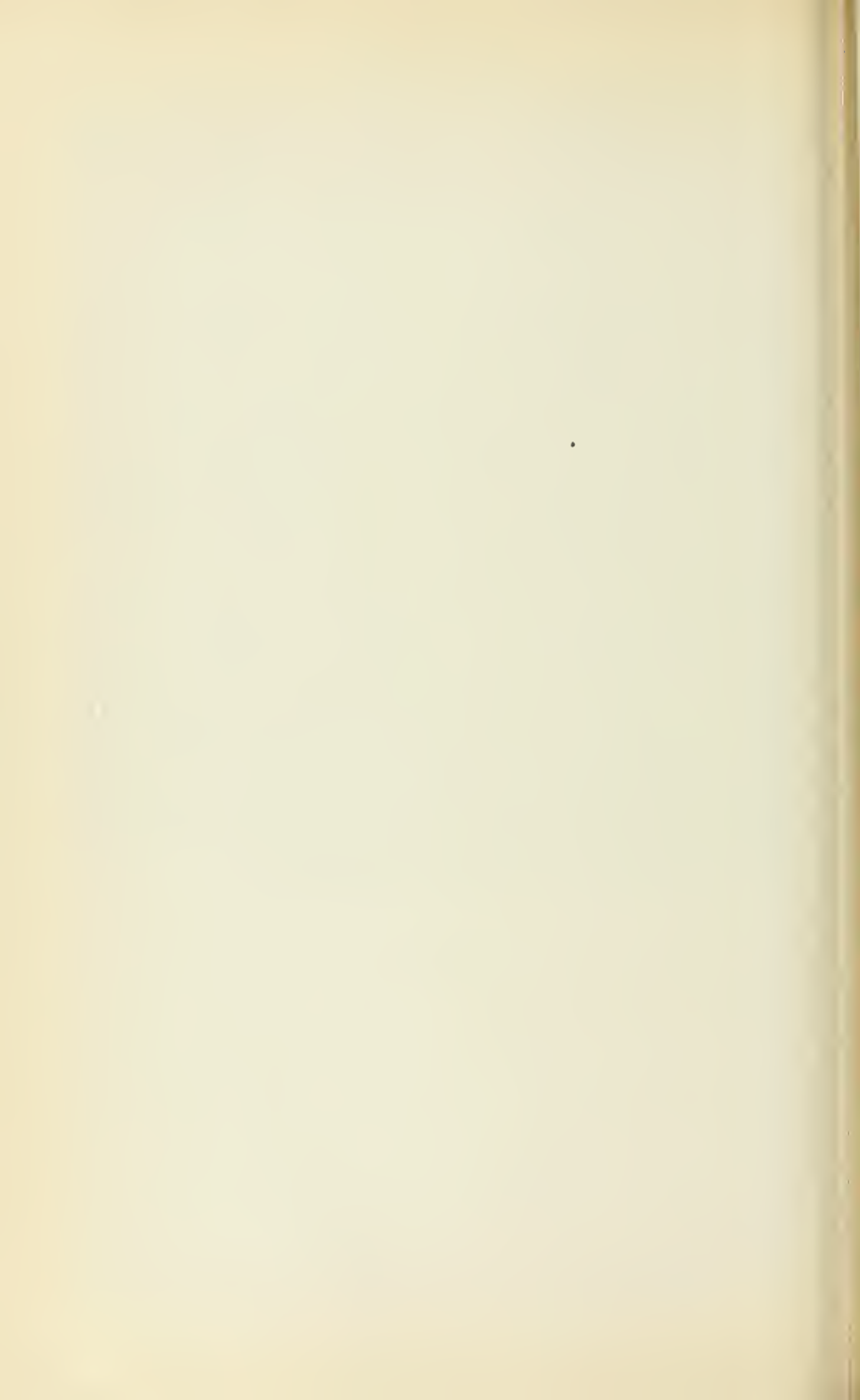
But the court did say to the jury, that, if they found the contract on the part of the plaintiff was to pay a certain sum of money in gold, they should compute the difference between gold and currency, and render their verdict in dollars and cents in currency; and in this we see no error. While we have decided that a judgment upon a contract payable in gold may be for payment in coined dollars, we have never held that in all cases it must be so. While gold coin is in one sense money, it is in another an article of merchandise. Gregory was required to discharge his debt in gold before he could rightfully take the property into his possession under the replevin. If the payment had been so made, Morris would have had his coin at that time to use as money or merchandise, according to his discretion. But it was not made; and Gregory, by his wrongful act in taking the property, subjected himself to damages. If the contract had been in terms for the delivery of so much gold bullion, there is no doubt but the court might have directed the jury to find the value of the bullion in currency, and bring in a verdict accordingly. But we think, as was thought in *Bronson v. Rodes*, such a case is not really distinguishable from this. The question is not whether Gregory had the right to pay in gold dollars after his debt had become due, but whether, having wrongfully got the property into his possession without payment at all, the damages he is required to pay on account of this wrongful act must, as a matter of law, be estimated in gold, or whether they may be in currency. We think it clear, that, under such circumstances, it was within the power of the court, so far as Gregory was concerned, to treat the contract as one for the delivery of so much gold bullion; and, if Morris was willing to accept a judgment which might be discharged in currency, to have his damages estimated according to the currency value of bullion. Certainly, if Morris had in good faith sold the cattle under his power of sale for currency, and

received payment in that kind of money, he would have been entitled to convert the currency into gold before crediting it upon his debt. So here, if, with the approbation of the court, he takes a judgment that may be discharged in currency, the judgment should be for an amount which would be the equivalent in currency of the specified amount of coin as bullion. This was the rule adopted by the court, and we think it correct.

The eighth and ninth assignments of error relate to the form of the verdict. As has already been seen, where the property has been delivered to the plaintiff, the jury, if they find for the defendant, must also find whether the defendant has "the right of property or the right of possession only." In this case the verdict, though for the defendant, is silent upon that point; but the record shows that by consent the court charged the jury if they found for the defendants they should find "that they had the right of possession only." This cures any defect there may have been in the verdict in this particular. The whole record must be taken together; and, as the jury did not find to the contrary of the instruction, the presumption is that they followed it.

All the other assignments relate to the admissibility of evidence, and as to them it is sufficient to say we are satisfied with the rulings that were made. Certainly, the instruments in writing which were objected to were admissible. They tended directly to prove the defence set up in the amended answer, and no objection appears to have been made at the trial as to the proof of their execution. The cross-examination of Gregory, which was objected to, was clearly legitimate, under the most stringent rules governing that subject. He had testified that he had purchased the cattle from Morris. It was clearly proper, therefore, on cross-examination, to ask him if his contract of purchase was in writing, and, if so, to identify the paper.

Judgment affirmed.



GRIEB v. COLE

(27 N. W. Rep. 579, 60 Mich. 397.)

Supreme Court of Michigan. April 8, 1886.

Error to St. Clair; Stevens, Judge.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

George P. Voorheis, for appellant. Chadwick & Wood, for plaintiff.

CHAMPLIN, J. On May 1, 1883, one W. D. McLaughlin, as agent for plaintiff, took from the defendant the following order: "Gratiot, Mich., May 2, 1883. To Charles Grieb, Port Huron, Mich.: You will please ship me, on or about the first day of June, 1883, one Buckeye light mower, to Port Huron, for which I agree to pay you \$77, in manner as follows, (reserving, however, the full benefit of the warranty hereon indorsed:) \$35 cash, with freight from Port Huron, on delivery, and execute approved notes as follows: \$35, payable on the first day of January, 1884, with interest at 7 per cent. from delivery; \$42, payable on the first day of January, 1885, with interest at 7 per cent. from delivery; \$—, payable on the — day of —, 188—, with interest at 7 per cent. from delivery. For the purpose of obtaining credit for the above, I certify that I own, in my own name, — acres of land in the township of Gratiot, county of St. Clair, and state of Michigan, of which 80 acres are improved, and the whole worth, at a fair valuation, \$5,000 over and above all incumbrances, liabilities, and legal exemptions. It is not incumbered, except 1,000 dollars, and the title is perfect. I also own \$500 worth of personal property over and above all indebtedness, and not exempt from execution by law. P. O. address, Port Huron. Taken by W. D. McLaughlin, Agent.

His
Mark
Chas. N. Cole,"—across the back of which was printed a blank warranty, with Grieb's printed name appended, as follows: "Whereas, Mr. — has this day given us his order for a —, we hereby agree, in consideration of said order and the faithful performance of the conditions herein mentioned, to warrant said — one year to be good and well made, and to do as good work as any other machine of its class. It is an express condition of this warranty that the directions for using this machine shall be faithfully followed, and if for any reason it fails to perform as warranted, immediate notice of the same must be communicated to the agent to whom the order is given, and if said agent should fail to make the machine perform as warranted, it may be returned, and money or note refunded. And it is also agreed, should the machine be used from day to day or at intervals, or set aside before or after use, without giving said agent notice, then, in either of said cases, it shall be conclusive evidence that the machine is accepted and the warrant is at an end. Dated ———.

Charles Grieb." The agent delivered this so-called "order" to the plaintiff, who claims that he accepted it, and delivered to the defendant the said machine on the eighteenth day of July, 1883, but the defendant has neither paid for said machine, nor executed and delivered the notes; and after the time expired when the note for \$35 mentioned in the order would have matured, had it been executed, the plaintiff brought suit in justice's court to recover the amount claimed to be due at that time. The plaintiff's declaration was in writing, and, besides the common counts in assumpsit, contained a special count, and setting out the substance of the above order, and alleging a delivery of the machine ordered. The plea was the general issue.

It is always proper, in construing a contract, to take into consideration the position which the parties occupied, and the circumstances under which the agreement was entered into. The plaintiff resided at Port Huron, and was engaged in the business of supplying mowing-machines to farmers. He was not a manufacturer, but took written orders, and purchased the machines to fill such orders. Defendant is a farmer, residing in the vicinity of Port Huron, and on the second day of May, 1883, signed the order above set out, and delivered it to plaintiff's agent. On the trial the plaintiff offered in evidence the aforesaid order, and warranty thereon indorsed; to which the defendant objected because not admissible under the declaration, and as immaterial to the issue. The objection was overruled, and this constitutes defendant's first assignment of error. This objection is based upon the idea that the paper is incomplete; that the order refers to the warranty on the back, and reserves the full benefit of such warranty, and it appears that the blanks in the warranty were not filled out; and it is claimed, and I think rightly, that the warranty indorsed must be of such legal validity as to support an action thereon by Cole in case of a breach thereof.

By reference to the warranty indorsed, it will be observed that the name of Mr. Cole, and the description of the machine ordered, are omitted, as well as the date. If the warranty stood alone, there could be no doubt that it would be so far incomplete as to render it invalid, because thus standing it lacks the essential qualities of naming the party to be indemnified and the subject-matter. It does not appear from it whether the machine is a steam-thresher or a mowing-machine. But the reference in the order to the warranty indorsed thereon constituted the order and warranty one instrument, and when read together, no ambiguity or uncertainty appears. The party to whom the warranty is made is the party making the order, and the machine is the machine described in the order, and the date of the order supplies the date to the warranty, for they are contemporaneous, and the warranty has the same force and effect as if embodied in the order itself. The warrantor is bound by the printed signature which he adopts as his as fully as if it was

in his handwriting. The order and warranty were properly admitted in evidence at that stage of the case.

The plaintiff gave evidence tending to show that he had complied with the contract on his part, and had delivered the machine at Port Huron within the terms and meaning of the contract, and also had requested defendant to execute the notes, and that defendant declined to accept such delivery, or to execute and deliver the notes. The fact of delivery was controverted by defendant. The defendant also offered testimony tending to show that the mower which plaintiff claimed to have delivered to defendant was a second-hand machine, showing considerable wear; that the worn parts had been stripped and filled with paint in the wood-work, and parts of it had been painted over after having been used and worn; that the axles had old grease upon them, one set of knives were chipped and broken, and the tongue and neck-yoke considerably worn; that the entire machine had been used one season somewhat; but the court, on objection of plaintiff's counsel, excluded this evidence as not admissible under the plea, and not tending to show the condition of the machine when delivered. The latter portion of this ruling was based upon the fact that the witnesses by whom these facts were sought to be proved did not make the examination of the machine until after the trial in the justice's court in April, 1884. The evidence, however, showed that on the twenty-first of July, 1883, which was three days after plaintiff claims to have sent the machine

to defendant's farm and demanded the notes, defendant gave written notice to plaintiff that he refused to purchase it, and that it was there at plaintiff's risk, and to come and take it away, and the testimony was that it had not been used since. There was therefore no reason for excluding the testimony on this ground.

The court erred also in excluding the evidence upon the other ground stated. It was proper for the defendant, under the plea of the general issue, to prove that the article delivered was not the article he purchased. He did not order or purchase a second-hand mowing machine, or one that had been in use and worn; but the order, taken in connection with the circumstances under which it was made, called for a new machine. A purchase of a machine from a dealer implies that the machine sold shall be new,—that is, not second-hand, or the worse for wear,—and under such an order the dealer could not impose upon the purchaser a second-hand and worn article, whether it complied with the terms of the warranty or not, as to being good and well made, and will do as good work, as any other machine of its class. This evidence, if believed, fairly met and rebutted the plaintiff's case, and tended directly to sustain the defendant's plea, which put in issue each and every allegation of the plaintiff's declaration. *Rodman v. Guilford*, 112 Mass. 405.

The judgment must be reversed, and a new trial ordered.

CAMPBELL, C. J., and MORSE, J., concurred. SHERWOOD, J., did not sit.



GROAT et al. v. GILE.

(51 N. Y. 431.)

Commission of Appeals of New York. 1873.

Appeal from order setting aside a verdict for plaintiffs and granting a new trial.

Action to recover the value of wool which the defendant had shorn from sheep, to which the plaintiffs claimed title. The opinion states the facts.

John H. Reynolds, for appellants. John Gaul, Jr., for respondent.

LOTT, C. C. As the verdict of the circuit in favor of the plaintiffs was ordered by the judge who tried the action on the version given by the defendant of the contract or agreement between the parties, it becomes necessary to refer to it with particularity for the purpose of ascertaining whether his conclusion of law based thereon was correct.

The defendant, on his direct examination, after stating that the plaintiffs called on him about the 20th of May, 1864, and that he and the plaintiff Groat had some conversation about the purchase of his sheep and lambs, in which he said that he wanted to sell the old sheep with the lambs, and that he would ask \$4 apiece for them, testified as follows: "They concluded to go and see the sheep; I told them where they were; one flock was near a mile from the house; they went off together; went to the further lot first; when they came back from this lot I told them where the others were; I told them I did not believe they would like that lot; they did not look as well as the others, as some of them had lost their wool; then they went off to see the other lot and came back; they asked me how many sheep and lambs there were; I told them I could not tell how many there were; I did not know myself; I think I said in the neighborhood of so many sheep and so many lambs; then they inquired about taking the sheep; it was agreed that they should take the lambs the middle of September and the old sheep the first of November, and pay me \$4 apiece for sheep and lambs; this was the contract; think I told them I would give them a good chance; something was said about cutting the lambs' tails off; I told them I thought it was not prudent; I tried to dissuade them from having it done; that they had got too large and might die; something was said in answer to it, but I don't know just what; they asked me if the sheep were sound after they had been to see them; I told them I did not consider them entirely sound; then they asked that I should doctor the sheep if they needed it; I told them I would; after the talk they handed me over twenty-five dollars to bind the bargain, as they said; then they went away." On his cross-examination, he said: "When Groat and Jacobia were there in May, I had sheep in two lots: the sheep I sold them were in the lots mentioned; I sold them all that were in these lots; did not know how many sheep I had; had not counted them for some time;

sometimes they die; told them I did not know how many I had; that there would be in the neighborhood of ninety old sheep; they were to take all the sheep in the two lots, except two bucks and a lame ewe; they got all the sheep in the two lots except two bucks and a lame ewe; they agreed to give four dollars per head; in the bargain they were to have all the sheep except two bucks and a lame sheep; I agreed to sell the sheep at that price; nothing was said about the wool; they got ninety-two old sheep and seventy-one lambs." And on further re-direct examination he said: "When they made the contract for these sheep, there was nothing said about the wool." And also: "Some of the lambs came in March, and so along, and some were only a few days old; some time in August is the usual and proper time for taking lambs from sheep; they had not been separated from the sheep on the nineteenth of May; the lambs were in no condition to be separated from the sheep at that time without ruining the lambs."

The preceding statement of the defendant's evidence contains all that relates to the negotiation and making of the agreement, and fully justifies the construction given to it by the learned judge at the circuit. It is clear that the plaintiffs intended to buy of the defendant, and that it was his intention to sell to them all of the sheep and lambs that were running in the two lots of land referred to by him (except two bucks and a lame ewe, as to the identity of which there was no question), at \$4 per head, and that no further or other designation or selection was contemplated. All the parties understood what particular sheep and lambs were intended to be sold, and there is no doubt that these were sufficiently identified. Indeed, that fact does not appear to have been disputed on the trial. Under such circumstances, when the terms of the sale were agreed on and the payment of \$25 was made to the defendant on account of the purchase-money by the plaintiffs, their liability became fixed for the balance, which was ascertainable by a simple arithmetical calculation based upon a count of the sheep and lambs and the price to be paid per head for them. No delivery of them or other act whatever in relation to them by the defendant was required or intended. The plaintiffs were to take them without any agency in delivering them on the part of the defendant, and they, from the time the agreement was made, became the owners thereof. The defendant subsequently kept them at the risk of the plaintiffs. Chancellor Kent, in his Commentaries, vol. 2, p. 492, in stating the rule governing sales at common law, says: "When the terms of sale are agreed on and the bargain is struck and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties without actual payment or delivery, and the property and the risk of accident to the goods vest in the buyer." This rule is modified by our statute of frauds so far as to require in certain cases that a note or memorandum of the contract shall be made in writing

and subscribed by the parties to be charged, or that the buyer shall accept and receive a part of the property sold, or at the time pay some part of the purchase-money; and in such cases he says, at p. 493: "When the bargain is made and is rendered binding by giving earnest, or by part payment, or part delivery, or by a compliance with the requisition of the statute of frauds, the property, and with it the risk, attach to the purchaser; but though the seller has parted with the title, he may retain possession until payment." The fact that the number of the sheep and lambs sold was not ascertained at the time the terms of sale were agreed on did not prevent the application of the rule referred to in this case. It is true that the same learned jurist, after stating that "it is a fundamental principle, pervading everywhere the doctrine of sales of chattels, that if goods of different values be sold in bulk and not separately and for a single price, or per aversionem, in the language of the civilians, the sale is perfect and the risk with the buyer," adds, "but if they be sold by number, weight or measure, the sale is incomplete, and the risk continues with the seller until the specific property be separated and identified." The present case is not one of the latter class. That rule has reference to a sale, not of specific property clearly ascertained, but of such as is to be separated from a larger quantity, and is necessary to be identified before it is susceptible of delivery. The rule or principle does not apply where the number of the particular articles sold is to be ascertained for the sole purpose of ascertaining the total value thereof at certain specified rates or a designated fixed price. This distinction is recognized in *Crofoot v. Bennett*, 2 N. Y. 258; *Kinberly v. Patchin*, 19 id. 330; 75 Am. Dec. 334; *Bradley v. Wheeler*, 44 N. Y. 495. The sale in question was in fact of a particular lot of sheep and lambs, and not of a certain undesignated number to be selected and delivered at a future time, and the postponement of the time for taking them away did not prevent the title passing to the plaintiffs.

A sale of a specified chattel may pass the property therein to the vendee and vests the title in him without delivery. See *Chitty Contracts* (8th Am. ed.), 332, and *Terry v. Wheeler*, 25 N. Y. 520.

All the parties appear to have understood the transaction, at the time it took place, as a present absolute sale and change of title. What was said about cutting the lambs' tails off and doctoring the sheep, if they needed it, is evidence of such understanding, and there is nothing in what is said to have been the agreement about taking them away inconsistent with it. That gave the plaintiffs the privilege of leaving them in the defendant's pasture till the time specified for taking them away, but did not deprive them of the right to take them before, if they chose so to do. The remark of the defendant at the time to the plaintiffs, that he "would give them a good chance," shows that such was its object and intention. It is proper moreover to consider the state-

ment in reference to such agreement in connection with what had been previously testified to by the plaintiffs, and which was not denied by the defendant, and therefore impliedly admitted, to the effect that Groat, one of the plaintiffs, before going to look at the sheep and lambs, had stated to the defendant that he had no pasture for them, to which he replied that he had lots of pasture and would keep them for the plaintiffs if they purchased, and that they, after looking at them, had stated to him that they would take them at the price named, if the parties could agree upon the time for keeping them. Considered in that connection, it is clear that the agreement was one for the plaintiffs' accommodation and an inducement to them to make the purchase at the price asked, which had been fixed irrespective of their subsequent pasturage on the defendant's land. It affords no ground or warrant for saying that the defendant, during the time they were so kept, intended to assume and bear all the risks incident to a continuance of his ownership of them, and consequently that the purchase-money receivable by him should depend on the number that should be living at the time specified or limited for that purpose. On the contrary, the fact that the price at which they were sold was that named by him when the first application to him to sell them was made, without reference to the question of the future keeping of them in his pasture, and the other circumstances attendant on the transaction, as stated by him, clearly show that such was not his intention.

It follows, from what has been said, that there was no error in the ruling of the judge that the title to the sheep passed to the plaintiffs immediately upon the completion of the contract and the payment of the \$25 by them. That necessarily carried with it the right to the wool on them, it being shown that there was no reservation thereof, or any thing said about it during the negotiation or at the time the contract was made. It is not a mere presumption, as stated in the prevailing opinion in the supreme court, that the parties "intended, in the absence of evidence to the contrary, that the title to the wool should follow the title to the sheep." As was well said by Justice Ingalls in his dissenting opinion: "When the sheep were sold the wool was grown and was a part of the sheep, adding to their value," and there is no reason or principle for saying that such particular part did not pass to the purchaser with the rest of the animals. The sale was of the entire animal and not of different parts or portions constituting it, or of what it was formed.

Assuming then that the legal effect of the agreement of the parties, as testified to by the defendant himself, was to vest the title to the wool in the plaintiffs, it was clearly incompetent to show a custom in Columbia county, where the transaction took place, that the wool of sheep sold, under the circumstances disclosed, does not go to the purchaser. See *Wheeler v. Newbold*, 16 N. Y. 392, 401;

Higgins v. Moore, 34 id. 417; Bradley v. Wheeler, 44 id. 495.

There were several offers of evidence by the defendant which were rejected by the court. Among them were the following: 1st. That the plaintiff Groat, on a previous occasion, purchased a number of sheep and lambs of the defendant under an arrangement precisely similar to the present, and that he did not claim the wool; 2d. That the plaintiffs admitted to a witness, on being offered \$100 for their bargain with the defendant and to take the sheep and lambs off their hands, allowing the defendant to have the wool, refused the offer and said that the sheep, without the wool, were worth more money than the offer; and 3d. That the plaintiff Groat admitted that he did not understand he had bought the wool in question, or think of making any claim to it until his co-plaintiff suggested that they could hold it.

These were properly excluded. It was immaterial to the present controversy what the plaintiffs, or either of them, had claimed of the defendant under a previous sale. Their legal rights could not be controlled under the present contract by a failure to demand what they were entitled to under a previous one, and it cannot be held that the wool, under this agreement, was excepted from the operation of the sale, because one of the plaintiffs did not assert his rights under another, and it could not aid in determining what the contract in dispute was, whether or not the purchase of the sheep was so profitable as to cause the plaintiffs to reject the offer made them for their bargain. Nor could the understanding of one of the plaintiffs, as to the question whether he had bought the wool or not, alter the effect of the transaction or the contract actually entered into. What he in fact did buy was the question, and that did not depend on what he understood, but on the agreement. The defendant was also asked what was the value of the sheep without the wool under the arrangement he had testified to. That question was properly excluded; the inquiry was wholly irrelevant. The parties could make such agreement as they saw fit, and it was immaterial whether the defendant sold the property in question for more or less than it was worth, in the absence of any fraud or other evidence affecting its validity.

There was a request to charge the jury that if the statement of the defendant was correct, then the sum of \$25 paid by the plaintiffs was merely paid to bind the bargain and take the contract out of the statute of frauds, and that the title to the sheep did not thereby pass absolutely to the plaintiffs. This was refused, and what has already been said as to the legal effect of that statement, shows that such refusal was correct.

The court was then asked by the defendant to submit the following questions to the jury:

1st. Whether the contract in suit was executed or executory; whether it was the intention of the parties that the title to the sheep should pass to the plaintiffs im-

mediately upon the making of the contract or at some future period.

2d. Whether the defendant, upon the making of this contract, intended to sell or the plaintiffs to buy the wool in question in this suit; and on his refusal so to do, and after proper exceptions were taken, he was requested to charge the jury that if the contract was executory and it was not the intention to pass the title to the sheep until delivery and payment, then the wool sheared from the sheep, before they were actually delivered and paid for, belonged to the defendant. This was also refused, and an exception was taken to such refusal.

There was no error to submit those questions or give that instruction to the jury. They all involved the submission of matters of law to their consideration and determination. The court had previously decided that the terms, nature and effect of the contract should be determined and controlled by the defendant's statement, or version of it, which was the most favorable view in which it could be considered for him. The case was thus substantially one in which there was no dispute of facts as to the terms of the agreement, and it therefore became a question of law to be determined by the court, whether the contract was executed or executory, and what was the intention of the parties (to be ascertained from the contract) as to the nature, extent and effect of the sale.

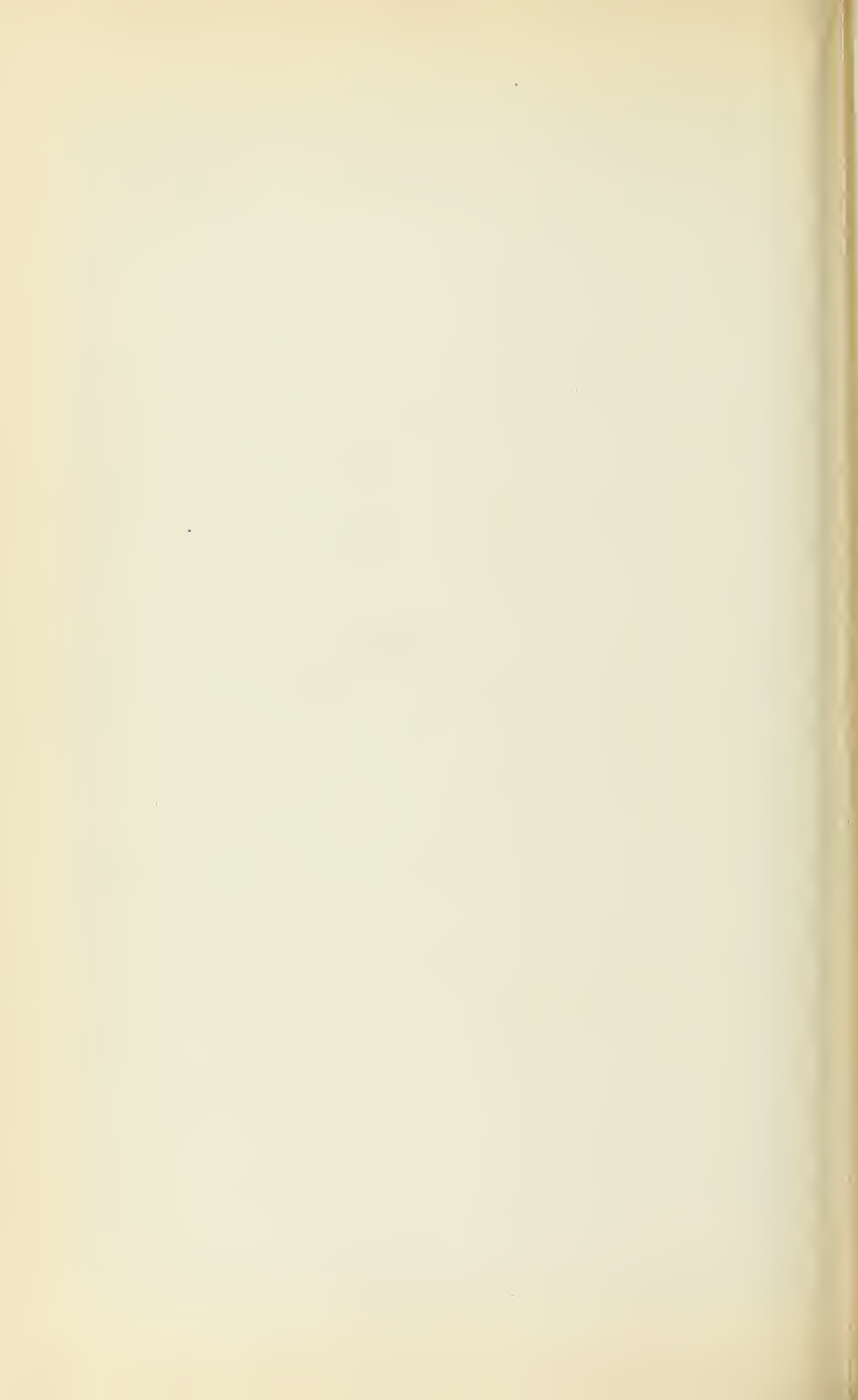
The only remaining question to be considered relates to the rule of damages laid down by the court, which he stated to be "the highest market price of wool between the time of the demand and the time of trial, with interest from the time of the demand."

It may be questionable whether the instruction as to the right to recover interest is correct; and I understand, from the points of the counsel of the defendant, that he only makes objection on this appeal to that portion of the charge. That question was not presented by his exception, which was to the entire instruction and not to the allowance of interest only. The part allowing a recovery for the highest market value between the conversion and the time of trial was held by us in *Lobdell v. Stowell*, decided at the September term, 1872, (51 N. Y. 70,) to be the proper rule or measure of damages or compensation, on the authority of *Romaine v. Van Allen*, 26 N. Y. 309; *Burt v. Dutcher*, 34 id. 493; *Markham v. Jaudon*, 41 id. 235. There was therefore no ground of complaint to that portion of the charge. The exception being to that as well as to the portion relating to the interest, was too broad and consequently not well taken, and is not available as a ground for setting aside the verdict in favor of the plaintiffs and granting a new trial.

The result of the views above expressed is, that the order of the general term granting such new trial should be reversed, and judgment must be ordered against defendant on the verdict, with costs.

All concur.

Order reversed and judgment accordingly.



GROVER *v.* GROVER.

(24 Pick. 261.)

Supreme Judicial Court of Massachusetts.
Middlesex. March 20, 1837.

Assumpsit upon a note made by Charles W. Grover, and payable to the order of Hiram S. Grover, the plaintiff's intestate. In March, 1832, Grover W. Blanchard called to see the intestate, and asked whether the mortgage deed given to secure the payment of the note in question had been recorded? The deed had not been recorded, and the intestate said to Blanchard, "I will make a present of these to you, if you will accept them." Blanchard then took them, and put them in his pocket, saying that he would accept them as a token of affection. Blanchard afterwards gave them back to the intestate, saying, "You may keep the papers until I call for them, or collect them for me." No assignment was made on the note or mortgage. The intestate then put the mortgage deed on record. The plaintiff, after the death of the intestate, took the deed from the register's office, and, having received payment of the amount secured thereby, discharged the mortgage. Upon the death of the intestate, the note was found in his chest, with his papers; and Blanchard took it, refused to deliver it to the plaintiff, and caused this action to be brought by the administrator for his benefit. The defendant contended (1) that no valid gift of a chose in action could be made *inter vivos* without writing; (2) that the name of the donor or of his administrator could not be used without his consent in an action for the use of the donee; and (3) that the donor could not, by law, act as the agent of the donee to keep the papers or collect the money. The jury found that the intestate did intend to give the property contained in the note and mortgage absolutely to Blanchard. The whole court were to determine whether or not the property passed and vested in Blanchard, and whether or not he might maintain this action without the consent of the nominal plaintiff, for his own use.

Hoar, for plaintiff. Keyes and Farley, for defendant.

WILDE, J. The jury have found, that the deceased intended to give the property in the note, and in the mortgage made to secure it, absolutely, to Blanchard; and the question is, whether by the rules of law this intention can be carried into effect.

It is objected, that no valid gift of a chose in action can be made *inter vivos*, without writing, and this objection would be well maintained, if a legal transfer of a chose in action were essential to give effect to a gift. But as a good and effectual equitable assignment of a chose in action may be made by parol, and as courts of law take notice of and give effect to such assignments, there seems to be no good foundation for this objection. It is true that the cases, which are numerous, in which such equitable assignments have been supported, are founded on assign-

ments for a valuable consideration; but there is little, if any, distinction in this respect, between contracts and gifts *inter vivos*; the latter indeed, when made perfect by delivery of the things given, are executed contracts. 2 Kent's Comm. (3d ed.) 438. By delivery and acceptance the title passes, the gift becomes perfect, and is irrevocable. There is, therefore, no good reason why property thus acquired should not be protected as fully and effectually as property acquired by purchase. And so we think that a gift of a chose in action, provided no claims of creditors interfere to affect its validity, ought to stand on the same footing as a sale.

The cases favorable to the defence do not depend on the question, whether an assignment must be in writing, but on the question, whether a legal transfer is not necessary to give validity to a donation of a chose in action. The donation of a note of hand payable to bearer, or of bank notes, lottery tickets and the like, where the legal title passes by delivery, is good; for by the form of the contract no written assignment is necessary; but as to all other choses in action, negotiable securities excepted, it has been held in several cases, that they are not subjects of donation *mortis causa*, on the ground undoubtedly, for I can imagine no other, that a legal assignment is necessary to give effect to such donations; and the same reason would apply to donations *inter vivos*. The leading case on this point is that of *Miller v. Miller*, 3 P. Wms. 356, in which it was held, that the gift of a note, being a mere chose in action, could not take effect as a donation *mortis causa*, because no property therein could pass by delivery, and an action thereon must be sued in the name of the executor. But in *Snellgrove v. Bailly*, 3 Atk. 214, Lord Hardwicke decided, that the gift and delivery over of a bond was good as a donation *mortis causa*, on the ground that an equitable assignment of the bond was sufficient. It seems to be very difficult to reconcile these two cases. The distinction suggested by Lord Hardwicke in the case of *Ward v. Turner*, 2 Ves. Sen. 431, in which he adheres to the decision in *Snellgrove v. Bailly*, is technical, and, to my mind, unsatisfactory; and certainly has no application to our laws, which place bonds and other securities on the same footing. We cannot, therefore, adopt both decisions without manifest inconsistency; and we think, for the reasons already stated, that the decision in *Snellgrove v. Bailly* is supported by the better reasons, and is more conformable to general principles, and the modern decisions in respect to equitable assignments. We are, therefore, of opinion that the gift of the note of hand in question is valid; and in coming to this conclusion, we concur with the decision in the case of *Wright v. Wright*, 1 Cowen, 598, wherein it was held, that the gift and delivery over of a promissory note, *mortis causa*, is valid in law, although the legal title did not pass by the assignment.

It is not necessary to decide whether the gift of the mortgage security is valid, although it is reported to have been said by

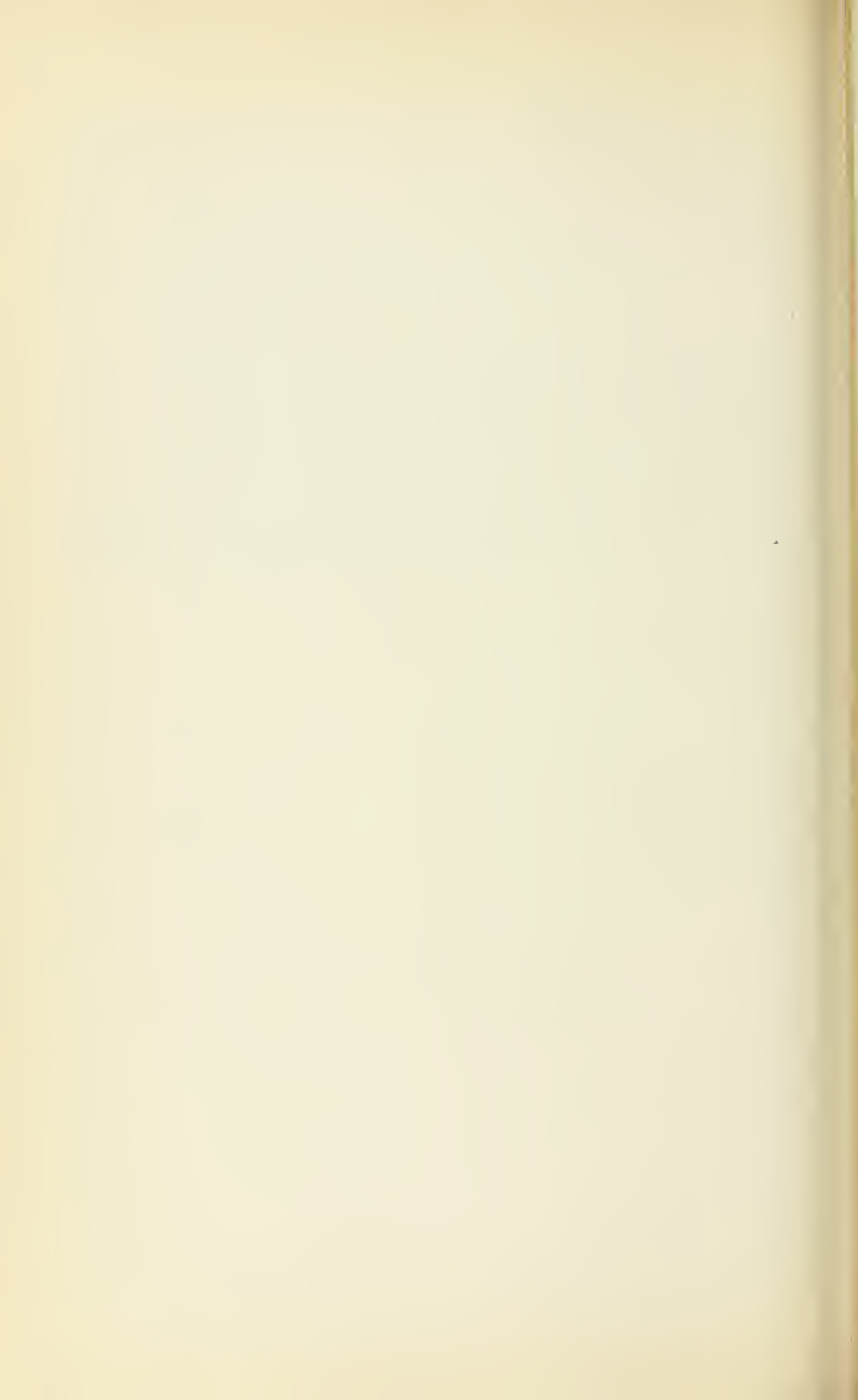
the vice chancellor, in the case of *Duffield v. Elwes*, 1 Sim. & Stu. 243, that a mortgagor was not compellable to pay the mortgage debt without having back the mortgage estate; and for that and other reasons he decided, that a mortgage was not a subject of a gift, *mortis causa*. This decision, however, was afterwards overruled in the house of lords, *Duffield v. Elwes*, 1 Bligh's New. R. 497, on the ground, that the gift of the debt operated as an equitable assignment of the mortgage. But as we think it clear, that the right to maintain this action does not depend on that question, we give no opinion in regard to it.

Another objection is, that if the gift was valid and complete, by the delivery of the note, it was annulled by the redelivery to the donor. We think this objection also is unfounded. In the case of *Bunn v. Markham*, 7 Taunt. 230, Gibbs, C. J. lays it down as a well settled principle, that if after a donation *mortis causa*, the donor resumes possession, he thereby revokes and annuls the donation. This is the law no doubt. Whether there may not be an exception to this rule, when the donor takes back the thing given at the request of the donee, for a particular purpose, and agrees to act as his agent under circum-

stances negating every presumption that he intended to revoke his gift, is a question which it is not necessary now to consider; for the principle has no relation to a donation *inter vivos*. When such a donation is completed by delivery, the property vests immediately and irrevocably in the donee; and the donor has no more right over it than any other person. But a donation *mortis causa* does not pass a title immediately, but is only to take effect on the death of the donor, who in the mean time has the power of revocation, and may at any time resume possession and annul the gift.

The last objection to the maintenance of this action by Blanchard, in the name of the administrator, has been sufficiently answered in considering the first objection. It is contended, that the consent of the administrator is necessary. But if an equitable assignment is sufficient to complete the gift, it follows that the administrator is trustee, and cannot set up his legal right in order to defeat the trust. This is fully established by the case of *Duffield v. Elwes*, 1 Bligh's New R. 497; *Hurst v. Beach*, 5 Madd. Ch. R. 351; and *Duffield v. Hicks*, 1 Dow & C., 1.

Judgment for plaintiff for the use of Blanchard.



GRYMES v. HONE.

(49 N. Y. 17.)

Court of Appeals of New York. Mar. 26, 1872.

Defendant's testator, 80 years old and feeble, made an absolute assignment of bank stock to his granddaughter, and delivered the assignment to his wife, with instructions to deliver it to the granddaughter in case of his death. Five months afterwards he died. The stock had not been transferred on the bank books.

John H. Reynolds, for appellant. Orlando Meads, for respondent.

PECKHAM, J. On the 19th of August, 1867, the alleged donor being the owner of one hundred and twenty shares of stock, included in one certificate, in the Bank of Commerce of New York city, made an absolute assignment in writing, transferable on the books of the bank on the surrender of the certificate, undersigned and witnessed, of twenty shares thereof to this plaintiff, his favorite granddaughter, for value received, as the assignment purports, and appointed her his attorney irrevocable to sell and transfer the same to her use. After this paper had been signed "he kept it by him for awhile" (how long nowhere appears), and afterward handed it to his wife, to put with the will and other papers in a tin box she had. When he gave to his wife the paper so drawn, he said: "I intend this for Nelly. If I die, don't give this to the executors; it isn't for them, but for Nelly; give it to her, herself." She asked, "Why not give it to her now?" "Well," he said, "better keep it for the present; I don't know how much longer I may last or what may happen, or whether we may not need it." This is the statement as given by the widow of donor. It was admitted that at the time of executing said instrument the donor was from seventy-eight to eighty years of age, was in failing health, and so continued till his death, January 23, 1868. Upon these facts was there a valid gift *mortis causa*?

Upon the question as to what constitutes such a gift, the authorities are infinite, not always consistent. But at this time it is generally agreed that to constitute such a gift, it must be made with a view to the donor's death from present illness, or from external and apprehended peril. It is not necessary that the donor should be in extremis, but he should die of that ailment. If he recover from the illness or survive the peril the gift thereby becomes void; and until death it is subject to his personal revocation. 2 Kent Com. 444, and cases cited; 2 Redf. Wills, 299 et seq.; 1 Story Eq. Jur., § 606, etc., notes and authorities.

In the next place there must be a delivery of it to the donee or to some person for him, and the gift becomes perfected by the death of the donor.

Three things are necessary. 1. It must be made with a view to donor's death. 2. The donor must die of that ailment or peril. 3. There must be a delivery. The

appellant insists that the gift in this case fulfills neither requisition.

Was this gift made with a view to the donor's death? It is so found by the referee as a question of fact. What the witness intended to convey by the term "failing health" is not clear; but intendment is against the appellant where the fact is left uncertain. There is nothing in the case inconsistent with the idea that the testator, when he signed this assignment, was confined to his bed and so continued till his death; though I do not wish to be understood as saying that such confinement was necessary to validate the gift. It seems that he died, as the referee finds, from this failing health, in five months thereafter; so that the terms as used indicated a very serious ailment.

True he did not, and of course could not, know when death would occur when he executed this assignment, but he was in apprehension of it. His age and his "failing" told him death was near, but when it might occur he had no clear conviction. An ailment at such an age is extremely admonitorious.

From these facts, can this court say as matter of law, that this testator was not so seriously ill when he executed this assignment as to be apprehensive of death; that he was not legally acting "in view" of death; that he was not so ill as to be permitted to make this sort of gift? True, the donor died five months thereafter; but we are referred to no case or principle that limits the time within which the donor must die to make such a gift valid. The only rule is that he must not recover from that illness. If he do, the gift is avoided. The authorities cited by the appellant's counsel, of *Weston v. Hight*, 17 Me. 287, 35 Am. Dec. 250, and *Staniland v. Willott*, 3 McN. & G. 664, are both instances of recovery, and the gifts on that ground declared void. In the latter the donor and his committee recovered back the stocks given, because of his recovery. The first case is improperly quoted in 2 Redf. 300, note 11, as not originally authorizing the gift.

The declaration of the donor that his wife should keep the assignment and not hand it over until after his death, as he did not know what might happen, nor but that they might need it, was simply a statement of the law as to such a gift, whether the declaration was or was not made. Clearly he could not tell whether he should die or recover from that ailment. If he did recover the law holds the gift void.

The transaction as to such a gift is, the donor says I am ill, and fear I shall die of this illness; wherefore I wish you to take these things and hand them to my granddaughter after my death; but do not hand them to her now, as I may recover and need them. A good donation *mortis causa* always implies all this. If delivered absolutely to the donee in person, the law holds it void in case the donor recovers, and he may then reclaim it. *Staniland v. Willott*, supra.

To make a valid gift *mortis causa*, it is not necessary that there should be any express qualification in the transfer or the

delivery. It may be found to be such a gift from the attending circumstances, though the written transfer and the delivery may be absolute. See the last case.

I think this donor made this gift "with a view to his death," within the meaning of the rule on that subject.

2d. This also settles the second requisite, as it is admitted that he did not recover, but died of this "failing health," as it is expressed.

3d. Was there a delivery? The assignment was delivered to his wife for the donee. She thus became the agent of the donor. So far as the mere delivery is concerned this is sufficient. See the elementary writers before cited; also *Drury v. Smith*, 1 P. Wms. 404; *Sessions v. Moseley*, 4 Cush. 87; *Contant v. Schuyler*, 1 Paige, 316; *Bornemann v. Siddinger*, 8 Shep. 185; *Wells v. Tucker*, 3 Binn. 366; *Hunter v. Hunter*, 19 Barb. 631. Such a delivery to be given to the grantee after the grantor's death is good as to a deed of real estate. *Hathaway v. Payne*, 34 N. Y. 92.

It is urged that this gift was not completed; that the stock was not transferred on the books of the bank, and could not be until the certificate held by the donor was surrendered, and that equity will not aid volunteers to perfect an imperfect gift.

Within the modern authorities this gift was valid, notwithstanding these objections. The donor by this assignment and power, parted with all the interest in the stock assigned as between him and the donee, and the donee became the equitable owner thereof as against every person but a bona fide purchaser without notice. Delivery of the stock certificate without a transfer on the bank's books would have made no more than an equitable title as against the bank (*N. Y. & N. H. R. Co. v. Schuyler*, 34 N. Y. 80, and cases cited), though it would give a legal title as against the assignor (*McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341, just decided), and according to the case of

Duffield v. Elwes, 1 Bligh (N. R.), 497, 530, decided in the house of lords. The representatives of the donor were trustees for the donee by operation of law to make the gift effectual. See also to the same effect *Ex parte Pye*, 18 Ves. 140; *Kekewich v. Manning*, 1 De G., M. & G. 176; *Richardson v. Richardson*, L. R. 3 Eq. Cas. 686. This trust, like this species of gift, is peculiar. The trust, like the gift, is revocable during the donor's life, and is perfected and irrevocable by his death.

This extended the law as laid down by Lord Hardwicke, in *Ward v. Turner*, 2 Ves. Sr. 431, 442, upon this subject, and our courts have gone in the same direction with *Duffield v. Elwes*. Where notes payable to the donor's order and not indorsed, and other things of similar character, have been given *mortis causa*, courts compel the representatives of the donor to allow the donee to sue in their name, though the legal title has not passed. See last case; *Grover v. Grover*, 24 Pick. 261, 35 Am. Dec. 319; *Chase v. Redding*, 13 Gray, 418; *Bates v. Kempton*, 7 id. 382; and see also *Westerlo v. De Witt*, 36 N. Y. 340, 93 Am. Dec. 517; *Walsh v. Sexton*, 55 Barb. 251.

The equitable title to this stock is thus passed by the assignment, and it was not necessary to hand over the certificate. A court of equity will compel the donor's representatives to produce the certificate, that the legal title to the stock may be perfected.

As there is great danger of fraud in this sort of gift, courts cannot be too cautious in requiring clear proof of the transaction. This has been the rule from the early days of the civil law (which required five witnesses to such a gift) down to the present time. In this case the proof of the assignment, etc., is entirely clear, the question being as to its effect. The judgment should be affirmed, with costs to be paid out of the estate.

All concur; ALLEN, J., not voting.

HAGUE et al. v. PORTER.

(3 Hill, 141.)

Supreme Court of New York. July, 1842.

Action by Hague and Redfield against one Porter for goods sold and delivered. Judgment for defendant, and plaintiffs bring error. Affirmed.

Defendant, a merchant in New York, agreed to take of plaintiffs, doing business in Newark, N. J., two dozen lamps, which were paid for and delivered. At the same time defendant ordered 100 more lamps of the same kind, to be made and delivered as soon as practicable. Subsequently defendant suggested an alteration to be made in the 100 lamps so ordered, and they were completed as directed, and sent to defendant's store. Defendant refused to receive the lamps, and they were left on the sidewalk. The court below directed a nonsuit, on the ground that there was no proof of delivery.

R. N. Morrison, for plaintiffs in error.
C. W. Van Voorhis, for defendant in error.

COWEN, J. Here was no actual delivery and acceptance by the defendant below. The contract was executory, and he refused to receive. It was scarcely a case of goods bargained and sold.¹ The

¹ Something remained to be done to the lamps, at the time they were ordered, before they were ready for delivery; and hence the sale was incomplete. (See *Downer v. Thompson*, 2 Hill, 137.)

count should, I apprehend, have been special, for refusing to accept. All the cases on this point were considered in *Atkinson v. Bell*, (2 Man. & Ry. 292, 8 Barn. & Cress. 277, S. C.,) and the subject entirely exhausted: indeed the case itself is directly against the plaintiff in error. The contract for the two dozen lamps was distinct, and the delivery of these bore no relation to the one hundred in question. (*Thompson v. Macaroni*, 3 Barn. & Cress. 1.)

The case of *Downer v. Thompson*, (2 Hill, 137,) or rather the dictum cited from that case, went on the assumption that there had been a delivery to and acceptance by the carrier with the assent of the vendee.² That is a constructive delivery to the vendee himself, and satisfies a count for goods sold and delivered, the same as a personal delivery to and acceptance by him. If he order goods to be sent by a carrier, though he do not name him, and they are sent accordingly, that is a delivery. (*Dutton v. Solomonson*, 3 Bos. & Pull. 582.) Such direction may certainly be implied from the course of trade; but I do not see here any direction so to send, either express or implied. The practice between Newark and New York is not shown. There was no dispute in the cases cited that the goods were to be sent by a carrier, nor that they were so sent pursuant to order.

Judgment affirmed.

² And see *Grosvenor & Starr v. Phillips*, (2 Hill, 147.)

HANSON et al. v. BUSSE.

(45 Ill. 496.)

Supreme Court of Illinois. Sept. Term, 1867.

Action by Ralph Hanson and another against Frederick Busse. From a judgment for defendant, plaintiffs appeal. Affirmed.

Blodgett & Winston, for appellants.
Thomas Shirley, for appellee.

LAWRENCE, J. This was action, brought by Hanson and Barrett, against Busse, to recover the price of one hundred and ten barrels of apples, sold by them to Busse. The demand was resisted, on the ground that the apples, when opened, proved to be decayed and entirely worthless. The jury found for the defendant and the plaintiffs appealed.

The court gave for the defendant a series of instructions, nearly all of which embody the idea, that if the plaintiffs represented the apples to be good, and the defendant bought them, relying upon such representations, and they were bad and unmerchantable, and the defendant offered, at once, to return them, he would not be liable for the price.

In reference to the sale of personal property, which is open to the inspection and examination of the purchaser, this would not be the law. In such cases it is immaterial how far the purchaser may rely upon the representations of the vendor as to the quality of the goods, if there was no intention on the part of the vendor to warrant, and if he used no language fairly implying such an intent. The different rule of the civil law may be founded on higher morals, and the modern decisions, both in England and this country, seem to be tending in that direction. This tendency is shown in the recognition of exceptions to the rule. But the rule itself must be considered firmly settled in the common law, that the vendor of goods which the purchaser has, at the time of purchase, the opportunity of examining, is not responsible for defects of quality, in the absence of fraud and warranty; and although no particular form of words is requisite to constitute a warranty, yet a simple commendation of the goods, or a representation that they are of a certain quality does not make a warranty, unless the language of the vendor, taken in connection with the circumstances of the sale, fairly implies an intention, on his part, to be understood as warranting. The rule has been thus laid down by this court in

several cases. *Towell v. Gatewood*, 2 Scam. 22; *Adams v. Johnson*, 15 Ill. 345, and *Kohl v. Lindley*, 39 id. 195. In the last case the rule is fully considered.

But, although these instructions would be erroneous if applied to ordinary sales of personal property open to inspection, yet they must be considered in reference to their application to this particular case, and, tried by that standard, we cannot say they misled the jury. As stated by this court in *Kohl v. Lindley*, above quoted, one of the exceptions to the general rule is, where the sale is made by sample, and another, where the purchaser has no opportunity for inspection. The bulk must be as good as the sample, and, if there is no opportunity for examination, the article sold must be what the vendor represents it to be. In such cases the maxim *caveat emptor* can have no application.

In the case before us the proof shows that the 110 barrels were piled up in tiers at a railway depot in Chicago. The purchaser went with the clerk of the plaintiffs to look at them. They opened a couple of barrels that stood on the floor. The purchaser was lame from rheumatism, and requested the clerk to climb up and open a barrel on the top of the tiers. He did so, and showed the purchaser some apples which were in good condition, and said they were all like that. The plaintiffs had told the defendant the apples were just such as he had previously bought, shipped by the same man, and good handpicked fruit. The apples in the three barrels exhibited as samples were unquestionably merchantable, or the defendant would not have bought. It would be unreasonable to require that he should have opened every one of the 110 barrels. He had the right to rely on the samples shown to him, and on the representations of the plaintiffs that the apples were good. He had no opportunity for the exercise of his own judgment, and the plaintiffs must have known that he bought relying upon their representations. The case falls clearly within the exceptions to the general rule above mentioned, and there is no ground for saying *caveat emptor*. The verdict was just, and the instructions as applied to the facts of this case could not have misled the jury.

The plaintiffs' instructions were properly refused, because inapplicable to the facts of this case. They would have tended to mislead the jury.

The judgment must be affirmed.

Judgment affirmed.



HARDMAN et al. v. BOOTH.

(1 Hurl. & C. 803.)

English Court of Exchequer, Hilary Term, 26
Vict. Jan. 12, 1863.

Trover for twenty-two pieces of serge and eighty-two pieces of woollen linings of the plaintiffs.

Pleas.—First: Not guilty. Second: that the goods are not the plaintiffs'.—Issues thereon.

At the trial, before Martin, B., at the London sittings after last Trinity term, the following facts appeared.—The plaintiffs were worsted manufacturers at Rawtonstall, near Manchester, and they employed Messrs. Hughes and Keighley as their London agents. In May, 1862, one of the plaintiffs being in London, and having heard of a firm of Gandell & Co., in Joiners' Hall Buildings, Upper Thames street, called, with Keighley, at those premises and inquired for Messrs. Gandell. At that time the firm, which had been established eighty or ninety years, and was well known, consisted only of Thomas Gandell, who was old and in bad health; and his son, who was his clerk, managed the business. The firm of Gandell & Co. was only known to the plaintiff and Keighley by reputation, and, on their inquiring for Messrs. Gandell, one of the workmen directed them to the counting house, where they found Edward Gandell. Keighley said, "I believe you are a buyer of the class of goods Mr. Hardman is making," and introduced the plaintiff to him. After some conversation, and when they were about to leave, Edward Gandell said, "We are government packers, but we have a shipping connection that we sometimes buy for, and I have no doubt we shall be able to do a little business together." On leaving, the plaintiff began to copy the name from the door-post, when Edward Gandell handed him a printed card, having on it: "Thomas Gandell & Co., Packers, Joiners' Hall Buildings, 79 Upper Thames Street." Keighley had two subsequent interviews with Edward Gandell, at the first of which he introduced him to one Todd. The goods in question were ordered by Edward Gandell, and sent at two different times in July. The first lot was sent to Joiners' Hall Buildings, and a receipt for it was given by one of Gandell & Co.'s men; the other lot was taken away in a cart of Gandell & Co., which Edward Gandell had offered to send for it. The plaintiff drew a bill of exchange for the first lot of goods on "Messrs. Thomas Gandell & Co."; but, at the request of Edward Gandell, the name was altered to "Edward." The invoice for both lots was headed:—"Messrs. Edward Gandell & Co., Joiners' Hall Buildings, Upper Thames Street, London. Bought of Hardman, Brothers, per William Hughes & Co." Edward Gandell carried on business in partnership with Todd, whom he introduced to Keighley, and who had an office in Size Lane. Neither the plaintiff nor Keighley knew of the firm of Gandell & Todd. The goods were pledged by Edward Gandell to the defendant, who was

an auctioneer, with a power of sale, as a security for £300 bona fide advanced by the defendant to Gandell & Todd. Shortly afterwards Gandell & Todd became bankrupt; and the defendant, in pursuance of the power, sold the goods by auction for £341, and retained £300, and paid over £41 to the assignees.

It was submitted, on behalf of the defendant, that the action was not maintainable, inasmuch as there was a sale of the goods to Edward Gandell. The learned judge non-suited the plaintiffs, reserving leave to move to enter the verdict for them for £341.

Ballantine, Serjt., in last Michaelmas term, obtained a rule nisi accordingly, on the ground that no property passed to Edward Gandell in consequence of his fraud, and therefore the defendant was liable for the value of the goods. Hawkins now shewed cause. Giffard and Poland, in support of the rule.

POLLOCK, C. B.—I am of opinion that the rule should be absolute. The first question is whether there was a contract. It is difficult to lay down any general rule by which, at all times and under all circumstances, it may be determined whether or no there is a contract voidable at the option of the party defrauded, but in this case I think it clear that there was no contract. Mr. Hawkins contended that there was a contract personally with Edward Gandell, the individual with whom the conversations took place. It is true that the words were uttered by and to him, but the plaintiffs supposed that they were dealing with Gandell & Co., the packers, to whom they sent the goods; the fact being that Edward Gandell was not a member of that firm and had no authority to act as their agent. Therefore at no period of time were there two consenting minds to the same agreement. Then, what is the consequence? A person having no authority whatever over the goods sends them to the defendant, an auctioneer, who, supposing the goods belong to that person, bona fide advances money upon them, taking a power of sale; but that did not authorize him to sell another person's goods and retain the proceeds to reimburse himself.

I think that he is liable to the extent of the money realized by the sale, and that the rule should be absolute to enter the verdict for that amount.

MARTIN, B.—I am also of opinion that there was no contract. I cannot doubt that the plaintiffs believed that they were dealing with Gandell & Co., the packers. The cases cited are quite correct; and if Gandell & Co. had obtained the goods by means of fraud, the plaintiffs might have been precluded from recovering. But the case is very different. The goods were obtained by the fraud of Edward Gandell, who pretended that he was a member of the firm of Gandell & Co., and led the plaintiffs to believe that they were dealing with Gandell & Co. The only doubt I have had was whether there ought not to be a new trial, in order that the question

might be submitted to a jury; but I do not think it right to send down the case for a new trial, for it is clear that the plaintiffs believed that they were dealing with Gandell & Co., and therefore there was no contract.

CHANNELL, B.—I am also of opinion that there ought not to be a new trial, but that the rule ought to be absolute to enter the verdict for the plaintiffs. I do not think that the defendant was in the position of a mere conduit-pipe, as a carman would have been; but that he is responsible for the conversion of the goods, and the plaintiffs are entitled to recover provided the goods belong to them. There is no doubt they were originally the plaintiffs' goods, and they must still be theirs unless there has been a contract of sale to divest the property. It is not suggested that there was a sale to Gandell & Co.; and I do not think there was a sale to Gandell & Todd, or either of them, so as to render a repudiation of the contract by the plaintiffs necessary, for it is evident that the plaintiffs believed that they were dealing with Gandell & Co., and never meant to contract with Gandell & Todd.

WILDE, B.—I am of the same opinion. The defendant made advances to Gandell & Todd upon the security of the goods, and under a power of sale he sold them to recoup himself. The defendant now sets up a contract, voidable he admits, between the plaintiffs and Edward Gandell; and if there had been such a contract, and the defendant had sold the goods before the plaintiffs repudiated it, no doubt the defendant would have had a good defense. The real question therefore is, whether there has been such a dealing as amounts to a sale. It is clear that there was no sale to Gandell & Co., because they never authorized Edward Gandell to purchase for them; and it is equally clear that there was no sale to Edward Gandell, because the plaintiffs never intended to deal with him personally. The fact of his name being Gandell cannot affect the question, inasmuch as the dealing was not with him personally, but under the belief that he represented the firm of Gandell & Co. The result is that there was no contract, and the evidence is too strong to render it worth while to submit the case again to a jury.

Rule absolute.



HARKNESS v. RUSSELL & CO.

(7 Sup. Ct. Rep. 51, 118 U. S. 663.)

Supreme Court of the United States. Nov. 8, 1885.

Appeal from the supreme court of the territory of Utah.

The facts fully appear in the following statement by Mr. Justice BRADLEY:

This was an appeal from the supreme court of Utah. The action was brought in the district court for Weber county, to recover the value of two steam-engines and boilers, and a portable saw-mill connected with each engine. A jury being waived, the court found the facts, and rendered judgment for the plaintiff, Russell & Co. The plaintiff is an Ohio corporation, and by its agent in Idaho, on the second of October, 1882, agreed with a partnership firm by the name of Phelan & Ferguson, residents of Idaho, to sell to them the said engines, boilers, and saw-mills for the price of \$4,988, nearly all of which was secured by certain promissory notes, which severally contained the terms of the agreement between the parties. One of the notes (the others being in the same form) was as follows, to-wit: "Salt Lake City, October 2, 1882. On or before the first day of May, 1883, for value received in one sixteen-horse portable engine, No. 1,026, and one portable saw-mill, No. 128, all complete, bought of L. B. Mattison, agent of Russell & Co., we, or either of us, promise to pay to the order of Russell & Co., Massillon, Ohio, \$300, payable at Wells, Fargo & Co.'s bank, Salt Lake City, Utah Territory, with ten per cent. interest per annum from October 1, 1882, until paid, and reasonable attorney's fees, or any costs that may be paid or incurred in any action or proceeding instituted for the collection of this note or enforcement of this covenant. The express condition of this transaction is such that the title, ownership, or possession of said engine and saw-mill does not pass from the said Russell & Co. until this note and interest shall have been paid in full, and the said Russell & Co. or his agent has full power to declare this note due, and take possession of said engine and saw-mill when they may deem themselves insecure even before the maturity of this note; and it is further agreed by the makers hereof that if said note is not paid at maturity, that the interest shall be two per cent. per month from maturity hereof till paid, both before and after judgment, if any should be rendered. In case said saw-mill and engine shall be taken back, Russell & Co. may sell the same at public or private sale without notice, or they may, without sale, indorse the true value of the property on this note, and we agree to pay on the note any balance due thereon, after such indorsement, as damages and rental for said machinery. As to this debt we waive the right to exempt, or claim as exempt, any property, real or personal, we now own, or may hereafter acquire, by virtue of any homestead or exemption law, state or federal, now in force, or that hereafter may be en-

acted. P. O., Oxford, Oneida County, Idaho territory. \$300. Phelan & Ferguson." Some of the notes were given for the price of one of the engines with its accompanying boiler and mill, and the others for the price of the other. Some of the notes were paid; and the present suit was brought on those that were not paid. The property was delivered to Phelan & Ferguson on the execution of the notes, and subsequently they sold it to the defendant Harkness, in part payment of a debt due from them to him and one Langsdorf. The defendant, at the time of the sale to him, knew that the purchase price of the property had not been paid to the plaintiff, and that the plaintiff claimed title thereto until such payment was made. The unpaid notes given for each engine and mill exceeded in amount the value of such engine and mill when the action was commenced.

The territory of Idaho has a law relating to chattel mortgages, [act of January 12, 1875,] requiring that every such mortgage shall set out certain particulars as to parties, time, amount, etc., with an affidavit attached that it is bona fide, and made without any design to defraud and delay creditors; and requiring the mortgage and affidavit to be recorded in the county where the mortgagor lives, and in that where the property is located; and it is declared that no chattel mortgage shall be valid (except as between the parties thereto) without compliance with these requisites, unless the mortgagee shall have actual possession of the property mortgaged. In the present case no affidavit was attached to the notes, nor were they recorded.

The court found that it was the intention of Phelan & Ferguson and of Russell & Co. that the title to the said property should not pass from Russell & Co. until all the notes were paid. Upon these facts the court found, as conclusions of law, that the transaction between Phelan & Ferguson and Russell & Co. was a conditional or executory sale, and not an absolute sale with a lien reserved, and that the title did not pass to Phelan & Ferguson, or from them to the defendant, and gave judgment for the plaintiff. The supreme court of the territory affirmed this judgment. [7 Pac. Rep. 865.] This appeal was taken from that judgment.

Parley L. Williams, (James N. Kimball and Abbot R. Heywood, on the brief,) for appellant. Charles W. Bennett, for appellee.

Mr. Justice BRADLEY, after stating the facts as above reported, delivered the opinion of the court.

The first question to be considered is whether the transaction in question was a conditional sale or a mortgage; that is, whether it was a mere agreement to sell upon a condition to be performed, or an absolute sale, with a reservation of a lien or mortgage to secure the purchase money. If it was the latter, it is conceded that the lien or mortgage was void as against third persons, because not verified by affidavit, and not recorded as required

by the law of Idaho. But, so far as words and the express intent of the parties can go, it is perfectly evident that it was not an absolute sale, but only an agreement to sell upon condition that the purchasers should pay their notes at maturity. The language is: "The express condition of this transaction is such that the title * * * does not pass * * * until this note and interest shall have been paid in full." If the vendees should fail in this, or if the vendors should deem themselves insecure before the maturity of the notes, the latter were authorized to repossess themselves of the machinery, and credit the then value of it, or the proceeds of it if they should sell it, upon the unpaid notes. If this did not pay the notes, the balance was still to be paid by the makers by way of "damages and rental for said machinery." This stipulation was strictly in accordance with the rule of damages in such cases. Upon an agreement to sell, if the purchaser fails to execute his contract, the true measure of damages for its breach is the difference between the price of the goods agreed on and their value at the time of the breach or trial, which may fairly be stipulated to be the price they bring on a resale. It cannot be said, therefore, that the stipulations of the contract were inconsistent with or repugnant to what the parties declared their intention to be, namely, to make an executory and conditional contract of sale. Such contracts are well known in the law and often recognized; and, when free from any fraudulent intent, are not repugnant to any principle of justice or equity, even though possession of the property be given to the proposed purchaser. The rule is formulated in the text-books and in many adjudged cases.

In Lord Blackburn's Treatise on the Contract of Sale, published 40 years ago, two rules are laid down as established. (1) That where, by the agreement, the vendor is to do anything to the goods before delivery, it is a condition precedent to the vesting of the property; (2) that where anything remains to be done to the goods for ascertaining the price, such as weighing, testing, etc., this is a condition precedent to the transfer of the property. Blackb. Sales, 152. And it is subsequently added that "the parties may indicate an intention, by their agreement, to make any condition precedent to the vesting of the property; and, if they do so, their intention is fulfilled." Blackb. Sales, 167.

Mr. Benjamin, in his Treatise on Sales of Personal Property, adds to the two formulated rules of Lord Blackburn a third rule, which is supported by many authorities, to-wit: (3) "Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." Benj. Sales, (2d Ed.) 236; 1d. (3d Ed.) § 320. The author cites for this proposition Bishop v. Stillito, 2 Barn. & Ald. 329, note a; Brandt v. Bowby, 2 Barn. & Adol. 932; Barrow v. Coles, (Lord Ellenborough,) 3

Camp. 92; Swain v. Shepherd, (Baron Parke,) 1 Moody & R. 223; Mires v. Solebay, 2 Mod. 243.

In the last case, decided in the time of Charles II., one Alston took sheep to pasture for a certain time, with an agreement that if, at the end of that time, he should pay the owner a certain sum, he should have the sheep. Before the time expired the owner sold them to another person; and it was held that the sale was valid, and that the agreement to sell the sheep to Alston, if he would pay for them at a certain day, did not amount to a sale, but only to an agreement. The other cases were instances of sales of goods to be paid for in cash or securities on delivery. It was held that the sales were conditional only, and that the vendors were entitled to retake the goods, even after delivery, if the condition was not performed; the delivery being considered as conditional. This often happens in cases of sales by auction, when certain terms of payment are prescribed, with a condition that, if they are not complied with, the goods may be resold for account of the buyer, who is to account for any deficiency between the second sale and the first. Such was the case of Lamond v. Duvall, 9 Q. B. 1030; and many more cases could be cited.

In *Ex parte Craweour*, L. R. 9 Ch. Div. 419, certain furniture dealers let Robertson have a lot of furniture upon his paying £10, in cash and signing an agreement to pay £5 per month (for which notes were given) until the whole price of the furniture should be paid; and when all the installments were paid, and not before, the furniture was to be the property of Robertson; but, if he failed to pay any of the installments, the owners were authorized to take possession of the property, and all prior payments actually made were to be forfeited. The court of appeals held that the property did not pass by this agreement, and could not be taken as Robertson's property by his trustee under a liquidation proceeding. The same conclusion was reached in the subsequent case of *Craweour v. Salter*, L. R. 18 Ch. Div. 30.

In these cases, it is true, support of the transaction was sought from a custom which prevails in the places where the transactions took place, of hotel-keepers holding their furniture on hire. But they show that the intent of the parties will be recognized and sanctioned where it is not contrary to the policy of the law. This policy, in England, is declared by statute. It has long been a provision of the English bankrupt laws, beginning with 21 James I. c. 19, that if any person becoming bankrupt has in his possession, order, or disposition, by consent of the owner, any goods or chattels of which he is the reputed owner, or takes upon himself the sale, alteration, or disposition thereof as owner, such goods are to be sold for the benefit of his creditors. This law has had the effect of preventing or defeating conditional sales accompanied by voluntary delivery of possession, except in cases like those before referred to; so that very few decisions are to be found in the English books directly in point on the question under consideration. The following case

presents a fair illustration of the English law as based upon the statutes of bankruptcy. In *Horn v. Baker*, 9 East, 215, the owner of a term in a distillery, and of the apparatus and utensils employed therein, demise the same to J. & S. in consideration of an annuity to be paid to the owner and his wife during their several lives, and upon their death the lessees to have the liberty of purchasing the residue of the term, and the apparatus and utensils, with a proviso for re-entry if the annuity should at any time be two months in arrear. The annuity having become in arrear for that period, instead of making entry for condition broken, the wife and administrator of the owner brought suit to recover the arrears, which was stopped by the bankruptcy of J. & S. The question then arose whether the utensils passed to the assignees of J. & S. under the bankrupt act, as being in their possession, order, and disposition as reputed owners; and the court held that they did; but that, if there had been a usage in the trade of letting utensils with a distillery, the case would have admitted a different consideration, since such a custom might have rebutted the presumption of ownership arising from the possession and apparent order and disposition of the goods. This case was followed in *Holroyd v. Gwynne*, 2 Taunt. 176.

This presumption of property in a bankrupt arising from his possession and reputed ownership became so deeply imbedded in the English law that in process of time many persons in the profession, not advertent to its origin in the statute of bankruptcy, were led to regard it as a doctrine of the common law; and hence in some states in this country, where no such statute exists, the principles of the statute have been followed, and conditional sales of the kind now under consideration have been condemned either as being fraudulent and void as against creditors, or as amounting, in effect, to absolute sales with a reserved lien or mortgage to secure the payment of the purchase money. This view is based on the notion that such sales are not allowed by law, and that the intent of the parties, however honestly formed, cannot legally be carried out. The insufficiency of this argument is demonstrated by the fact that conditional sales are admissible in several acknowledged cases, and therefore there cannot be any rule of law against them as such. They may sometimes be used as a cover for fraud; and, when this is charged, all the circumstances of the case, this included, will be open for the consideration of a jury. Where no fraud is intended, but the honest purpose of the parties is that the vendee shall not have the ownership of the goods until he has paid for them, there is no general principle of law to prevent their purpose from having effect.

In this country, in states where no such statute as the English act referred to is in force, many decisions have been rendered sustaining conditional sales accompanied by delivery of possession, both as between the parties themselves and as to third persons.

In *Hussey v. Thornton*, 4 Mass. 404, (de-

cided in 1808,) where goods were delivered on board of a vessel for the vendee upon an agreement for a sale, subject to the condition that the goods should remain the property of the vendors until they received security for payment, it was held (Chief Justice Parsons delivering the opinion) that the property did not pass, and that the goods could not be attached by the creditors of the vendee.

This case was followed in 1822 by that of *Marston v. Baldwin*, 17 Mass. 606, which was replevin against a sheriff for taking goods which the plaintiff had agreed to sell to one Holt, the defendant in the attachment; but by the agreement the property was not to vest in Holt until he should pay \$100, (part of the price,) which condition was not performed, though the goods were delivered. Holt had paid \$75, which the plaintiff did not tender back. The court held that it was sufficient for the plaintiff to be ready to repay the money when he should be requested, and a verdict for the plaintiff was sustained.

In *Barrett v. Pritchard*, 2 Pick. 512, the court said: "It is impossible to raise a doubt as to the intention of the parties in this case, for it is expressly stipulated that 'the wool, before manufactured, after being manufactured, or in any stage of manufacturing, shall be the property of the plaintiff until the price be paid.' It is difficult to imagine any good reason why this agreement should not bind the parties. * * * The case from Taunton (*Holroyd v. Gwynne*,) was a case of a conditional sale; but the condition was void as against the policy of the statute 21 Jac. 1, c. 19, § 11. It would not have changed the decision in that case if there had been no sale; for, by that statute, if the true owner of goods and chattels suffers another to exercise such control and management over them as to give him the appearance of being the real owner, and he becomes bankrupt, the goods and chattels shall be treated as his property, and shall be assigned by the commissioners for the benefit of his creditors. The case of *Horn v. Baker*, 9 East, 215, also turned on the same point, and nothing in either of these cases has any bearing on the present question."

In *Coggill v. Hartford & N. H. R. Co.*, 3 Gray, 545, the rights of a bona fide purchaser from one in possession under a conditional sale of goods were specifically discussed, and the court held, in an able opinion delivered by Mr. Justice Bigelow, that a sale and delivery of goods on condition that the title shall not vest in the vendee until payment of the price passes no title until the condition is performed, and the vendor, if guilty of no laches, may reclaim the property, even from one who has purchased from his vendee in good faith, and without notice. The learned justice commenced his opinion in the following terms: "It has long been the settled rule of law in this commonwealth that a sale and delivery of goods on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee, and that the vendor, in case the condition is not fulfilled, has a right to repossess him-

self of the goods, both against the vendee and against his creditors claiming to hold them under attachments." He then addresses himself to a consideration of the rights of a bona fide purchaser from the vendee, purchasing without notice of the condition on which the latter holds the goods in his possession; and he concludes that they are no greater than those of a creditor. He says: "All the cases turn on the principle that the compliance with the conditions of sale and delivery is, by the terms of the contract, precedent to the transfer of the property from the vendor to the vendee. The vendee in such cases acquires no property in the goods. He is only a bailee for a specific purpose. The delivery which in ordinary cases passes the title to the vendee must take effect according to the agreement of the parties, and can operate to vest the property only when the contingency contemplated by the contract arises. The vendee, therefore, in such cases, having no title to the property, can pass none to others. He has only a bare right of possession, and those who claim under him, either as creditors or purchasers, can acquire no higher or better title. Such is the necessary result of carrying into effect the intention of the parties to a conditional sale and delivery. Any other rule would be equivalent to the denial of the validity of such contracts. But they certainly violate no rule of law, nor are they contrary to sound policy."

This case was followed in *Sargent v. Metcalf*, 5 Gray, 306; *Deshon v. Bigelow*, 8 Gray, 159; *Whitney v. Eaton*, 15 Gray, 225; *Hirschhorn v. Canney*, 98 Mass. 149; and *Chase v. Ingalls*, 122 Mass. 381; and is believed to express the settled law of Massachusetts.

The same doctrine prevails in Connecticut, and was sustained in an able and learned opinion of Chief Justice Williams, in the case of *Forbes v. Marsh*, 15 Conn. 384, (decided in 1843,) in which the principal authorities are reviewed. The decision in this case was followed in the subsequent case of *Hart v. Carpenter*, 24 Conn. 427, where the question arose upon the claim of a bona fide purchaser.

In New York the law is the same, at least so far as relates to the vendee in a conditional sale and to his creditors; though there has been some diversity of opinion in its application to bona fide purchasers from such vendee.

As early as 1822, in the case of *Haggerty v. Palmer*, 6 Johns. Ch. 437, where an auctioneer had delivered to the purchaser goods sold at auction, it being one of the conditions of sale that indorsed notes should be given in payment, which the purchaser failed to give, Chancellor Kent held that it was a conditional sale and delivery, and gave no title which the vendee could transfer to an assignee for the benefit of creditors; and he said that the cases under the English bankrupt act did not apply here. The chancellor remarked, however, that "if the goods had been fairly sold by P., [the conditional vendee,] or if the proceeds had been actually appropriated by the assignees before notice of this

suit and of the injunction, the remedy would have been gone."

In *Strong v. Taylor*, 2 Hill, 326, Nelson, C. J., pronouncing the opinion, it was held to be a conditional sale where the agreement was to sell a canal-boat for a certain sum, to be paid in freighting flour and wheat, as directed by the vendor, he to have half the freight until paid in full, with interest. Before the money was all paid the boat was seized under an execution against the vendee; and, in a suit by the vendor against the sheriff, a verdict was found for the plaintiff, under the instruction of the court, and was sustained in banc upon the authority of the Massachusetts case of *Barrett v. Pritchard*, 2 Pick. 512.

In *Herring v. Hoppock*, 15 N. Y. 409, the same doctrine was followed. In that case there was an agreement in writing for the sale of an iron safe, which was delivered to the vendee, and a note at six months given therefor; but it was expressly understood that no title was to pass until the note was paid; and if not paid, Herring, the vendor, was authorized to retake the safe, and collect all reasonable charges for its use. The sheriff levied on the safe as the property of the vendee, with notice of the plaintiff's claim. The court of appeals held that the title did not pass out of Herring. Paige, J., said: "Whenever there is a condition precedent attached to a contract of sale which is not waived by an absolute and unconditional delivery, no title passes to the vendee until he performs the condition or the seller waives it." Comstock, J., said that, if the question were new, it might be more in accordance with the analogies of the law to regard the writing given on the sale as a mere security for the debt in the nature of a personal mortgage; but he considered the law as having been settled by the previous cases, and the court unanimously concurred in the decision.

In the cases of *Smith v. Lynes*, 5 N. Y. 41, and *Wait v. Green*, 35 Barb. 585, on appeal, 36 N. Y. 556, it was held that a bona fide purchaser, without notice from a vendee who is in possession under a conditional sale, will be protected as against the original vendor. These cases were reviewed, and, we think, substantially overruled, in the subsequent case of *Ballard v. Burgett*, 40 N. Y. 314, in which separate elaborate opinions were delivered by Judges Grover and Lott. This decision was concurred in by Chief Judge Hunt, and Judges Woodruff, Mason, and Daniels; Judges James and Murray dissenting. In that case Ballard agreed to sell to one France a yoke of oxen for a price agreed on, but the contract had the condition "that the oxen were to remain the property of Ballard until they should be paid for." The oxen were delivered to France, and he subsequently sold them to the defendant Burgett, who purchased and received them without notice that the plaintiff had any claim to them. The court sustained Ballard's claim; and subsequent cases in New York are in harmony with this decision. See *Coley v. Mann*, 62 N. Y. 1; *Bean v. Edge*, 84 N. Y. 510.

We do not perceive that the case of *Dows v. Kidder*, 84 N. Y. 121, is adverse to the ruling in *Ballard v. Burgett*. There, although the plaintiffs stipulated that the title to the corn should not pass until payment of the price, (which was to be cash, the same day,) yet they indorsed and delivered to the purchaser the evidence of title, namely, the weigher's return, to enable him to take out the bill of lading in his own name, and use it in raising funds to pay the plaintiff. The purchaser misappropriated the funds, and did not pay for the corn. Here the intent of both parties was that the purchaser might dispose of the corn, and he was merely the trustee of the plaintiff, invested by him with the legal title. Of course, the innocent party who purchased the corn from the first purchaser was not bound by the equities between him and the plaintiff.

The later case of *Parker v. Baxter*, 86 N. Y. 586, was precisely similar to *Dows v. Kidder*; and the same principle was involved in *Farwell v. Importers' & Traders' Bank*, 90 N. Y. 483, where the plaintiff delivered his own note to a broker to get it discounted, and the latter pledged it as collateral for a loan made to himself. The legal title passed; and although, as between the plaintiff and the broker, the former was the owner of the note and its proceeds, yet that was an equity which was not binding on the innocent holder.

The decisions in Maine, New Hampshire, and Vermont are understood to be substantially to the same effect as those of Massachusetts and New York; though by recent statutes in Maine and Vermont, as also in Iowa, where the same ruling prevailed, it is declared in effect that no agreements that personal property, bargained and delivered to another, shall remain the property of the vendor, shall be valid against third persons without notice. *George v. Stubbs*, 26 Me. 243; *Sawyer v. Fisher*, 32 Me. 28; *Brown v. Haynes*, 52 Me. 578; *Boynton v. Libby*, 62 Me. 253; *Rogers v. Whitehouse*, 71 Me. 222; *Sargent v. Gile*, 8 N. H. 325; *McFarland v. Farmer*, 42 N. H. 386; *King v. Bates*, 57 N. H. 446; *Heflin v. Bell*, 30 Vt. 134; *Armington v. Houston*, 38 Vt. 418; *Fales v. Roberts*, 38 Vt. 503; *Duncans v. Stone*, 45 Vt. 123; *Moseley v. Shattuck*, 43 Iowa, 540; *Thorpe v. Fowler*, 57 Iowa, 541, 11 N. W. Rep. 3.

The same view of the law has been taken in several other states. In New Jersey, in the case of *Cole v. Berry*, 42 N. J. Law, 308, it was held that a contract for the sale of a sewing-machine to be delivered and paid for by installments, and to remain the property of the vendor until paid for, was a conditional sale, and gave the vendee no title until the condition was performed; and the cases are very fully discussed and distinguished.

In Pennsylvania the law is understood to be somewhat different. It is thus summarized by Judge Depue, in the opinion delivered in *Cole v. Berry*, 42 N. J. Law, 314, where he says: "In Pennsylvania a distinction is taken between delivery under a bailment, with an option in the bailee to purchase at a named price, and

a delivery under a contract of sale containing a reservation of title in the vendor until the contract price be paid; it being held that in the former instance property does not pass as in favor of creditors and purchasers of the bailee, but that in the latter instance delivery to the vendee subjects the property to execution at the suit of his creditors, and makes it transferrable to bona fide purchasers. *Chamberlain v. Smith*, 44 Pa. St. 431; *Rose v. Story*, 1 Pa. St. 190; *Martin v. Mathlot*, 14 Serg. & R. 214; *Hank v. Linderman*, 61 Pa. St. 499." But, as the learned judge adds: "This distinction is discredited by the great weight of authority, which puts possession under a conditional contract of sale and possession under a bailment on the same footing,—liable to be assailed by creditors and purchasers for actual fraud, but not fraudulent per se."

In this connection, see the case of *Copland v. Bosquet*, 4 Wash. 588, where Mr. Justice Washington and Judge Peters (the former delivering the opinion of the court) sustained a conditional sale and delivery against a purchaser from the vendee, who claimed to be a bona fide purchaser without notice.

In Ohio the validity of conditional sales accompanied by delivery of possession is fully sustained. The latest reported case brought to our attention is that of *Cull v. Seymour*, 40 Ohio St. 670, which arose upon a written contract contained in several promissory notes given for installments of the purchase money of a machine, and resembling very much the contract in the case now under consideration. Following the note, and as a part of the same document, is this condition: "The express conditions of the sale and purchase of the separator and horse-power for which this note is given, is such that the title, ownership, or possession does not pass from the said Seymour, Sabin & Co. until this note, with interest, is paid in full. The said Seymour, Sabin & Co. have full power to declare this note due, and take possession of said separator and horse-power, at any time they may deem this note insecure, even before the maturity of the note, and to sell the said machine at public or private sale, the proceeds to be applied upon the unpaid balance of the purchase price." The machine was seized under an attachment issued against the vendee, and the action was brought by the vendor against the constable who served the attachment. The case was fully argued, and the authorities pro and con duly considered by the court, which sustained the condition expressed in the contract, and affirmed the judgment for the plaintiff. See, also, *Sanders v. Ketcher*, 28 Ohio St. 630.

The same law prevails in Indiana. *Shireman v. Jackson*, 14 Ind. 459; *Dunbar v. Rawles*, 28 Ind. 225; *Bradshaw v. Warner*, 54 Ind. 58; *Hodson v. Warner*, 60 Ind. 214; *McGirr v. Sell*, 1d. 249. The same in Michigan. *Whitney v. McConnell*, 29 Mich. 12; *Smith v. Lozo*, 42 Mich. 6, 3 N. W. Rep. 227; *Marquette Manuf'g Co. v. Jeffery*, 49 Mich. 283, 13 N. W. Rep. 592. The same in Missouri. *Ridgeway v. Kennedy*, 52 Mo. 24; *Wangler v. Franklin*, 70 Mo. 659; *Sum-*

ner v. Cottey, 71 Mo. 121. The same in Alabama, Fairbanks v. Eureka, 67 Ala. 109; Sumner v. Woods, Id. 129. The same in several other states. For a very elaborate collection of cases on the subject, see Mr. Bennett's note to Benj. Sales, (4th Ed.) § 320, pp. 329-336; and Mr. Freeman's note to Kanaga v. Taylor, 70 Amer. Dec. 62, 7 Ohio St. 134. It is unnecessary to quote further from the decisions. The quotations already made show the grounds and reasons of the rule.

The law has been held differently in Illinois, and very nearly in conformity with the English decisions under the operation of the bankrupt law. The doctrine of the supreme court of that state is that if a person agrees to sell to another a chattel on condition that the price shall be paid within a certain time, retaining the title in himself in the mean time, and delivers the chattel to the vendee so as to clothe him with the apparent ownership, a bona fide purchaser, or an execution creditor of the latter, is entitled to protection as against the claim of the original vendor. Brundage v. Camp, 21 Ill. 330; McCormick v. Hadden, 37 Ill. 370; Murch v. Wright, 46 Ill. 488; Michigan Cent. R. Co. v. Phillips, 60 Ill. 190; Lucas v. Campbell, 88 Ill. 447; Van Duzor v. Allen, 90 Ill. 499. Perhaps the statute of Illinois on the subject of chattel mortgages has influenced some of these decisions. This statute declares that "no mortgage, trust deed, or other conveyance of personal property having the effect of a mortgage or lien upon such property, is valid as against the rights and interests of any third person, unless the possession thereof be delivered to and remain with the grantee, or the instrument provide that the possession of the property may remain with the grantor, and the instrument be acknowledged and recorded." It has been supposed that this statute indicates a rule of public policy condemning secret liens and reservations of title on the part of vendors, and making void all agreements for such liens or reservations unless registered in the manner required for chattel mortgages. At all events, the doctrine above referred to has become a rule of property in Illinois, and we have felt bound to observe it as such.

In the case of Hervey v. Rhode Island Locomotive Works, 93 U. S. 664, where a Rhode Island company leased to certain Illinois railroad contractors a locomotive engine and tender at a certain rent, payable at stated times during the ensuing year, with an agreement that, if the rent was duly paid, the engine and tender should become the property of the lessees, and possession was delivered to them, this court, being satisfied that the transaction was a conditional sale, and that, by the law of Illinois, the reservation of title by the lessors was void as against third persons unless the agreement was recorded, (which it was not in proper time,) decided that a levy and sale of the property in Illinois, under a judgment against the lessees, were valid, and that the locomotive works could not reclaim it. Mr. Justice Davis, delivering the opinion of the court, said: "It was decided by this court in Green v. Van Buskirk, 5 Wall.

307, and 7 Wall. 139, that the liability of property to be sold under legal process issuing from the courts of the state where it is situated, must be determined by the law there, rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every state has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. * * * The policy of the law in Illinois will not permit the owner of personal property to sell it, either absolutely or conditionally, and still continue in possession of it. Possession is one of the strongest evidences of title to this class of property, and cannot be rightfully separated from the title, except in the manner pointed out by the statute. The courts of Illinois say that to suffer, without notice to the world, the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and in this way works an injury to third persons. Accordingly, the actual owner of personal property creating an interest in another to whom it is delivered, if desirous of preserving a lien on it, must comply with the provisions of the chattel mortgage act. Rev. St. Ill. 1874, 711, 712." The Illinois cases are then referred to by the learned justice to show the precise condition of the law of that state on the subject under consideration.

The case of Hervey v. Rhode Island Locomotive Works is relied on by the appellants in the present case as a decision in their favor; but this is not a correct conclusion, for it is apparent that the only points decided in that case were—First, that it was to be governed by the law of Illinois, the place where the property was situated; secondly, that by the law of Illinois the agreement for continuing the title of the property in the vendors after its delivery to the vendees, whereby the latter became the ostensible owners, was void as against third persons. This is all that was decided, and it does not aid the appellants, unless they can show that the law as held in Illinois, contrary to the great weight of authority in England and this country, is that which should govern the present case. And this we think they cannot do. We do not mean to say that the Illinois doctrine is not supported by some decisions in other states. There are such decisions; but they are few in number compared with those in which it is held that conditional sales are valid and lawful as well against third persons as against the parties to the contract.

The appellants, however, rely with much confidence on the decision of this court in Heryford v. Davis, 102 U. S. 235, a case coming from Missouri, where the law allows and sustains conditional sales. But we do not think that this case, any more than that of Hervey v. Rhode Island Locomotive Works, will be found to support their views. The whole question in Heryford v. Davis was as to the construction of the contract. This was in the form of

a lease, but it contained provisions so irreconcilable with the idea of its being really a lease, and so demonstrable that it was an absolute sale with a reservation of a mortgage lien, that the latter interpretation was given to it by the court. This interpretation rendered it obnoxious to the statute of Missouri requiring mortgages of personal property to be recorded in order to be valid as against third persons. It was conceded by the court, in the opinion delivered by Mr. Justice Strong, that if the agreement had really amounted to a lease, with an agreement for a conditional sale, the claim of the vendors would have been valid. The first two or three sentences of the opinion furnish a key to the whole effect of the decision. Mr. Justice Strong says: "The correct determination of this case depends altogether upon the construction that must be given to the contract between the Jackson & Sharp Company and the railroad company, against which the defendants below recovered their judgment and obtained their execution. If that contract was a mere lease of the cars to the railroad company, or if it was only a conditional sale, which did not pass the ownership until the condition should be performed, the property was not subject to levy and sale under execution at the suit of the defendant against the company. But if, on the other hand, the title passed by the contract, and what was reserved by the Jackson & Sharp Company was a lien or security for the payment of the price, or what is called sometimes a mortgage back to the vendors, the cars were subject to levy and sale as the property of the railroad company." The whole residue of the opinion is occupied with the discussion of the true construction of the contract; and, as we have stated, the conclusion was reached that it was not really a lease nor a conditional sale, but an absolute

sale, with the reservation of a lien or security for the payment of the price. This ended the case; for, thus interpreted, the instrument inured as a mortgage in favor of the vendors, and ought to have been recorded in order to protect them against third persons.

But whatever the law may be with regard to a bona fide purchaser from the vendee in a conditional sale, there is a circumstance in the present case which makes it clear of all difficulty. The appellant in the present case was not a bona fide purchaser without notice. The court below find that, at the time of and prior to the sale, he knew the purchase price of the property had not been paid, and that Russell & Co. claimed title thereto until such payment was made. Under such circumstances, it is almost the unanimous opinion of all the courts that he cannot hold the property as against the true owners; but as the rulings of this court have been, as we think, somewhat misunderstood, we have thought it proper to examine the subject with some care, and to state what we regard as the general rule of law where it is not affected by local statutes or local decisions to the contrary.

It is only necessary to add that there is nothing either in the statute or adjudged law of Idaho to prevent, in this case, the operation of the general rule, which we consider to be established by overwhelming authority, namely, that, in the absence of fraud, an agreement for a conditional sale is good and valid as well against third persons as against the parties to the transaction; and the further rule, that a bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement to sell was made, has been performed.

The judgment of the supreme court of the territory of Utah is affirmed.



HASTIE et al. v. COUTURIER et al.

(9 Exch. 102.)

Courts of Exchequer Chamber. June 25, 1853.

Error on a bill of exceptions, as allowed by the court of exchequer in the case of *Couturier v. Hastie*, 8 Exch. 40. The bill of exceptions set out the evidence, (a) and contained an allegation that the meaning of "free on board" is, that the goods are on board. The bill of exceptions also stated, that the lord chief baron, at the trial of the cause, ruled as follows: (b) "That the meaning and construction of the contract with A. Callender was, that A. Callender, as purchaser, was to take upon himself all risk, from the time of the shipment of the corn; that the purchaser bought the cargo, if it existed at the date of the contract; but that if it had been damaged or lost, he bought the benefit of the insurance, but no more; and that by selling the cargo the vendor undertook that the vendee should have it, if it existed, and that the vendor had not sold it before to another. And the lord chief baron then further ruled and directed the jury, that, if they believed the evidence, the sale of the cargo at Tunis by the agents of the defendants was not such a sale as to defeat the contract, and that it was rendered necessary in consequence of sea damage, and was made merely to prevent the loss being so great as it otherwise would necessarily have been."

Before COLERIDGE, MAULE, CRESSWELL, WIGHTMAN, WILLIAMS, TALFOURD, and CROMPTON, JJ.

Butt (Bovill with him), for plaintiffs in error, the defendants below. Cowling, for defendant in error.

COLERIDGE, J.—(After stating the pleadings and evidence his lordship proceeded:—) The case was originally tried before Martin, B., who, in directing the jury, ruled that the contract imported that, at the time of the sale, the corn was in existence as such, and capable of delivery, and a verdict was found for the defendants, the plaintiffs having leave to move to enter a verdict in their favour on all the issues except those on the fifth and sixth pleas, and on those pleas for judgment non obstante veredicto. The case was argued before the lord chief baron and Barons Parke and Alderson. The lord chief baron agreed in the opinion expressed by Martin, B., at nisi prius; but the other learned barons differed from him, and made the rule absolute; whereupon it was agreed that the question should be brought before this court on a bill of exceptions, as if the lord chief baron had directed the jury in conformity with the opinion of Barons Parke and Alderson. The case therefore comes before us without any great preponderance of authority in favour of the defendants in error. Nor do we find in the arguments of counsel, or in the judgment of the court below, any case referred to upon which that judgment was founded. It turned entirely on the meaning of the contract made between the parties, which was in

these terms: "Bought of Hastie & Hutchison a cargo of about 1180 quarters of Salonica Indian corn of fair average quality when shipped per the 'Kezia Page,' Captain Page, from Salonica, bill of lading dated the 22d of February, at 27s. per quarter, free on board, and including freight and insurance to a safe port in the United Kingdom, the vessel calling at Cork or Falmouth for orders, measure to be calculated as customary, payment at two months from this date, or in cash, less discount at the rate of 5 per cent. per annum for the unexpired time upon handling shipping documents." An attempt was made to explain this document by evidence, but failed. There is, indeed, an expression in the bill of exceptions, "that the meaning of free on board is, that the goods are on board," which, taken literally, may import that they are on board at the time when the words are used; but it was not contended for the plaintiffs in error that such is the true meaning. The case, therefore, is not affected by that statement, and the question depends upon the words of the contract, unexplained by any evidence.

For the plaintiffs in error it was contended, that the parties plainly contracted for the sale and purchase of goods, that the price to be paid was for goods, and that for the price the purchaser was to have the benefit of a contract to carry them and a policy of insurance; that a vendor of goods undertakes that they exist, and that they are capable of being transferred, although he may not stipulate for their condition; and that as the good in question had been sold and delivered to other parties before the contract in question was made, there was nothing on which it could operate: and *Barr v. Gibson*, 3 M. & W. 390, and *Strickland v. Turner*, 7 Exch. 208, were cited.

On the other hand it was argued, that this was not a mere contract for the sale of an ascertained cargo, but that the purchaser bought the adventure, and took upon himself all risks from the shipment of the cargo. It was said that the mention of the condition of the cargo at the time of shipment was a proof of the intention of the parties that the buyer should take all risks from that time; that its condition at the time of sale, or the fact of its existence, could not then be ascertained, and therefore the purchaser must be supposed to have taken the risks; that if it had existed, however much deteriorated, the purchaser must have taken it, although the loss had been all but total, and therefore there was no reason for excluding total loss from the risks that he was to bear; that if it had ceased to exist the consideration would not fail, for the purchaser would have the shipping documents. It was further argued that the stipulation for payment, which would probably have to be made before the arrival of the cargo, indicated an intention that the purchaser was in all events to pay for it, on account of the inconvenience that would ensue if he might have to reclaim the money back. It was not disputed that the cases of *Barr v. Gibson* and *Strickland v. Turner* were well decided.

It appears to us that the contract in question was for the sale of a cargo supposed to exist, and to be capable of transfer, and that, inasmuch as it had been sold and delivered to others by the captain before the contract in question was made, the plaintiffs cannot recover in this action. With regard to the description of the cargo as "of fair average quality when shipped," we think that, if those words had not been introduced, it must have been held that the purchaser of a cargo on a voyage would take upon himself the chance of what its condition at the time of purchase might be, and that this clause was introduced for his benefit, by enabling him to object, if the fact were so, that the cargo was bad when shipped. If, in *Barr v. Gibson*, there had been a stipulation that the ship, when she sailed on the voyage during which she was sold, was seaworthy, that would not have made the purchaser liable, if a total loss had occurred before the contract was entered into. It has been said, that if the loss had been all but total, if the cargo had become all but worthless, yet, if it existed in specie, the purchaser must unquestionably have been bound, and therefore there is no reason for holding that he was not also to take the risk of a total loss. The same argument would have applied in *Strickland v. Turner*. If the annuitant, at the time of the sale of the annuity, had been in extremis, and had died the next hour, the purchaser would have been bound and could not have recovered the purchase money, but was held to be so entitled, the annuitant having died before the sale. Again, it has been supposed that there is an inconsistency in saying that, if the cargo had sustained sea-damage, constituting an average loss covered by the policy,

it would pass to the purchaser so as to secure to him an indemnity, but would not pass in the event of a total loss. This seems to depend upon the same point, and not to be attended with any real difficulty.

If the contract for sale of the cargo was valid, the shipping documents would pass as accessories to it; but if, in consequence of the previous sale of the cargo, the contract failed as to the principal subject-matter of it, the shipping documents would not pass. Although we cannot find any decision in point, there is a case of *Sutherland v. Pratt*, 11 M. & W. 296, where this subject was mentioned. In that case, the plaintiff had bought goods on a voyage, and effected an insurance, lost or not lost. They had sustained sea damage before the sale, and the purchaser sued on the policy. The underwriters pleaded that the goods were damaged before the plaintiff had acquired any interest in them. On demurrer, it was held that the plea was bad; but the very learned counsel who argued for the plaintiff admitted, in answer to a question put by Parke, B., that if the goods had been totally lost before his contract of purchase was made, there would not have been an insurable interest, as a person cannot buy a thing that has been totally lost.

For these reasons, it appears to us that the basis of the contract in this case was the sale and purchase of goods, and that all the other terms in the bought note were dependent upon that, and that we cannot give to it the effect of a contract for goods lost or not lost. The consequence is, that the judgment of the court below must be reversed, and entered for the plaintiffs in error according to arrangement between the parties.

Judgment reversed.



HATCH v. BAYLEY.

(12 Cush. 27.)

Supreme Judicial Court of Massachusetts. Suffolk and Nantucket. Mar. Term, 1853.

In this action a verdict was returned for the plaintiff, and the defendant excepted to the rulings.

C. A. Welch, for plaintiff. E. Wright, for defendant.

SHAW, C. J. This is an action of replevin for twenty-three barrels of flour, and the single question is, whether it was the property of the plaintiff. It was attached by the defendant as the property of J. B. Hoogs. It appears by the case, that Hoogs, previously to his departure for Albany to purchase flour, promised the plaintiff, in consideration of a loan of his note to raise money upon, to sell the plaintiff two hundred barrels of his purchase, at prices fixed. At Albany, Hoogs purchased and put on board the railroad cars for Boston, one hundred barrels of one brand and twenty-three of another, to be forwarded to Boston, taking the usual receipt or way-bill, making the said flour deliverable to himself. The flour was forwarded, and Hoogs inclosed to the plaintiff a written order, making the flour deliverable to him. This the plaintiff notified to the agent of the railroad company, and at the same time paid the freight. The agent took the plaintiff's directions as to the mode and place of delivery; the agent marked the car containing it, and directed the car to be run on a side-track to a point near the plaintiff's warehouse, for the purpose of being there delivered; but the flour was not taken out of the car, nor had the car been actually removed. All this occurred before the attachment. There was no evidence of any bill of sale, or other conveyance of said flour, from Hoogs to the plaintiff.

The court, in reference to this evidence, which was not controverted, instructed the jury, that if they should find that the said car, containing said twenty-three barrels of flour, was, prior to said attachment, marked as aforesaid by the clerk of the corporation, in the presence of said plaintiff, who then gave the foregoing direction in regard to its marking and disposal, it was a sufficient delivery; and that it was not necessary that the corporation should open the car, separate the twenty-three barrels of flour from the rest of the merchandise, or run the said car on the side-track, or do any other act to complete the delivery.

These directions, we think, were correct. No bill of sale or other contract in writing was necessary to effect an actual sale and transfer of property; the verbal contract made by the said Hoogs, in Boston, to sell the plaintiff two hundred barrels of flour, though being an executory contract, could not be enforced by law, by reason of the statute of frauds, without writing, yet when it was actually executed, the property passed to the vendee.

Then, was it executed by a sufficient delivery? Putting the flour into the cars at Albany, was not a delivery, because

the way-bill made the flour deliverable to Hoogs himself. But the right to receive the property on arrival was assignable, and when Hoogs ordered it delivered to the plaintiff, and the company, by their authorized agent, acknowledged the plaintiff's right, took his directions as to the delivery, then marked the car containing it, with directions to the subordinates of the company so to deliver the merchandise, it was a good constructive delivery, pursuant to the agreement to sell, and vested the property in the vendee.

In general, that act, which changes the control and dominion of property, after an agreement for a sale, that which supercedes the power and control of the vendor and transfers it to the vendee, is a good delivery to pass the property; such as a delivery of the key of the warehouse, *Wilkes v. Ferris*, 5 Johns. 335; *Packard v. Dunsmore*, 11 Cush. 282; transfer of a warehouse-keeper's receipt, notified and assented to by the warehouse-keeper, *Taxworth v. Moore*, 9 Pick. 347; removal of a horse from vendor's sale-stable to his livery-stable, to keep for the vendee, *Elmore v. Stone*, 1 Taunt. 458; transfer of dock warrants for goods in the London dock warehouses, *Zwinger v. Samuda*, 7 Taunt. 265.

In all these cases, the ground is, that the same person who was the agent of the vendor to keep, becomes the agent of the vendee to keep; and the possession of the agent is the possession of the principal. *Gardner v. Howland*, 2 Pick. 599; *Gibson v. Stevens*, 8 How. 384.

And we think the judge was right in directing the jury as he did. What amounts to a delivery of goods sold, when the facts are found, is a question of law. The court left it to the jury upon the evidence, to decide whether the facts were true, and directed them hypothetically, that if such facts were true, they constituted a sufficient delivery. This was no encroachment on the province of the jury; it left them at liberty to weigh the evidence, to draw their own inferences, and decide on the facts; and the judge did what it was his province to do, directed them in matter of law, to enable them to return a general verdict.

Another ground of defence is, that the sale was fraudulent, in regard to which the court instructed the jury that it was necessary that the defendant should adduce stronger proof, to establish fraud, &c., than is necessary to prove a debt or a sale; that the presumption was, that every man conducted honestly without fraud; and when fraud was alleged, the proof must not only be sufficient to establish an innocent act, but to overcome the presumption of honesty. These were obviously general remarks, upon the nature of evidence in application to facts to be proved by it, and perhaps they are not stated with all the illustrations which accompanied them, or precisely as they were made.

As we understand them, the judge intended to say, that he who alleges fraud against another, is bound to prove it. That every man is presumed to act honestly until the contrary is proved; that he who charges another with an act involv-

ing moral turpitude or legal delinquency, must prove it; that as this is an allegation against a presumption of fact, it requires somewhat more evidence than if no such presumption existed. It carried no direction as to the amount of evidence required, or as to the nature of evidence, whether positive or circumstantial, but only that, on the whole, it must be somewhat stronger; and we cannot perceive that such a direction is incorrect. The ordinary direction to the jury is, that he

who charges fraud must prove it to the satisfaction of the jury. We think it not contrary to any rule or principle of law for the judge to inform the jury, that as the charge of fraud is a charge against a presumption of fact, perhaps often a slight one, yet the jury, in order to be satisfied, might require somewhat stronger evidence, than would suffice to prove the acknowledgment of an obligation, or the delivery of a chattel. 1 Greenl. Ev. § 380.
Exceptions overruled.

HAWES et al. v. WATSON et al.

(2 Barn. & C. 540.)

King's Bench. Jan. 28, 1824.

Trover for a quantity of tallow. Plea, not guilty.

At the trial before ABBOTT, C. J., at the London sittings after Michaelmas term, the following facts were proved for the plaintiffs. The plaintiffs on the 25th of September, 1823, purchased by contract, of Messrs. Moberly & Bell, 300 casks of tallow at 40s. per cwt. On the 27th of September, in part execution of their contract, Moberly & Bell sent to the plaintiffs the following transfer note, signed by the defendants, who were wharfingers:—

"Messrs. J. & B. Hawes.—We have this day transferred to your account (by virtue of an order from Messrs. Moberly & Bell), 100 casks tallow, ex Matilda, with charges from October 10, 1823. H. & M. 100 casks."

The plaintiffs then gave Moberly & Bell their acceptance for £2880, the price of the tallow, which was duly paid, and afterwards sold 21 casks of this tallow, which the defendants delivered, pursuant to their order. Moberly & Bell stopped payment on the 11th October, and on the 14th the defendants received notice from Raikes & Co., the original vendors of the tallow, not to deliver the remaining casks to Moberly & Bell, or their order; and the defendants in consequence, refused to deliver the remainder of the tallow to the plaintiffs, upon their demanding the same. On the part of the defendants it was proved, that Moberly & Bell, on the 26th September, had purchased of Raikes & Co. 100 casks of tallow (the same that were afterwards sold to the plaintiffs) landed out of the Matilda, lying at Watson's wharf, at £2 1s. per cwt. to be paid for in money, allowing 2½ per cent discount, and fourteen days for delivery; and on the same day Raikes & Co. gave a written order upon the defendants to weigh, deliver, transfer, or rehouse the tallow. Moberly & Bell had not paid for the same, nor had it been weighed subsequently to this order. Upon these facts it was contended at the trial, on the part of the defendants, that they were not bound to deliver to the plaintiffs the remaining seventy-nine casks of tallow, inasmuch as Raikes & Co. had, as between them and Moberly & Bell, a right to stop them in transitu, the delivery to Moberly & Bell not being perfect, inasmuch as the tallow had not been weighed. The Lord Chief Justice, however, was of opinion that whatever the question might be as between buyer and seller, the defendants having, by their note of the 27th of September, acknowledged that they held the tallow on account of the plaintiffs, could not now dispute their title; and the plaintiffs had a verdict.

The Attorney-General now moved for a new trial, upon the ground taken at the trial. *Hanson v. Meyer*,¹ is an authority to shew, that the absolute property in the tallow would not vest in Mober-

ly & Bell, the first vendee, until it was weighed. The contract in that case was in terms similar to the contract made between the original vendors and Moberly & Bell. The weighing must precede the delivery, in order that the price may be ascertained. In that case too, part of the goods had been weighed and delivered, yet it was held that the vendor might retain the remainder, which continued unweighed in his possession; and *Shepley v. Davis*² is also an authority to the same effect.

ABBOTT, C. J. The plaintiffs, in this case, paid their money upon the faith of the transfer note, signed by the defendants, by which they acknowledged that they held the tallow as their agents. If we were now to hold, that, notwithstanding that acknowledgment and that payment, the plaintiffs are not entitled to recover, we should enable the defendants to cause an innocent man to lose his money. To hold that the doctrine of stoppage in transitu applied to such a case as the present, would have the effect of putting an end to a very large portion of the commerce of the city of London.

BAYLEY, J. This appears to me very different from the ordinary case of vendor and vendee. In such cases, justice requires that the vendee shall not have the goods unless he pays the price. If he cannot pay the price, the vendor ought to have his goods back; but if the question arises, not between the original vendor and the original vendee, but between the original vendor and a purchaser from the vendee, that purchaser having paid the full price for the goods, what is the honesty and justice and equity of the case? Surely, that the vendee who has paid the price, shall be entitled to the possession of the goods. I am of opinion, that when Messrs. Raikes & Co. signed the order to transfer, weigh, and deliver, that, according to the settled course and usage of trade, enabled Moberly & Bell to sell the goods again. There are many cases in which it has been held, that if the first vendor does any thing which can be considered as sanctioning the sale by his vendee, that destroys all right of the former to stop in transitu. *Stoveld v. Hughes*,³ *Harman v. Anderson*.⁴

HOLROYD, J. I think that the note given by the defendants makes an end of the present question. When that note was given, the tallow became the property of the plaintiffs, and is to be considered from that time as kept by the defendants as the agents of the plaintiffs, and the latter were to be liable from the 10th October for all charges. This case is very different from that of *Hanson v. Meyer*. There, there was a sale of all the vendor's starch (the quantity not being ascertained) at 6l. per cwt. The order was to weigh and deliver all the vendor's starch, and a part having been weighed and de-

¹ 5 Taunt. 617.² 14 East. 308.³ 2 Camp. 243.⁴ 6 East. 614.

livered, but not the residue, the main question before the court was, whether the weighing and delivery of part did or did not in point of law operate as a transfer of the property as to the whole. The court held, rightly, that it did not, because there the price of the whole which was to be paid for by bills could not be ascertained before it was weighed. The delivery of part, therefore, was not a delivery of the whole, but the order was complied with only as to the part which was weighed and delivered, and the property in the residue remained unchanged until something further was done. It was not a delivery of part for the whole, and therefore it did not operate in law as a delivery of the whole so as to divest the vendor of his right to stop in transitu; but here, the wharfingers, upon the receipt of the order directing them to weigh and deliver, sent an acknowledgment that they, the wharfingers, had transferred the goods to the vendees, and that they would be considered as subject to charges from a certain period. I think, therefore, that the wharfinger then held the tallow as the goods of the plaintiffs and as their agents, although there was not any actual weighing of them; and that the plaintiffs were then in possession by the defendants as their agents, they having acknowledged themselves as such by their note. For these reasons I am of opinion that the plaintiffs are entitled to recover.

BEST, J. I am also of opinion that the acknowledgment which has been given in evidence puts an end to all question in this case. The very point has already been decided in the case of *Harmon v. Anderson*.⁵ There the wharfinger had transferred the goods to the name of the vendee and actually debited him with warehouse rent, but he having become insolvent the sellers gave notice to the wharfingers to retain the goods; and upon an action of trover being brought against the wharfingers by the assignees of the vendee, it was contended that the seller's right to stop in transitu continued; but Lord Ellenborough said: "That the goods having been transferred into the name of the purchaser, it would shake the best established principles, still to allow a stoppage in transitu. From that moment the defendants became trustees for the purchaser, and there was an executed delivery, as much as if the goods had been delivered into his own hands. The payment of rent in these cases is a circumstance to show on whose account the goods are held, but it is immaterial here; the transfer in the books being of itself decisive." In the ensuing term, the then attorney general (after Lord C. J. Gibbs) expressed his acquiescence in the decision

at nisi prius. In that case indeed, it does not appear that in order to ascertain the price, it was necessary to weigh the goods, but in a subsequent case of *Stonard v. Dunkin*,⁶ it was expressly held by Lord Ellenborough that a warehouseman, who on receiving an order from the seller of malt to hold it on account of the purchaser gave a written acknowledgment that he so held it could not set up as a defence for not delivering it to the purchaser, that by the usage of trade the property in malt sold was not transferred till it was remeasured and that before the malt in question was remeasured, the seller became bankrupt; and there Lord Ellenborough says: "Whatever the rule may be between the buyer and seller, it is clear the defendant cannot say to the plaintiff 'the malt is not yours' after acknowledging to hold it on his account. By so doing they attorned to him." It appears to me, too, that if we consider the principle upon which the right of stoppage in transitu is founded, it cannot extend to such a case as the present. The vendee has the legal right to the goods the moment the contract is executed, but there still exists in the vendor an equitable right to stop them in transitu, which he may exercise at any time before the goods get actually into the possession of the vendee, provided the exercise of that right does not interfere with the rights of third persons. Now, it appears to me impossible that it can be exercised in this case without disturbing the rights of third persons, for the property has not only been transferred to the purchaser in the books of the wharfingers, but there has been an acknowledgment by them that they hold it for the purchaser, who has paid the price of it. It has been said that there has been no change of property. If there has not, I do not see how there can be any until the tallow is actually melted down and converted into candles. If the argument on the part of the defendants be valid, the vendor, if he is not fully paid, has a right, if the goods are not weighed, to stop in transitu, even though they have passed through the hands of a hundred different purchasers and been paid for by all except the first. It appears to me that we should disturb an established principle if we held that this could be done in such a case as the present. I think the right of stoppage in transitu is an equitable right, to be exercised by the vendor only when it can be done without disturbing the rights of third persons.⁷ Here, that cannot be done, and therefore I think that *Raikes & Co.* had not any right to stop in transitu, and that the plaintiffs are therefore entitled to recover.

Rule discharged.

⁵ 2 Camp. 344.

⁷ See *Cuming v. Brown*, 9 East, 506.

⁶ 2 Camp. 243.

HENSCHIEL, Adm'r, etc., v. MAURER et al.
(34 N. W. Rep. 926, 69 Wis. 576.)

Supreme Court of Wisconsin. Nov. 1, 1887.

Appeal from circuit court, Sheboygan county.

The facts fully appear in the following statement by CASSODAY, J.:

This action was commenced February 17, 1886, for the foreclosure of a mortgage upon real estate executed January 2, 1877, by one Conrad Maurer, (since deceased,) and the defendant Marie Maurer, then his wife and now his widow, given to secure a promissory note of even date, executed by said Conrad, and both running and payable to the plaintiff's intestate, for \$1,200, two years from the date thereof, with interest at 8 per cent. The complaint is in the usual form, and alleged that said George died intestate, September 27, 1884, and that the plaintiff was appointed such administrator, March 5, 1885. The said widow and the minor heirs of said Conrad, by their guardian ad litem, by way of answer, in effect denied that the plaintiff was the owner and holder of said note and mortgage; denied that there was any sum due or payable thereon; and allege, upon information and belief, in effect, that September 22, 1884, and while said George was the owner and holder of said note and mortgage, and in his last sickness, in contemplation and expectation of death, he, the said George, executed and acknowledged a written discharge of said mortgage, in the presence of two witnesses, who subscribed their names thereto as such, and wherein the said George acknowledged satisfaction and payment in full of said mortgage, and thereby released the same, and all his right, title, and interest in and to the mortgaged premises, and thereby authorized the register of the county to enter such satisfaction of record; that September 26, 1884, in immediate contemplation and expectation of death, the said George delivered said satisfaction piece, together with said note and mortgage, and also certain other personal property and choses in action, to his uncle, one Fred Maurer, for delivery, and with direction to deliver said note and mortgage, and said satisfaction thereof, to said Conrad, as a gift and release of said note and mortgage; that at the same time said George delivered to said Fred a written order to the effect that he deliver, of the money and other personal property in his hands, \$25 to Mrs. Marie Henschel or order, and the balance to his said brother, Conrad, and Mrs. Adolph Henschel, as to his verbal order; that, upon the death of said George, and during the life of said Conrad, said Fred delivered to said Conrad said note, mortgage, and satisfaction piece, as so directed by said George.

At the close of the trial the court found, in effect, that the note and mortgage were executed, and payments made thereon, as stated in the complaint; that September 22, 1884, and while of sound and disposing mind and memory, but in extreme sickness and expectation of death, the said George made and executed said satisfac-

tion piece; that on the same day he delivered the same, together with said note and mortgage, to said Conrad, as and for a satisfaction of said mortgage, and subsequently, and on the same day, caused said note and mortgage, and satisfaction piece, to be placed with said Fred for final delivery after his death, without any condition or control over the same; that said note, mortgage, and satisfaction piece were subsequently, and prior to the commencement of this action, delivered to said Conrad by said Fred; that the making of said satisfaction piece, and the delivery of the same with said note and mortgage, were intended and made as a release and satisfaction of said mortgage, and the indebtedness thereby secured, and a gift causa mortis thereof to the said Conrad, who was brother to said George. As conclusions of law the court found, in effect, that said satisfaction constituted a good and valid gift causa mortis, and a release and discharge of said mortgage and indebtedness to the said Conrad; that the plaintiff, as administrator, had received no right to or interest in the mortgage; that the defendants were entitled to judgment dismissing the complaint, and adjudging said note and mortgage fully satisfied and discharged, and for costs and disbursements against the estate of said George; and judgment was ordered thereon accordingly. From such judgment so entered thereon the plaintiff brings this appeal.

Krez & Krez, for appellant. Seaman & Williams, for respondents.

CASSODAY, J., (after stating the facts as above.) The evidence is to the effect that September 22, 1884, the plaintiff's intestate at first requested one Charles Heins to draw his will, and to give all his property, except \$25 mentioned, to his brother, Conrad, and his sister, Mrs. Adolph Henschel; that, when informed that it would probably cost \$60 or \$70 in the probate court, he declined to make a will; that he then asked if such distribution could not be made in some other way, and was told by Heins that it could, and accordingly the satisfaction piece was drawn and executed, and then, with the note and mortgage, delivered, first to Conrad, then to the uncle, and subsequently to Conrad, as found, that at the same time he executed a deed of 160 acres of land in Marathon county to his sister, Mrs. Adolph Henschel, and delivered that to her; that he thereupon directed her to deliver the deed to his uncle, and she did so; that at the same time he gave to his uncle an order for the personal property, with directions to keep all the papers until he ascertained the value of the Marathon county lands, and then divide the personal property, so that his said brother and sister should each have one-half of all his property, except that he should give Mrs. Herman Henschel \$25; that in executing the papers he wrote his own name, and was at the time physically weak, but of sound mind, with no hope of recovery, but, perhaps, with an expectation of reclaiming the property if he did recover; and he died

five days thereafter. Upon these facts it is urged by counsel that the whole transaction, when taken together, was simply an attempt by the intestate to dispose of all his property by will, or to delegate to his uncle the power to do so upon his death, or both together.

There can be no question but what a person of sound mind, even in extremis, may make a partial as well as a total disposition of his property by will. The same is true in case of a gift as to any property which is the subject of gift. The mere fact that he attempts at the same time, and as a part of the same transaction, to dispose of the whole of his property, but for some cause the disposition is ineffectual as to a part of it, will not prevent its being effectual as to the other part. Here the matters of conveying the land to the sister, and the directions for disposing of the personal property, are not within the issues, and hence not before us for determination. No question of creditors or other claimants is involved. The only question presented is whether what was said and done by the intestate constituted a complete satisfaction and extinguishment of the note and mortgage. A mortgagee may undoubtedly, by way of gift to the mortgagor, completely satisfy the debt, and discharge the mortgage. *Moore v. Darton*, 4 De Gex & S. 517; *Lee v. Boak*, 11 Grat. 182; *Darland v. Taylor*, 52 Iowa, 503, 3 N. W. Rep. 510; *Carpenter v. Soule*, 88 N. Y. 251. Where a gift of personal property is made with intent to take effect immediately and irrevocably, and is fully executed by complete and unconditional delivery, it is certainly binding upon the donor as a gift *inter vivos*, even if the donor at the time is in extremis, and dies soon after. *Tate v. Leithead*, Kay, 658; *McCarty v. Kearnan*, 86 Ill. 292. But where such intent is not manifest, and the gift is otherwise made, under such circumstances it will ordinarily be regarded as a gift *causa mortis*. *Rhodes v. Childs*, 64 Pa. St. 23, 24; *Grymes*

v. Hone, 49 N. Y. 17. But even such a gift is not complete without delivery. *Id.*; *Wilcox v. Matteson*, 53 Wis. 23, 9 N. W. Rep. 814. *Brunn v. Schuett*, 59 Wis. 260, 18 N. W. Rep. 260. Such a gift may be defined as one made by the delivery of personal property by the donor in his last sickness, and in expectation of death then imminent, and upon condition that it shall belong to the donee if the donor dies, as anticipated, without revoking the gift, leaving the donee him surviving, and not otherwise. *Rhodes v. Childs*, *supra*; *Grymes v. Hone*, *supra*; *Ogilvie v. Ogilvie*, 1 Bradf. Surr. 356; 2 Quar. Law Rev. 446; 21 Amer. Law Rev. 734, and cases there cited. But even such a gift is defeated if the donor survive such sickness. *Staniland v. Willott*, 3 Macn. & G. 664. Here the intestate, as mortgagee, actually delivered the note, mortgage, and satisfaction to the mortgagor personally as a present. True, the intestate subsequently directed the mortgagor to deliver them to the uncle, as he directed Mrs. Adolph Henschel to deliver the deed she had received from him to the uncle. But this was apparently done in order that the uncle might the better ascertain the value of the land conveyed, and thus ascertain the difference in the value of the two gifts thus made, and then divide the personal property so as to make the gifts equal. Under such circumstances, and in view of the apparent absence of any hope of recovery, it would seem that the note, mortgage, and satisfaction may be regarded as so delivered to the mortgagor as an absolute gift in present. But even if there was an absence of such intent to make a then present and unconditional gift, yet as the delivery by the donor was complete, and he was at the time in his last sickness, and died soon thereafter, without revoking the gift, we must regard it as a valid and binding gift *causa mortis*.

The judgment of the circuit court is affirmed.



HIGGINS v. DELAWARE, L. & W. R. CO.

(60 N. Y. 553.)

Court of Appeals of New York. Feb. Term, 1875.

Appeal from order reversing judgment in favor of plaintiff and dismissing plaintiff's complaint.

Action to recover the value of one hundred tons of coal alleged to have been purchased by plaintiff of defendant, and which it refused to deliver.

On September 29, 1870, at a regular monthly auction sale of coal, held by defendant in New York, plaintiff bid off one hundred tons. The notice of sale stated that ninety thousand tons were to be sold, deliverable at the company's depot during the month of October, 1870, upon these terms, among others:

"Fifty cents per ton, in city bankable funds, to be deposited on the day of sale, as a security for the fulfillment of the contract by the purchaser, and the balance to be paid within ten days thereafter at the office of the company, when the order for the delivery of the coal will be given on their agent at Elizabethport. The coal to be taken away during the month of October, 1870. Should the purchaser fail to take it away within the month, the company may, at their option, at any time thereafter, discontinue further deliveries, and retain the fifty cents per ton deposited on the day of sale; or should the company elect so to do, they may resell the coal, either at public sale or otherwise, for account of such defaulting purchaser, who shall pay to the company any deficiency caused by the coal being sold at a price less than that agreed originally to be paid."

"The company may deliver at Hoboken, N. J., all or any portion of the coal now sold, and the purchaser shall accept the same as being delivered on the contract made by this sale, and shall pay therefor ten cents per ton in addition to the price agreed to be paid for the coal delivered at Elizabethport."

"Every effort will be made by the company for the fulfillment of its contracts for the delivery of coal; but if at any time the business of the company is so interrupted by storms, floods, breaks, accidents, combinations, turn-outs, strikes among miners or other employees, or by any other occurrence whatsoever, as to materially decrease the quantity of coal which the company would otherwise have been able to obtain and deliver during the month in which the coal now sold is deliverable, the company will not hold itself liable for or pay any damages sustained by reason of the non-delivery of the coal now sold, or of any portion thereof, although a portion of the coal that is received during said month may, in the usual course of the company's coal sales and business, be disposed of otherwise than in the fulfillment of the contracts made by this sale. Nor will the company, in case the coal now sold is not delivered, undertake a pro rata distribution among the respective purchasers of what is de-

livered; but in all cases of non-delivery from any of the above causes the money paid on coal will be promptly refunded."

Nelson Merrill, for appellant. Hamilton Odell, for respondent.

FOLGER, J. At the special term the judgment in this case was put upon the ground that the facts found in the findings, and some inferences therefrom made in the opinion, brought this case within the holdings in *Kimberly v. Patchin*, 19 N. Y. 330; 75 Am. Dec. 334, and *Russell v. Carrington*, 42 N. Y. 118, 1 Am. Rep. 498. The learned judge, in forming his opinion, having arrived at the conclusion that, as a matter of fact and inference, the sale was of a specified quantity of coal, to be taken from a specified general mass, indistinguishable in quality or value, and that it was the intention of the parties to pass the title to the amount sold, deemed the case within the principle of those authorities, and held that there was a complete sale to the plaintiff and a perfect title given to him.

At the general term the court was content with refuting, to its satisfaction, the theory upon which the special term had gone; and did not perceive in the findings nor in any inferences properly deducible therefrom, that the sale was from some certain or identified body of coal, either in bulk or included in any other mass then being anywhere in existence or capable of identification, and so it held that this case did not fall within the rule laid down in the cases above cited.

The special term did not notice, as a circumstance entitled to effect in the decision, and the general term, though alluding to it, laid no stress upon it, that by the terms of the sale to the plaintiff he was bound to take away the coal in the month of October. It is evident that this was a part of the terms of sale of some moment in the estimation of the defendants, for they based upon it, in the same terms of sale, important consequences. A failure of the buyer to take away all the coal bought, within the time specified, gave the defendants the right and power to refuse further delivery, and to forfeit the earnest money paid by the buyer, or to resell the coal on the buyer's account, and at his risk of loss. And we can readily perceive that it is essential to the successful prosecution of the business of the defendants, that they should not be compelled by the dilatoriness of their vendees to furnish, upon their docks at Elizabethport or Hoboken, space for the keeping into succeeding months, of the coal sold by them deliverable in a given month. Hence their stipulation in the terms of the sale appears, from a fair consideration of the language of it, and of the other parts of those terms and of the circumstances, to be of the essence of the contract, to have been really intended by the parties, and to have formed a condition precedent, to be observed and kept by the plaintiff if he wished to be able to retain his contract and to have it enforceable against the defendants. *Benj. Sales* (2d Ed.), 481. The finding is that the plain-

tiff demanded a delivery of the coal in February, 1871. There is a finding that he did not offer to take it away until then, and hence did not offer to in the month of October, 1870, as he was required to do to meet the condition precedent. There is lacking then a fact which should have been found to sustain the conclusion of law and the judgment. It is a fact which the proofs will not supply, for the evidence was that the defendants were ready and willing to make delivery of the coal in October and November, 1870.

It may not be well said, that though there is this condition precedent in the terms of sale, the defendants had prescribed the only remedies for themselves, in case the plaintiff did not keep the condition. It is true that options of the defendants were provided for; they could forfeit the earnest money paid; they could resell, on the plaintiff's account, and at his risk; they could discontinue future deliveries. But these were not all. There was also the legal right of every contracting party to hold himself absolved from his obligation when the other contracting party has failed to keep some condition precedent which he is bound to perform. Thus, in an agreement to exchange pieces of real estate on specified terms, and to deliver the deeds at a fixed date, "or forfeit the sum of \$500," it was held by this court that the party not in default might elect to sue for the amount named as a forfeit, or generally for his damages from a breach of the contract by the other party, and in the latter action was not limited to the sum named. *Noyes v. Phillips*, 60 N. Y. 498. It is there said that parties are not released from the performance of their contract by reason of the same contract containing a penalty for non-per-

formance. Here the options reserved to the defendants, of a forfeiture of the earnest money, etc., are in the nature of penalties for non-performance by the plaintiff, but the relations and rights of the contracting parties, so far as harmonious with the provisions of the contract reserving option, are to be determined by the legal principles applicable.

Nor do we think that this case falls within the principle of 19 N. Y. and 42 Id., supra. The findings of the special term do not set forth facts sufficient therefor. Nor are we able, from the evidence in the case, to make inferences which will supply the lack. There is not that in the testimony which proves or indicates that there was, either at Elizabethport or at Hoboken, at the time of the sale, a mass of ninety thousand tons of coal, undistinguishable in kind and quality and value from that contracted for of the defendants; or that at that time there was an ascertained body of coal at either of those places, all parts of which were of the same value, and undistinguishable from each other. Rather, it appears to us, that the terms of the contract and the circumstances of the case indicate, that the ninety thousand tons at that time offered for sale, had not yet reached either of the contemplated points of delivery, and were not yet gathered into one mass. Nor can we make the inference that it was the intention of the defendants to pass the title to the plaintiff before actual delivery of the quantity he contracted for. But we do not elaborate the reasons for these conclusions.

As a new trial would not afford opportunity to change any of the facts as now presented, we affirm the judgment to the general term.

All concur.



HIGGINS v. MURRAY.

(73 N. Y. 252.)

Court of Appeals of New York. 1878.

Action for work and materials. Defendant employed plaintiff to manufacture some circus tents, within a specified time, from material furnished by plaintiff. No place of delivery or price was specified. Defendant afterwards requested plaintiff, by letter, to ship the tents to him at Lewiston. He shipped them by steamboat, via Portland, C. O. D., and they were destroyed by fire on the way.

S. T. Freeman, for appellant. John W. Weed, for respondent.

CHURCH, C. J. The action is not strictly for the sale of the article manufactured, but for work, labor, and materials, performed and used in its manufacture (*Mixer v. Howarth*, 21 Pick. 205; 32 Am. Dec. 256); and hence is not within the statute of frauds. It is undisputed that the plaintiff performed his contract, and if the defendant had refused to take the tents, an action upon the agreement would have been sustained. *Crookshank v. Burrell*, 18 Johns. 58; 9 Am. Dec. 187. There is some confusion in the authorities as to when the title passes to the purchaser in such cases. In *Andrews v. Durant*, 11 N. Y. 35; 62 Am. Dec. 55, Denio, J., lays down the rule, that in such a case "the title does not pass until the article is finished and delivered, or at least ready for delivery, and approved by such party;" and there are other authorities to the same effect. *Gripen v. N. Y. C. R. Co.*, 40 N. Y. 36; *Comfort v. Kierstedt*, 26 Barb. 473.

It is urged in this case that the title did not pass, for two reasons: First. Because there was no acceptance; and, second. Because the plaintiff shipped the property C. O. D., thereby refusing to deliver until the value was paid. This last ground was sustained in *Baker v. Bourleault*, 1 Daly, 24, where certain cards were ordered to be sent to New Orleans, and were sent C. O. D., and lost at sea.

The important question to determine is when the liability of the defendant attached. If the article had burned during the progress of construction, it is clear that no action would lie, for the reason that the contract was an entirety, and until performed, no liability would exist. And this rule I apprehend would apply when the contract is to make and deliver at a particular place, and loss ensues before delivery at the place, and for the same reason. But when the contract is fully performed, both as it respects the character of the article, and the delivery at the place agreed upon or implied, and the defendant is notified, or if a specified time is fixed, and the contract is performed within that time, upon general principles I am unable to perceive why the party making such a contract is not liable. One person agrees to manufacture a wagon for another in thirty days for \$100, and the other agrees to pay for it.

The mechanic performs his contract. Is he not entitled to enforce the obligation against the other party, and if after such performance the wagon is destroyed without the fault of the mechanic, is the undischarged liability canceled? It does not depend upon where the technical title is, as in the sale of goods. It was upon this principle substantially that *Adlard v. Booth*, 7 Car. & P. 108, was decided. The question was submitted to the jury whether the work of printing books was completed before the fire. Suppose in this case that the defendant had refused to accept a delivery of the tent, his liability would have been the same, although the title was not in him. The plaintiff had a lien upon the article for the value of his labor and materials, which was good as long as he retained possession. This was in the nature of a pledge or mortgage. Retaining the lien was not inconsistent with his right to enforce the liability for which this action was brought. That liability was complete when the request to ship was made by the defendant, and was not affected by complying with the request, nor by retaining the lien the same as when the request was made. As the article was shipped at the request of and for the benefit of the defendant (assuming that it was done in accordance with the directions), it follows that it was at his risk, and could not impair the right of the plaintiff to recover for the amount due him upon the performance of his contract.

If the plaintiff had agreed to deliver the tent in Lewiston as a part of the contract for its manufacture, he could not have recovered any thing; but this was not a part of the contract. Suppose the tent had reached Lewiston in good order and the defendant had refused to accept or receive it, his liability would be clear and complete. As before stated, the point as to who had the title is not decisive. It may be admitted that the plaintiff retained the title as security for the debt, and yet the defendant was liable for the debt in a proper personal action. This is a case of misfortune where one of the parties without fault must incur loss, and it seems to me very clear that the legal right is with the plaintiff. A point is made that the property was not properly shipped. It was directed to the defendant at Lewiston, and was forwarded to Portland on a steamer running to that place. It does not appear but that was the usual mode of shipment to Lewiston, and the deviation would impose the obligation upon the consignee at the latter place to forward the property by a connecting carrier. We cannot presume that there was no connecting route, and if we could, it is difficult to see what else the plaintiff could have done. At all events it does not appear that the loss was occasioned by the defendant's negligence or fault in not properly shipping the goods.

The judgment must be affirmed.

All concur except ALLEN and MILLER, JJ., absent.
Judgment affirmed.

HILLESTAD et al. v. HOSTETTER et al.

(49 N. W. Rep. 192, 46 Minn. 393.)

Supreme Court of Minnesota. June 30, 1891.

Appeal from district court, Polk county;
MILLS, Judge.A. C. Wilkinson, for appellants. H.
Steenerson and W. H. Averill, for respondents.

VANDERBURGH, J. The plaintiffs sue to recover for a bill of goods sold and delivered to the defendants and to Carver Bros., lumbermen, at the request and by the order of the defendants. The account, as rendered, is admitted by the pleadings to be correct, except as to an alleged excess of \$9.25 in the account with Carver Bros. The only issue in the case litigated was whether the goods were furnished under an agreement that they were to be paid for by the defendants in lumber. The defendants allege that such was the agreement, and the plaintiffs deny it. The parties live in the same town, the plaintiffs being dealers in general merchandise, and the defendants engaged in selling lumber. The defendants' evidence tends to prove that in December, 1888, they and the Carvers were trading with another merchant, and that at the request of the plaintiffs he made an arrangement with them to deal with them, and "take goods for lumber," and "that, at plaintiffs' request, Carvers Bros., who were lumbering for defendants, were also induced to get their supplies of plaintiffs, to be paid for in the same way. There was no error in allowing the defendants to show that this change was made, and that the latter requested the Carvers to trade with plaintiffs on their account. This was an item of evidence confirmatory of the defendants' claim as to the nature of the agreement. One of the Carvers (O. F. Carver) sworn for the defendants testified that there was some trouble with plaintiffs about their orders, and that one of the plaintiffs explained to him that the reason was that the pass-book was not presented, but said "that it was all right," he "had made a trade with Hostetter," and "should need a considerable lumber in the spring." The witness also testified that he told him in the same conversation what Hostetter had said "that he had made a trade with him to get goods there, and that he was going to take lumber." O. P. Carver also testified that he changed his trade to plaintiff at Hostetter's request. He was then asked by defendants' counsel to state what that request was. This question the witness was allowed to answer, over the objection of plaintiffs' counsel, and in his answer he stated "that Hostetter wanted him to trade with plaintiffs, because he had arranged with them to take lumber, and he was to take groceries. We think it was error to allow the witness to testify as to the terms or particulars of the request. It was immaterial and hearsay. It was sufficient that he was in the employ of the defendants,

and that he went there to trade at their request. At the close of this witness' evidence the plaintiffs' counsel moved to strike out all his evidence. The court announced that he would reserve his decision for the time, but soon after, and before plaintiffs introduced their testimony in rebuttal, stated that the objectionable testimony above referred to was stricken out. And subsequently, in its charge to the jury, the court expressly so advised the jury, distinctly calling their attention to the fact and withdrawing the evidence from their consideration. The objectionable portion of the answer was not strictly responsive to the question, and should have been stricken out immediately, in which case there would have been no error to complain of. But we think the intervening delay was so short that the action of the court in striking it out, together with the charge on the subject, was sufficient to counteract any impression which might have been made on the minds of the jury by this item of evidence, particularly in view of the rest of the defendants' evidence on the subject. After plaintiffs' account was rendered to the defendants, in the spring of 1889, the latter, on or about June 1st, by their attorney, sent them written notice that they were ready to deliver the lumber according to agreement, and awaited their order. This was objected to by the plaintiffs, but was received by the court for the purpose of showing that the defendants were ready and willing to perform the contract. We find no exception in the record to this ruling. The court instructed the jury that they could only consider it for the purpose mentioned; and we think there was no error in submitting the evidence to the jury. The time for the delivery of the lumber and the prices are not specified in the agreement testified to by the defendants. It was sufficient that they were ready and willing to furnish it when called for. They had a lumber-yard amply stocked, and it was the plaintiffs' duty to apply for and select the lumber in payment of the amount of their claim; and they would be entitled to it at the current market rates. Bush. Cont. § 1436; Reede v. Proehl, 34 Minn. 498, 27 N. W. Rep. 191. The court also, in the same connection, stated to the jury, in substance, that there was some dispute as to the effect of the letter in connection with defendants' testimony, but they might consider it for what it was worth, or "as far as it went, with the rest of the case." This does not appear to be error from anything disclosed by the record, and it is not specifically excepted to. The plaintiffs excepted generally to that portion of the charge "in regard to the way or manner in which they might consider the letter." This includes all that was said on the subject, and the exception is ineffectual if any part of the instruction excepted to is proper, which, as we have seen, is the case here. We have very carefully examined the entire record, and find no errors warranting a new trial. Order affirmed.

HINCHMAN v. LINCOLN.

(S Sup. Ct. Rep. 369, 124 U. S. 38.)

Supreme Court of the United States. Jan.
9, 1888.

In error to the circuit court of the United States for the southern district of New York.

Theo. F. H. Meyer and Wayne McVeagh, (A. H. Wintersteen, on the brief,) for plaintiff in error. Augustus C. Brown, for defendant in error.

MATTHEWS, J. This is an action at law brought by Rufus P. Lincoln, a citizen of New York, against Charles S. Hinchman, a citizen of Pennsylvania, to recover \$18,000 as the agreed price and value of certain securities, stocks, and bonds alleged to have been sold and delivered by the plaintiff to the defendant. The sale is alleged to have taken place on July 8, 1882. It is set forth in the complaint that the plaintiff acquired title to the securities in question by purchase of one John R. Bothwell, subject to any claim Wells, Fargo & Co. had upon the same for advances made by them to or for the account of the said Bothwell; "that thereafter this plaintiff paid to Wells, Fargo & Company the amount of their said advances, and took possession of said securities, stocks, and bonds; but stated to the above-named defendant that he was willing and would pay over to the Stormont Silver Mining Company, which company was a large creditor of the said Bothwell, and in which company said defendant was very largely interested, any surplus which he derived in any way from said securities, stocks, and bonds, after having reimbursed himself in the sum of about \$26,000 and interest for advances theretofore made by him to and for the account of the said Bothwell." The answer denied the alleged sale and delivery. The action was tried in the circuit court of the United States for the Southern district of New York by a jury. There was a verdict in favor of the plaintiff, on which judgment was rendered, to reverse which this writ of error is prosecuted. A bill of exceptions sets out all the evidence in the cause, together with the charge of the court, and the exceptions taken to its rulings. At the close of the testimony, defendant's counsel, among other things, requested the court to charge the jury "that there is no evidence in the case of a completed sale of the securities to the defendant; and the plaintiff, therefore, cannot recover." This request was refused, and an exception taken by the defendant. This raises the general question whether there was sufficient evidence in support of the plaintiff's case to justify the court in submitting it to the jury. The defense rested upon two propositions: (1) That there was no evidence of any agreement between the parties for a sale and purchase; and (2) that, if there were, the agreement was not in writing, and there had been no receipt and acceptance of the subject of the sale, or any part thereof, by the defendant; and that consequently the agreement was within the prohibition of the statute of frauds in New York.

In regard to the first branch of the defense, we think there was sufficient evidence of a verbal agreement between the parties for the sale of the securities at the price named. It appeared in evidence that the plaintiff, having acquired title and possession to the securities previously belonging to Bothwell by paying off the advances due to Wells, Fargo & Co., agreed with the defendant, as representing the Stormont Silver Mining Company, to give to that company and other creditors of Clark and Bothwell the benefit of any surplus there might be after the payment of the amount due to the plaintiff. There is evidence tending to show that thereupon, a suggestion having been made that the defendant should purchase the securities from the plaintiff, it was agreed between them that the plaintiff would sell and the defendant would take them at the price of \$18,000, and the next day at 3 o'clock was appointed as the time for delivery. By way of explanation, and as having a bearing upon other items of evidence in the cause, it is proper to say that the defendant's testimony in denial of the fact of the agreement tends to the point that the proposed purchase by him was not in his individual capacity, but as the representative of the Stormont Silver Mining Company, of which he was one of the trustees, and was made conditional on his procuring the assent thereto of the other trustees. We assume, however, in the further consideration of the case, that the jury were warranted in finding the fact of a verbal agreement of sale as alleged by the plaintiff. The question as thus narrowed is whether there was sufficient evidence to submit to the jury, of a receipt and acceptance by the defendant of the securities sold.

It appears that on July 8, 1882, in pursuance of the appointment made the day previously, the plaintiff handed the securities in question, at the office of the Stormont Silver Mining Company in New York, to Schuyler Van Rensselaer, who was the treasurer of that company, and took from him the following receipt:

"Office of Stormont Silver Mining Company, No. 2 Nassau, Cor. of Wall Street.

"New York, July 8, 1882

"President, William S. Clark,

"Secretary, John R. Bothwell.

"Received of Dr. Rufus P. Lincoln the following certificates of stock on behalf of C. S. Hinchman, and to be delivered to him when he fulfills his contract with Dr. Lincoln to purchase said stocks for \$18,000 for—

28,100	shares Stormont Silver M'g Co.
24,300	" San Bruno Copper M'g Co.
800	" Eagle Silver M'g Co.
500	" Hite Gold Quartz M'g Co.
1,819	" Starr Grove Silver M'g Co.
1,410	" Menlo Gold Quartz Co. & order on Wells, Fargo & Co. for 45,000 shares Quartz Co.
600	" Satemo Gold Quartz Co.
100	" N. Y. & Sea Beach R. R. Co.

Also \$9,500 in first mortgage bonds of the Pattle M'n. & Lewis R. R. Co.

"Schuyler Van Rensselaer,

"Witness: M. W. Tyler."

The defendant was not present. The receipt, signed by Van Rensselaer, and which he gave to the plaintiff, was witnessed by M. W. Tyler, the plaintiff's attorney, and had been prepared by him. The securities mentioned therein are the same with those described in the complaint. For the purpose of proving the authority of Van Rensselaer to receive and receipt for the securities, some correspondence between the parties was put in evidence by the plaintiff, the material parts of which are as follows: On July 21, 1882, Tyler, as attorney for the plaintiff, wrote to the defendant as follows: "I was much disappointed in receiving your letter this afternoon, postponing your appointment with me in re Lincoln negotiation. When Dr. Lincoln accepted your offer of \$18,000 for his position in reference to the Bothwell securities, he did so unqualifiedly, without even suggesting a modification of your offer, in the hope that in this way he would expedite a conclusion of the matter, and believing that nothing was open except the delivery of the securities, and the receipt of the price. This was on July 7th. On July 8th, learning from Mr. Van Rensselaer that you had left word with him to receive the securities, Dr. L. called on Mr. Van R., and left with him the securities just as he received them. Now, under these circumstances, Dr. L. feels as if there was nothing left to be done except the payment of the money, and that ought not to take very long. Now, I will do anything to accommodate you in this matter in the way of an appointment. If it is inconvenient for you to see me in New York, if you will appoint an early day, I will meet you in Philadelphia. If you desire anything in particular should be signed or done by Dr. Lincoln in addition to what he has done already in delivering the securities to Mr. Van R., if you will write me what you request, I will prepare it and take it on with me for delivery to you." On the same day the plaintiff wrote to the defendant as follows: "Agreeable to a note from Col. Tyler, I went down town this P. M. to meet you as per appointment, and receive payment for Stormont and other stocks in accordance with your offer. I was especially disappointed, for I had promised to apply this money this week to cancel that which I borrowed when I took up the stock. I hope nothing will prevent your carrying out our arrangement by Monday or Tuesday at the furthest, and I will esteem it a favor if, on receipt of this, you will telegraph me when I shall receive a check for the amount of the consideration." In answer to this, the defendant wrote to the plaintiff from Philadelphia, July 22, 1882, as follows: "Dear Sir: Your favor of the 21st, as well as Mr. Tyler's, duly received. I did not understand that the negotiation between us was finally concluded, but, as I explained to Mr. Tyler, there were some other questions which would have to be settled before I could act in the matter, on account of my being a trustee. I told Mr. Van Rensselaer that he could receive the Stormont stock held by you for joint account of yourself and Stormont, without requiring you to

advance any more money, and that I would arrange with you about it; and he, knowing that I was in negotiation with you, took charge of the whole as handed to him by Mr. Tyler, your counsel. There are several questions which come up in regard to it, and I cannot give you any definite reply until I have conferred with counsel and my co-trustees on the subject. My advice to you is to exchange the Stormont stock for receipts, as a majority have already done, on receipt of this; and if you do so, and not convenient for you to advance the contribution for additional stock, I will see that it is carried until we have an opportunity to fix up the whole matter."

It is further in evidence that a short time after the date of Van Rensselaer's receipt, it was seen by the defendant, but he said or did nothing to repudiate it. Tyler also testifies that on July 20, 1882, he met the defendant, and had this conversation with him: "I said to Mr. Hinchman that I had been looking for him for several days, and that I supposed he knew we had delivered the securities—the Bothwell securities—to Mr. Van Rensselaer, as he had directed; and he said, 'Yes, that was all right;' and I said, 'Well, now, when will you be able to close this matter?' 'Well,' he says, 'I am in a great hurry this morning, but I will come to your office certainly this afternoon or tomorrow afternoon, at three o'clock. You can rely upon my coming and seeing you upon one or the other of those days.'" The plaintiff also testified that he had an accidental meeting with the defendant at Long Beach about the first of August, 1882. The defendant was in company with his attorney, Mr. Meyer. The interview is stated by the plaintiff as a witness as follows: "I spoke to him. I do not know that he recognized me, for I was not well acquainted with him before, and he introduced me to Mr. Meyer, and he said, 'This is Dr. Lincoln, from whom I have the Bothwell securities;' and we had some conversation about it, but nothing very definite, although there came up during the conversation a statement that there was some controversy about it. I don't know whether I made the statement, or Mr. Meyer, or Mr. Hinchman. I remarked that there might be some difference—had heard something about some difference—of opinion about it, but that I had none; and I told Mr. Meyer that the idea of turning them over to the Stormont Company was an afterthought of Mr. Hinchman; that I conceded nothing of the kind. I never had." The following letter also is in evidence:

"Office of Stormont Mining Company of Utah, No. 2 Nassau, Cor. of Wall St.

"President, Charles S. Hinchman.

"Secretary and Treasurer, Schuyler Van Rensselaer.

"New York, August 24, 1882.

"Schuyler Van Rensselaer, Esq., Sec'y and Treas. Stormont S. M. Co., No. 2 Nassau St., N. Y.—Dear Sir: Dr. Lincoln, through his attorney, Col. M. W. Tyler, having seen fit to disavow the understanding and agreement by which he obtained

'his position' in carrying the J. R. Bothwell securities in your hands left there by Col. Tyler, after conference with a majority of our trustees, I am instructed to notify you to retain possession of said securities until a court of competent jurisdiction shall direct you what to do with them; I claiming, as trustee, for the benefit of Stormont treasury, an equitable and bona fide interest therein. Please acknowledge safe receipt.

"Yours, truly, Chas. S. Hinchman,
"Presd. and Trustee S. S. M. Co."

There was some other correspondence between the parties not material to the present point, but nothing further was done until November 16, 1882, when a written demand was made by the plaintiff upon Van Rensselaer for the return of the securities. This demand was read in evidence on the part of the plaintiff. The following is a copy of it:

"To Schuyler Van Rensselaer: As Mr. Charles S. Hinchman refuses to fulfill his contract with Dr. Lincoln to purchase certain securities delivered to you on the eighth day of July, 1882, for Mr. Hinchman, I hereby demand the immediate return of the securities to me, to-wit, certificates for—

28,400	shares of the Stormont Co.'s stock, or its equivalent.
24,300	" " San Bruno Mining Co.'s stock.
800	" " Eagle Silver Mining Co.'s stock.
500	" " Hite Gold Quartz Mining Co.'s stock.
1,819	" " Star Grove Silver Mining Co.'s stock.
46,410	" " Menlo Gold Quartz Co.'s stock.
690	" " Satemo Gold Quartz Co.'s stock.
100	" " N. Y. & Sea Beach R. Co.'s stock.

\$9,500 in first mortgage bonds of the Battle Mountain & Lewis R. R. Co.

"Dated New York, November 16, 1882.

"Yours, etc., Rufus P. Lincoln.
"By M. W. Tyler, Atty."

The reply to it by Van Rensselaer, as proven, is as follows:

"New York, November 20, 1882.

"Dr. R. P. Lincoln—Sir: In answer to the demand made upon me through Mr. M. W. Tyler, I beg to say that I hold the securities mentioned therein on behalf of yourself and Mr. C. S. Hinchman, and I have no interest in or claim upon them personally. I have been notified by Mr. Hinchman not to deliver them to you, and for that reason shall not be able to accede to your demand. Any arrangement agreed to by yourself and Mr. Hinchman shall have my prompt acquiescence.

"I am, etc., S. Van Rensselaer.
"Per Nash & Kingsford, His Attys."

Nothing further occurred until the bringing of this suit on November 25, 1882. It is conceded by the counsel for the plaintiff that the delivery of the securities in question by the plaintiff to Van Rensselaer was according to the terms of the

receipt taken from him at the time, and of itself was not sufficient evidence of a receipt and acceptance by the defendant to satisfy the statute of frauds. The jury were so instructed by the court. In speaking of it in his charge, the judge said, "You will recollect that it recites that the property was to be delivered to Mr. Hinchman (I will simply state the language in substance) 'when he had performed his contract with Mr. Lincoln;' in other words, it attached a condition. If you find upon the evidence that that was all there was of this transaction, I think it my duty to say, as matter of law, that there was not such delivery as would take the case out of the statute, because, if that were true, if he simply delivered the stock to Mr. Van Rensselaer, to be delivered to Mr. Hinchman, upon the payment of the sum by Mr. Hinchman, it would not be a receipt and acceptance by him; the possession would not be in him; he could exercise no dominion over it until he had performed the act which it was necessary for him to perform in order to obtain the title. To put it more plainly, perhaps the plaintiff would have in that event made Mr. Van Rensselaer his agent, as well as the agent of the defendant." The position of the plaintiff's counsel on this part of the case is stated by him in a printed brief, as follows: "That receipt was put in evidence, not as conclusive of a delivery to Hinchman, but as a fact to be taken into consideration, after the jury had determined the question of defendant's capacity, in connection with his admission that he had given Van Rensselaer some authority in the premises; his admission to Tyler, after he saw the receipt, that the delivery to Van Rensselaer was 'all right;' his admission at Long Beach that he had the securities, and his direction to Van Rensselaer, on August 24th, not to surrender any of the securities. If the jury should find, as it actually did find, that Hinchman was acting in his individual capacity, and that his claim of a representative capacity, first intimated in his letter of July 22d, was an afterthought and false, then the authority given by him to Van Rensselaer was not the limited authority he said it was, and in view of the admission to Tyler that the delivery was 'all right,' the admission at Long Beach of possession, and the subsequent assertion of dominion over the securities, it was a fair inference for the jury that Van Rensselaer's authority was a general one to receive the securities for Hinchman. If the jury should so find, then, under the terms of the receipt, the delivery to Van Rensselaer was a delivery to Hinchman, and an acceptance by him, sufficient to satisfy the statute; for nothing remained but for him to pay the purchase price."

In dealing with the question arising on this record, we keep in view the general rule that it is a question for the jury whether, under all the circumstances, the acts which the buyer does or forbears to do amount to a receipt and acceptance, within the terms of the statute of frauds. *Bushel v. Wheeler*, 15 Q. B. 442; *Morton v. Tibbett*, Id. 428; *Borrowdale v. Bos-*

worth, 99 Mass. 381; *Wartman v. Breed*, 117 Mass. 18. But where the facts in relation to a contract of sale alleged to be within the statute of frauds are not in dispute, it belongs to the court to determine their legal effect. *Shepherd v. Pressey*, 32 N. H. 56. And so it is for the court to withhold the facts from the jury when they are not such as can in law warrant finding an acceptance; and this includes cases where, though the court might admit that there was a scintilla of evidence tending to show an acceptance, they would still feel bound to set aside a verdict finding an acceptance on that evidence. *Browne, St. Frauds*, § 321; *Denny v. Williams*, 5 Allen, 5; *Howard v. Borden*, 13 Allen, 299; *Pinkham v. Mattox*, 53 N. H. 604.

In order to take the contract out of the operation of the statute, it was said by the New York court of appeals, in *Marsh v. Rouse*, 44 N. Y. 643, that there must be "acts of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer as absolute owner, discharged of all lien for the price." This is adopted in the text of *Benj. Sales*, (*Bennett's 4th Amer. Ed.*) § 179, as the language of the decisions in America. In *Shindler v. Houston*, 1 N. Y. 261, 49 Amer. Dec. 316, *Gardiner, J.*, adopts the language of the court in *Phillips v. Bristol*, 2 Barn. & C. 511, "that, to satisfy the statute, there must be a delivery by the vendor, with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter, with the intent of taking possession as owner;" and adds: "This, I apprehend, is the correct rule, and it is obvious that it can only be satisfied by something done subsequent to the sale unequivocally indicating the mutual intentions of the parties. Mere words are not sufficient. *Bailey v. Ogden*, 3 Johns. 421. * * * In a word, the statute of fraudulent conveyances and contracts pronounces these agreements, when made, void, unless the buyer should 'accept and receive some part of the goods.' The language is unequivocal, and demands the action of both parties, for acceptance implies delivery, and there can be no complete delivery without acceptance." In the same case, *Wright, J.*, said: "The acts of the parties must be of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer. This is the doctrine of those cases that have carried the principle of constructive delivery to the utmost limit. * * * Where the acts of the buyer are equivocal, and do not lead irresistibly to the conclusion that there has been a transfer and acceptance of the possession, the cases qualify the inferences to be drawn from them, and hold the contract to be within the statute. * * * I think I may affirm with safety that the doctrine is now clearly settled that there must not only be a delivery by the seller, but an ultimate acceptance of the possession of the goods by the buyer, and that this delivery and acceptance can only be evinced by unequivocal acts independent of the proof

of the contract." This case is regarded as a leading authority on the subject in the state of New York, and has been uniformly followed there, and is recognized and supported by the decisions of the highest courts in many other states, as will appear from the note to the case as reported in 49 Amer. Dec. 316, where a large number of them are collected. So, in *Remick v. Sandford*, 120 Mass. 309, 316, it was said by *Devens, J.*, speaking of the distinction between an acceptance which would satisfy the statute, and an acceptance which would show that the goods corresponded with the warranty of the contract, that, "if the buyer accepts the goods as those which he purchased, he may afterwards reject them if they were not what they were warranted to be; but the statute is satisfied. But while such an acceptance satisfies the statute, in order to have that effect, it must be by some unequivocal act done on the part of the buyer with intent to take possession of the goods as owner. The sale must be perfected; and this is to be shown, not by proof of a change of possession only, but of such change with such intent. When it is thus definitely established that the relation of vendor and vendee exists, written evidence of the contract is dispensed with; although the buyer, when the sale is with warranty, may still retain his right to reject the goods if they do not correspond with the warranty. * * * That there has been an acceptance of this character, or that the buyer has conducted himself in regard to the goods as owner * * * is to be proved by the party setting up the contract."

Mr. Benjamin, in his treatise on *Sales*, § 187, says: "It will already have been perceived that in many of the cases the test for determining whether there has been an actual receipt by the purchaser has been to inquire whether the vendor has lost his lien. Receipt implies delivery, and it is plain that, so long as vendor has not delivered, there can be no actual receipt by vendee. The subject was placed in a very clear light by *Holroyd, J.*, in the decision in *Baldev v. Parker*, 2 Barn. & C. 37: 'Upon a sale of specific goods for a specific price by parting with the possession, the seller parts with his lien. The statute contemplates such a parting with the possession, and therefore, as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute.' No exception is known in the whole series of decisions to the proposition here announced, and it is safe to assume as a general rule that, whenever no fact has been proven showing an abandonment by the vendor of his lien, no actual receipt by the purchaser has taken place. This has been as strongly insisted upon in the latest as in the earliest cases. The principal decisions to this effect are referred to in the note." In accordance with this, the rule is stated in *Browne, St. Frauds*, § 317a, as follows: "Where, by the terms of the contract, the sale is to be for cash, or any other condition precedent to the buyer's

acquiring title in the goods he imposed, or the goods be at the time of the alleged receipt not fitted for delivery according to the contract, or anything remain to be done by the seller to perfect the delivery, such fact will be generally conclusive that there was no receipt by the buyer. There must be first a delivery by the seller, with intent to give possession of the goods to the buyer."

It is clear, and, as we have seen, is conceded, that the original delivery by the plaintiff to Van Rensselaer of the securities, according to the terms of the receipt taken at the time, was not a delivery to the defendant in the sense of the rule established by the authorities; and that consequently there was not, and could not have been, at that time, a receipt and acceptance of them by the defendant to satisfy the statute of frauds. How far can it be claimed that that inchoate and incomplete delivery was made perfect by any subsequent act or conduct of the parties? The first circumstance relied on by the plaintiff as material to that point is that, shortly after the receipt was given, the defendant was informed of it, and made no objection to it. But certainly this is insignificant; it added nothing to the transaction stated in the receipt that the defendant assented to it. That assent was simply that the securities had been delivered to Van Rensselaer, to be delivered to him when paid for. It did not alter the implied contract between Van Rensselaer and the plaintiff, arising upon the terms of the receipt, that the subject of the sale should not be delivered to the defendant until he had paid the agreed price. The next circumstance relied upon is the conversation testified to by Tyler as having taken place on July 20th between him and the defendant. In that conversation, Tyler testifies that he said to the defendant "that I supposed he knew we had delivered the securities—the Bothwell securities—to Van Rensselaer as he had directed; and he said, 'Yes, that was all right.'" Here, certainly, nothing was added to the transaction. Both these circumstances are also fully met by the well-established rule that mere words are not sufficient to constitute a delivery and acceptance which will take a verbal contract of sale out of the statute of frauds. *Shindler v. Houston*, *ubi supra*.

The next item of evidence in support of the plaintiff's contention is the conversation on August 1, 1882, at Long Beach, between the defendant and the plaintiff, in which the defendant, introducing Meyer to the plaintiff, said: "This is Doctor Lincoln, from whom I have the Bothwell securities." This declaration of the defendant is treated in the argument as an admission by him distinctly of the fact that he had at that time possession of the securities in question, which he could only have by a delivery from Van Rensselaer, either actual or constructive. This construction of the statement, however, in our opinion, is entirely inadmissible. The context plainly shows such not to have been its meaning, for, as appears by the testimony of the plaintiff relating it, the conversation immediately turned to the

controversy between the parties as to whether the defendant had been negotiating for the securities in his individual capacity, or as trustee for the Stormont Silver Mining Company. The expression testified to cannot fairly be extended beyond a casual reference to the transaction as it had taken place, and as it then stood upon the terms of the Van Rensselaer receipt. There is nothing whatever in the conversation to justify the inference that there had been a subsequent delivery by Van Rensselaer to the defendant, whereby the possession of the securities had been changed, or whereby the control and dominion over them had been given to the defendant by Van Rensselaer, contrary to the terms of his agreement with the plaintiff as contained in the receipt. And such was and must have been the understanding of the plaintiff himself, for subsequently, on the sixteenth of November, he made the written demand upon Van Rensselaer for the immediate return of the securities to him, on the ground that up to that time the defendant had refused to fulfill his contract for their purchase. This is certainly an unequivocal act on the part of the plaintiff entirely inconsistent with the assertion that there had been, prior to that time, any delivery by him or by his authority to the defendant of the subject of the alleged sale. Its legal effect goes beyond that; it was a distinct rescission of the contract of sale; it was a notice to Van Rensselaer not to deliver to the defendant thereafter, even if he should offer to complete the contract by payment of the consideration; it put an end, by its own terms, to the relation between the parties of vendor and vendee; it made it unlawful in Van Rensselaer thereafter to deal with the securities, except by a return of them to the plaintiff as their owner. The refusal of Van Rensselaer to comply with the terms of the demand subjected him to an immediate action by the plaintiff for their recovery specifically, if he could reach them by process, or otherwise, for damages for their conversion. This certainly is conclusive of the question of a prior delivery to the defendant, and a receipt and acceptance by him. *Taylor v. Wakefield*, 6 Bl. & Bl. 765; *Benj. Sales*, § 171.

To meet this view, however, the letter of the defendant to Van Rensselaer of August 24th is relied on as evidence of a receipt and acceptance by the defendant at that time, being, as it is argued, the exercise of control and dominion over the securities by the defendant as owner. That letter, it will be observed, is addressed to Van Rensselaer as secretary and treasurer of the Stormont Silver Mining Company by the defendant, signing himself president and trustee of the same. It declares that the plaintiff had seen fit to disavow the understanding and agreement by which, as claimed by the defendant, he had obtained control of the securities in question which had been left in Van Rensselaer's hands; that, after conference with a majority of the trustees of the company, he had been instructed to notify Van Rensselaer to retain possession of them until a court of competent

jurisdiction should direct him what to do with them; adding, "I claiming, as a trustee, for the benefit of Stormont treasury, an equitable and bona fide interest therein." Clearly, there is nothing in the sending of this document, or in its contents, which can have the effect contended for, whether considered alone, or in connection with the subsequent refusal of Van Rensselaer to return the securities to the plaintiff, in pursuance of his demand. Taken together, they do not constitute either the assertion or exercise of any right in respect to these securities under any contract of sale between the plaintiff and the defendant as individuals. It is quite true, and the authorities so declare, that the receipt and acceptance by the vendee under a verbal agreement, otherwise void by the statute of frauds, may be complete, although the terms of the contract are in dispute. Receipt and acceptance by some unequivocal act, sufficiently proven to have taken place under some contract of sale, is sufficient to take the case out of the prohibition of the statute, leaving the jury to ascertain and find from the testimony what terms of sale were actually agreed on. *Marsh v. Hyde*, 3 Gray, 331; *Townsend v. Hargraves*, 118 Mass. 325; *Benj. Sales*, § 170. But, as was said by Williams, J., in *Tomkinson v. Staight*, 17 C. B. 697, the acceptance by the defendant must be in the quality of vendee. "The statute does not mean that the thing which is to dispense with the writing is to take the place of all the terms of the contract, but that the acceptance is to establish the broad fact of the relation of vendor and vendee." The act or acts relied on as constituting a receipt and acceptance, to satisfy the statute, must be such as definitely establish that the relation of vendor and vendee exists. *Remick v. Sandford*, 120 Mass. 309.

In the present case the notice of the defendant, as president and trustee of the Stormont Company, to Van Rensselaer, to retain possession of the securities, and Van Rensselaer's refusal to return the securities to the plaintiff on his demand in consequence thereof, certainly are not facts which tend to establish the existing relation of vendor and vendee between

the plaintiff and the defendant. The defendant in his notice makes no claim as such; and certainly no assent on the part of the plaintiff to his exercise of any such dominion is shown. It is clear beyond all controversy, so far as this record shows, that the plaintiff had never consented that Van Rensselaer should deliver the securities to the defendant except upon payment of the price, nor is there a particle of proof that Van Rensselaer has ever done so.

It is further and finally urged, however, by his counsel, that it was competent for the plaintiff to waive the condition of a previous payment of the consideration, and to authorize Van Rensselaer to deliver the securities to the defendant without performance of the contract on the part of the latter, and that the bringing of the present action was such a waiver. If, in point of fact, Van Rensselaer had transferred the manual possession of the securities to the defendant, or if, contrary to the terms of his original receipt, he had agreed with the defendant to hold the securities subject to his order as his agent, free from the conditions of the purchase, and as his absolute property, the plaintiff's assent to this new arrangement might be well implied from his bringing an action against the defendant to recover the consideration. But the premises on which this conclusion rests are not to be found in the present case. There was no transfer of possession from Van Rensselaer to the defendant, nor has there been any change in the relation of Van Rensselaer to his possession of the securities, whereby he has agreed, with the consent of the defendant, to hold them as agent for the latter as vendee under any contract of sale with the plaintiff.

On the whole, we are well satisfied that there was no evidence of a receipt and acceptance of the securities in question by the defendant to authorize a recovery against him upon the alleged contract of sale. It was error in the circuit court to refuse to charge the jury to that effect, as requested by the counsel for the defendant. For that error the judgment is reversed, and the cause remanded, with directions to grant a new trial.



HORTON v. BUFFINTON.

(105 Mass. 399.)

Supreme Judicial Court of Massachusetts.
Bristol. Oct. Term, 1870.

Replevin of a wagon. Jarvis B. Horton, the original owner of the wagon, sold and delivered it to Charles A. Horton, who sold it to the plaintiff. While in the plaintiff's hands, it was attached by the defendant, a deputy sheriff, on a writ against Jarvis B. Horton. There was evidence that the sale by Jarvis B. Horton to Charles A. Horton was on a Sunday. The defendant requested the judge to instruct the jury that, "if Jarvis B. Horton undertook to sell the property to Charles A. Horton on Sunday, then Charles A. Horton acquired no title to it by that transaction, and could impart no title to the plaintiff, when he undertook to sell it to him, which the latter could set up against an attaching creditor of Jarvis B. Horton." The judge refused the instruction prayed for, and instructed that "if Charles A. Horton purchased the wagon on Sunday, and sold it to the plaintiff without informing him that it was purchased on Sunday, and the plaintiff was ignorant of that fact when he bought the wagon, and in no way participated in the transaction on Sunday, then he would acquire a title to the wagon by the sale from Charles A. Horton which he could set up against an attaching creditor of Jarvis B. Horton." The jury found for plaintiff, and the defendant alleged exceptions.

C. A. Reed, for plaintiff. G. Marston and G. E. Williams, for defendant.

AMES, J. It is well settled that contracts made upon the Lord's day are illegal and cannot be enforced. It is equally

well settled, however, that after such a contract has been executed and carried into full effect, the law will not aid a party, who has paid money or delivered property in pursuance of its terms, to reclaim what he has so parted with. The policy of the law is to leave the parties in all such cases without remedy against each other. The defence of illegality is allowed, "not as a protection to the defendant, but as a disability in the plaintiff." *Myers v. Meinrath*, 101 Mass. 366.

The case finds that the wagon in dispute, although it may be true that it was sold by Jarvis B. Horton on the Lord's day, was delivered to his brother, Charles A. Horton, was subsequently sold by the latter to the plaintiff, and was in the actual possession and use of the plaintiff at the time of the attachment by the defendant. In the absence of all evidence to the contrary, it may be assumed that the consideration of the first sale was paid. Under such circumstances it is difficult to see how the original vendor, Jarvis B. Horton, could have reclaimed it on the ground of any illegality in the contract of sale. The law would not aid him to undo what he had done. He could only impeach the sale by showing the illegality of his own act, which in the case of an executed and completed contract he certainly cannot do. This disability on his part to reclaim it would avail the party holding it, as a sufficient title. *Myers v. Meinrath*, *ubi supra*. It had ceased to be the original vendor's property, or liable for his debts, and therefore the attachment under which the defendant seeks to justify was wrongful. *King v. Green*, 6 Allen, 139. *Claridge v. Hoare*, 14 Ves. 59. *Way v. Foster*, 1 Allen, 408. *Gregg v. Wyman*, 4 Cush. 322. *Sampson v. Shaw*, 101 Mass. 145.

Exceptions overruled.



HOSMER et al. v. WILSON.

(7 Mich. 294.)

Supreme Court of Michigan. Oct. 17, 1859.

Assumpsit by John B. Wilson against Rufus Hosmer and another "for work and labour done, and services rendered, and materials furnished, by plaintiff and his servants for defendants, all at request of said defendants." Judgment for plaintiff, and defendants bring error. Reversed.

It appeared that one of defendants had called at plaintiff's foundry, and there signed a written order for an engine, to be paid for when taken out of the shop, and that plaintiff's clerk accepted the order; that plaintiff then proceeded to make such engine, and only stopped when he received a letter from defendants countermanding the order.

Jerome & Swift, for plaintiffs in error. Towle, Hunt & Newberry, for defendant in error.

CHRISTIANCY, J. Whether the written memorandum signed by the defendants below, when taken in connection with the whole transaction between the parties, was understood by all of them as a contract, might have been a fair question of fact for the jury. But admitting the contract to have been proved in all respects as claimed by the plaintiff, and that defendants below wrongfully countermanded the order for the engine, after the plaintiff had, in good faith, made most of the castings, and done a large part of the work; the first question which arises is, whether the plaintiff was entitled to recover upon the common counts for work and labor, as upon a quantum meruit? As to the materials it is admitted he could not, though contained in the same count; as they still belonged to plaintiff, and were never delivered to defendants.

In the case of a contract for a certain amount of labor, or for work for a specified period—when the labor is to be performed on the materials or property, or in carrying on the business, of the defendant, or when the defendant has otherwise accepted or appropriated the labor performed, if the defendant prevent the plaintiff from performing the whole, or wrongfully discharge him from his employment, or order him to stop the work, or refuse to pay as he has agreed (when payments become due in the progress of the work), or disable himself from performing, or unqualifiedly refuse to perform his part of the contract, the plaintiff may, without further performance, elect to sue upon the contract and recover damages for the breach, or treat the contract as at an end, and sue in general assumpsit for the work and labor actually performed: *Hall v. Ruple*, 10 Barr, 231; *Moulton v. Trask*, 9 Mete., 579; *Derby v. Johnson*, 21 Vt., 21; *Canada v. Canada*, 6 Cush., 15; *Draper v. Randolph*, 4 Harrington, 454; *Webster v. Enfield*, 5 Gilman, 298.

And in such cases he may, it would seem, under the common indebitatus count, recover the contract price, where the case is such that the labor done can be measured or apportioned by the contract rate; or

whether it can be so apportioned or not, he may under the quantum meruit recover what it is reasonably worth. But in all such cases, the plaintiff, having appropriated and received the benefit of the labor (or, what is equivalent, having induced the plaintiff to expend his labor for him, and, if properly performed according to his desire, the defendant being estopped to deny the benefit), a duty is imposed upon the defendant to pay for the labor thus performed. This duty the law enforces under the fiction of an implied contract, growing out of the reception or appropriation of the plaintiff's labor.

It is therefore evident, 1st, that in all the cases supposed, an implied contract would have arisen, and the plaintiff might have recovered upon a quantum meruit, if no special contract had ever been made; 2d, that in the like cases (where the value of the work done could not, as it probably could not in the case before us, be apportioned by the contract price) the value or fair price of the work done, would necessarily constitute the true measure of damages. And in all such cases, as first supposed, either the contract price, or the reasonable worth of the labor done, would measure the damages.

Similar considerations and like rules would, doubtless, equally apply to contracts for furnishing materials, and for the sale and delivery of personal property, when, after part of the materials or property has been received and appropriated by, or vested in the defendant, he has prevented the plaintiff from performing, or authorizing him to treat the contract as at an end, on any of the grounds above mentioned.

But the case before us stands upon very different grounds. Here the contract, as claimed to have been proved, was in no just sense a contract for work and labor, nor could the plaintiff, while at work upon the engine, be properly said to be engaged in the business of the defendants. It was substantially a contract for the sale of an engine, to be made and furnished by the plaintiff, to the defendants, from the shop, and, of course, from the materials of the plaintiff. The defendants had no interest in the materials, nor any concern with the amount of the labor. They were to pay a certain price for the engine when completed. Engines, it is true, are not constructed without labor; the labor, therefore, constitutes part of the value of the engine. But this would have been equally true if the contract in this case had been for an engine already completed.

The labor of the plaintiff was upon his own materials, to increase their value, for the purpose of effecting a sale to defendants when completed. No title in any part of the materials was to vest in defendants till the whole should be completed by plaintiff, and delivered to defendants. The plaintiff might have sold any of the materials, after the work was performed, or the whole engine when completed, at any time before delivery to, or acceptance by defendants.

Whether, therefore, the labor actually performed on these materials, when the

defendants refused to go on with the contract, or prevented the further performance, had enhanced or diminished the value of the materials, and how much, would be a necessary question of fact, in arriving at any proper measure of damages. The value of the work and labor does not, therefore, in such a case, constitute the proper criterion or measure of damages. If the value of the materials has been enhanced by the labor, the plaintiff, still owning the materials, has already received compensation to the extent of the increased value; and to give him damages to the full value of the labor, would give him more than a compensation. If the value of the materials has been diminished, the value of the labor would not make the compensation adequate to the loss. It would be only in the single case where the materials have neither been increased nor diminished by the labor, that the value of the labor would measure the damages. Such a case could seldom occur, and whether it could or not, it must always be a question of fact in the case, whether the value of the materials does remain the same, or whether it has been increased, or diminished, and to what extent.

Again, as the defendants never received the engine, nor any of the materials, the title and possession still remained in the plaintiff, and the defendants never having received or appropriated the labor of the plaintiff, if the same work had been performed under the like circumstances, without any actual or special contract, the law would have imposed no duty upon the defendants, and therefore implies no contract on their part to pay for the work done: 1 Chit. Pl., 382; *Atkinson v. Bell*, 8 B. & C., 277; *Allen v. Jarvis*, 20 Conn., 38.

The only contract, therefore, upon which the plaintiff can rely to pay him for the labor, is the special contract. No duty is imposed upon the defendants otherwise than by this. This contract, therefore, must form the basis of the plaintiff's action. He must declare upon it, and claim his damages for the breach of it, or for being wrongfully prevented from performing it. His damages will then be the actual damages which he has suffered from the refusal of the defendants to accept the articles, or in consequence of being prevented from its performance; and these damages may be more or less than the value of the labor. This case, therefore, in this respect, comes directly within the principle recognized in the case of *Atkinson v. Bell*, above cited, and in *Allen v. Jarvis*, 20 Conn., 38 (a well reasoned case, which we entirely approve). And see *Moody v. Brown*, 34 Me., 107, where the same principle is recognized.

But it was claimed by plaintiff's counsel that no action could have been maintained on the special contract until fully performed, and the engine delivered or tendered to the defendants; that the unqualified refusal of the defendants to take the engine, when it should be completed, was not a prevention of performance which would authorize the plaintiff to sue upon the contract on that ground. We

think it was, and that such absolute refusal is to be considered in the same light, as respects the plaintiff's remedy, as an absolute, physical prevention by the defendants. This view will be found fully sustained by the following cases: *Cort v. Ambergate Railway Co.*, 6 E. L. & Eq., 230; *Derby v. Johnson*, 21 Vt., 21; *Clarke v. Marsiglia*, 1 Denio, 317; *Hochster v. De Latour*, 20 E. L. & Eq., 157. In the latter case, it was held that a refusal of the employer before the work commenced, to allow it to be done, authorized an immediate action upon the contract.

So, a refusal to make any payment, which, by the contract, is to be made during the progress of the work, has the same effect: *Draper v. Randolph*, above cited; and see *Hoagland v. Moore*, 2 Blackf., 167; *Webster v. Enfield*, 5 Gilm., 298; *Withers v. Reynolds*, 2 B. & Ad., 882. See this whole subject ably discussed, and the authorities cited, in 2 Smith's Lead. Cas. (Amer. Edit.), 22 to 38; and for what will amount to prevention, see note of *Hare & Wallace* to same, 40. As to mode of declaring on the contract: *Ibid.*, 41, and 1 Chit. Pl., 326.

It would be unreasonable and unjust to hold that the plaintiff, in this case, after the positive countermand of the defendants' order, was, nevertheless, bound to go on and complete the engine, and thereby increase the damages, before he could recover for the work already done. The defendants cannot complain that the plaintiff has given credit to their assertion. The law will not require a vain thing. And it is certainly, in such cases, much better for both parties to hold the party thus notified to be fully justified in stopping the work, as it lessens the damages the other party has to pay, and relieves the party who has to do the work from expending further labor, for which he has fair notice he is to expect no payment. And it is certainly very questionable whether the party thus notified has a right to go on after such notice, to increase the amount of his own damages. In *Clarke v. Marsiglia*, above cited, it was held he had no such right, and that the employer has a right (in a contract for work and labor) to stop the work, if he choose, subjecting himself to the consequences of a breach of his contract, and that the workman, after notice to quit work, has no right to continue his labor, and recover pay for it. This doctrine is fully approved in *Derby v. Johnson*, above cited. This would seem to be good sense, and, therefore, sound law. And it would seem that any other rule must tend to the injury, and, in many cases, to the ruin of all parties.

It is unnecessary here to review the authorities cited by the plaintiff's counsel. Most, if not all of them, when carefully examined, will be found entirely in harmony with the views above expressed. The result of them will be found well and fairly stated, and evidently form a careful examination, in *Allen v. Jarvis*, above cited. I have made the same examination, and come to the same result.

It may, however, be proper here to say, that in the case of *Planche v. Colburn*, 8

Blng., 14, upon which much reliance was placed by the counsel for the defendant in error, there was a special count upon the contract, as well as the common counts, and it may be inferred from the opinion that the plaintiff was allowed to retain his verdict upon the special count. And we have the high authority of Lord Campbell that such was the case. See *Hochster v. De Latour*, 20 E. L. & Eq. 163, above cited. As the conclusion at which we have arrived upon this point disposes of the whole case, it becomes unnecessary, and even improper to discuss the other questions raised in the case.

And, as we do not conceive that under a writ of error we have any power to amend the declaration in this respect, the judgment must be reversed.

The other justices concurred.

HOWE v. HAYWARD.

(108 Mass. 54.)

Supreme Judicial Court of Massachusetts. Worcester. Oct. Term, 1871.

T. G. Kent, for plaintiff. P. E. Aldrich, for defendant.

CHAPMAN, C. J. It appears by the report, that the parties made an oral contract for the sale of property by the plaintiff to the defendant, and that each of them deposited the sum of \$200 in the hands of one Taft. The plaintiff contended that the money deposited by the defendant was given in earnest to bind the bargain, or in part payment. The defendant contended that it was under an agreement that the sum should be forfeited in case he refused without just cause to perform the contract. The jury found that it was not deposited in earnest or in part payment, but was deposited "as a forfeiture, to be paid over to the party who was ready to perform the contract, if the other party neglected to do so;" and under the instruction of the court found for the defend-

ant. The plaintiff contends that the finding should have been for the plaintiff, because, if the money was deposited as a forfeiture, as stated, it amounted to "earnest," within the meaning of the statute of frauds. This depends upon the proper definition of that term as used in the statute.

The idea of "earnest," in connection with contracts, was taken from the civil law. Guterbock on Bracton (Am. transl.) 145. It is not necessary to consider its precise effect under that law. As used in the statute of frauds, "earnest" is regarded as a part payment of the price. 2 Bl. Com. 447. *Pordage v. Cole*, 1 Saund. 3191. *Langfort v. Tiler*, 1 Salk. 113. *Morton v. Tibbett*, 15 Q. B. 428. *Walker v. Nussey*, 16 M. & W. 302. 1 Dane Ab. 235. The case of *Blenkinsop v. Clayton*, 7 Taunt. 597, cited by the plaintiff, turned on the question of delivery.

The deposit with Taft was not therefore equivalent to an earnest to bind the bargain, or part payment, and there was not a valid sale within the statute of frauds. The ruling was correct.

Judgment on the verdict.

HUMBLE v. MITCHELL.

(11 Adol. & E. 205.)

Queen's Bench, Michaelmas Vacation. Nov.
27, 1839.

Assumpsit by the purchaser of shares in a joint-stock company, called the Northern and Central Bank of England, against the vendor for refusing to sign a notice of transfer tendered to him for signature, and to deliver the certificates of the shares, without which the shares could not be transferred.

Pleas. 1. That the contract mentioned in the declaration was an entire contract for the sale of goods, wares, and merchandises, for a price exceeding £10, and that plaintiff had not accepted or received the said goods, &c., or any part thereof, and did not give any thing in earnest to bind the bargain or in part payment, and that no note or memorandum in writing of the bargain was made and signed by defendant or his agent thereunto lawfully authorized. Verification.

2. That the contract was a contract for the sale of, and relating to an interest in and concerning lands, tenements, and hereditaments of and belonging to the said company, and that there was not in respect of, or relating to, the said contract, an agreement or any memorandum or note thereof in writing signed by defendant, or by any other person thereunto by him lawfully authorized according to the form of the statute etc. Verification.

Replication: to the first plea, denying that the contract was for the sale of goods, wares, etc.; to the second, denying that it was for the sale of an interest in lands etc. Issues thereon.

At the trial of the cause before Coleridge J., at the Liverpool Spring assizes, 1838, it was proved that the company was in possession of real estate; but no title deeds to the estate were produced; nor was it shewn what was the nature of the

property belonging to the company, or the extent of their interest therein. The jury found a verdict for the plaintiff on both issues, subject to a motion to enter a verdict for the defendant. In the following Easter term Alexander obtained a rule nisi according to the leave reserved, citing, on the first plea, *Ex parte Valance*,¹ and, on the second plea, *Ex parte The Vauxhall Bridge Company*,² and *Ex parte Horne*.³

Cresswell and Crompton now shewed cause. Alexander, contra.

Lord DENMAN, C. J. With respect to the question arising on the second plea, we have already disposed of it. The other point is whether the shares in this company are goods, wares, or merchandises, within the meaning of § 17 of the statute of frauds. It appears that no case has been found directly in point; but it is contended that the decisions upon reputed ownership are applicable, and that there is no material distinction between the words used in the statute of frauds, and in the bankrupt act. I think that both the language and the intention of the two acts are distinguishable, and that the decisions upon the latter act cannot be reasonably extended to the statute of frauds. Shares in a joint-stock company like this are mere choses in action, incapable of delivery, and not within the scope of the 17th section. A contract in writing was therefore unnecessary.

PATTESON, WILLIAMS, and COLERIDGE, J.J., concurred.

Rule discharged.

A question also arose as to the proper mode of estimating the damages in this action; but on this point the parties eventually agreed.

¹ 2 Deacon, R. C. 354.

² 1 Glyn. & J. 101.

³ 7 B. & C. 632.

HUTHMACHER v. HARRIS'S ADM'RS.

(38 Pa. St. 491.)

Supreme Court of Pennsylvania. March 25, 1861.

Trover by Rosanna Gardner, administratrix, and Silas Satten and Peter H. Seovill, administrators of Elisha Harris, deceased, against David M. Huthmacher. Judgment for plaintiffs, and defendant brings error. Affirmed.

The property in controversy, consisting of promissory notes and two watches, was found by defendant in a square block of wood, on the top of which was a horizontal wheel with a perpendicular iron spindle, called in the vendue list a "drill machine," which was bought by him at a sale of the effects of the said Harris.

Hendrick B. Wright, for plaintiff in error.
E. L. Dana, for defendants in error.

WOODWARD, J. The ground on which we affirm this judgment is, that there was no sale of the valuables contained in the block of wood, which is called, in virtue of its horizontal wheel and upright spindle, "a drill machine." Sale, said Mr. Justice Wayne, in *Williamson v. Berry*, 8 How. 544, is a word of precise legal import, both at law and in equity. It means at all times a contract between parties to pass rights of property for money which the buyer pays, or promises to pay, to the seller for the thing bought and sold.

That no such contract was made by these parties in respect to the contents of the drill machine, we deduce from the agreed facts of the case. The machine itself, and every essential part and constituent element of it, were well sold. The consideration paid, though only fifteen cents, was in law a quid pro quo, and the sale, unaffected by fraud or misrepresentation, passed to the purchaser an indefeasible right to the machine and all the uses and purposes to which it could be applied. But the contents of the machine are to be distinguished from its constituent parts. They were unknown to the administrators, were not inventoried, were not exposed to auction, were not sold. Of course they were not bought. All that was sold was fairly bought, and may be held by the purchasers. The title to what was not sold remains unchanged. A sale of a coat does not give title to the pocket-book which may happen to be temporarily deposited in it, nor the sale of a chest of drawers a title to the deposits therein. In these cases, and many others that are easily imagined, the contents are not essential to the existence or usefulness of the thing contracted for, and not being within the contemplation or intention of the contracting parties, do not pass by the sale. The contract of sale, like all other contracts, is to be controlled by the clearly ascertained intention of the parties.

The argument proceeded very much on the doctrine that equity will, in certain cases, relieve against mistakes of fact as well as of law; but if there was no con-

tract of sale, there could be no mistake of fact to vitiate it, and therefore that doctrine has no possible application. Mistake is sometimes a ground of relief in equity; but a man who puts up his wares at auction and sells them to the highest bidder, has no right to relief on the ground that he was ignorant of the value of that which he sold. Such a mistake comes of his own negligence, for it is his duty to possess all necessary knowledge of the value of that which he brings to market, and the rule is general that if a party becomes remediless at law by his own negligence, equity will leave him to bear the consequences.

Nor could these administrators, had they sold the contents, have pleaded, in addition to their ignorance, their fiduciary character, and their possible liability for a devastavit, in defence of the vested rights of the purchaser; for, in respect to the personality of the decedent, they stood in the dead man's shoes, and were in fact, as they are commonly called in law, his personal representatives. The law cast the personal estate upon them for purposes of administration, and a fair sale made in pursuit of that purpose, would confer as perfect a title as if made by a living owner. They, no more than any other vendor, could set aside such a sale to avert the consequences of their own negligence.

But inasmuch as they did not, in point of fact, sell the valuables which are in dispute, these principles, and all the arguments drawn from the law of mistake, are outside of the case.

If, then, there was no sale and purchase of the contents of the block or machine, how did Huthmacher, when he discovered his unsuspected wealth, hold it? Evidently as treasure trove, which, though commonly defined as gold or silver hidden in the ground, may, in our commercial day, be taken to include the paper representatives of gold and silver, especially when they are found hidden with both of these precious metals. And it is not necessary that the hiding should be in the ground, for we are told in 3 Inst. 132, that it is not material whether it be of ancient time hidden in the ground, or in the roof, or walls, or other part of a castle, house, building, ruins or otherwise.

The certain rule of the common law, in regard to treasure trove, as laid down by Bracton, lib. 3, cap. 3, and as quoted in *Viner's Abridgement*, is, "that he to whom the property is, shall have treasure trove, and if he dies before it be found, his executors shall have it, for nothing accrues to the king unless when no one knows who hid that treasure." The civil law gave it to the finder; according to the law of nature, and we suppose it was this principle of natural law that was referred to in what was said of treasure hid in a field, in Matthew's Gospel, xiii. 44.

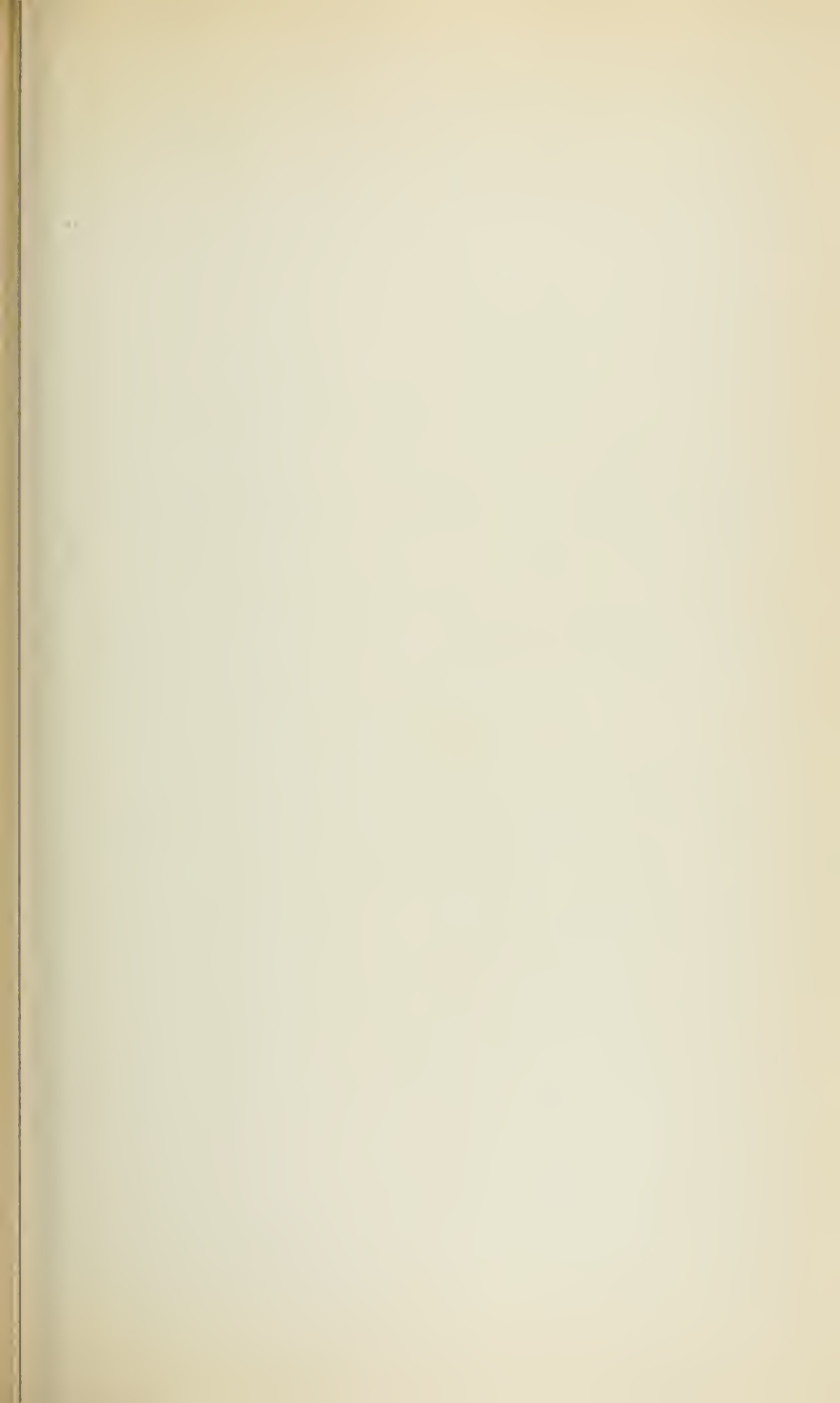
But the common law, which we administer, gave it always to the owner if he could be found, and if he could not be, then to the king, as wrecks, strays, and other goods are given, "whereof no person can claim property;" 3 Inst. 132. Huth-

macher, therefore, held the unsold valua-
bles for the personal representatives of the
deceased owner.

Several sporadic cases, some of which
were highly apocryphal, were mentioned
in the argument as affording analogies

more or less appropriate to this case, but
it is quite unnecessary to discuss them,
because if they touch, they do not encum-
ber the clear ground whereon, as above
indicated, we rest our judgment.

The judgment is affirmed.



ILSLEY et al. v. STUBBS.

(9 Mass. 65.)

Supreme Judicial Court of Massachusetts.
Cumberland. May Term, 1812.

This was a replevin of a quantity of salt and coals. Issue being taken upon the question of the property of the plaintiffs in the articles replevied, the same was tried at the last October term in this county before Thatcher, J., and a verdict found by consent for the defendant, subject to the opinion of the court upon the evidence reported by the judge who sat in the trial.

To maintain the issue on their part, the plaintiffs relied on a bill of sale from Lemuel Weeks and W. C. Weeks his son, dated the 8th of January 1808 at Portland, expressed to be for the consideration of 3000 dollars and purporting to convey to the plaintiffs, "all and singular the contents of the cargo now on board of the ship Henry of Portland, Joseph Weeks master, now on a voyage to Liverpool, and back to the United States,"—and also on a bill of lading executed by the said Joseph Weeks, as master of the ship Henry, at Liverpool on the 27th of January 1808; by which he acknowledges the shipment and receipt of the salt and coals in question on board the said ship, to be delivered at Portland unto Mess. Weeks & Son, or their assigns; and which bill of lading was endorsed by Mess. Weeks & Son to the plaintiffs on the 22d of March 1808.

The plaintiffs also produced in evidence an agreement made between Logan, Lenox & Co. and Weeks & Son, dated the 4th of November 1807, stating the terms on which the former receive consignments and make insurance when directed by their correspondents: and limiting the draughts of the latter to the estimated value of their consignments.—Also a letter from Logan, Lenox & Co. to Weeks & Son, dated at Liverpool December 28th 1807, announcing the arrival of the ship Henry, and undertaking to procure employment for her, if practicable; and if not, to dispatch her immediately with a cargo of salt.—Likewise the copy of an account current of Logan, Lenox & Co. with Weeks and Son, in which, under date of January 26th 1808, the former charge the latter with a cargo of salt and coals shipped by the Henry, and credit them with the proceeds of the outward cargo of the same ship: which account had been produced before certain arbitrators between Logan, Lenox & Co. and a Mr. M'Lellan, but, as one of the arbitrators testified, not as shewing the state of the existing demands between the parties to the account: nor did it appear that it had ever been rendered as such to Weeks & Son.

On the other hand, the defendant relied on another bill of lading affirmed to be the same master of the ship Henry at Liverpool, on the 10th of February 1808; by which the same shipment of the salt and coals is stated to be "on the proper account and risk of citizens of the United States, to be delivered at Boston unto

Mr. Peter Stubbs or his assigns, freight for the same being paid."

The shipment in question is in both instances stated to have been made by Logan, Lenox & Co.; and the origin of these contradictory bills of lading was explained by the testimony of Joseph Weeks, the master of the ship. In his deposition he relates his voyage in the Henry for account of his owners Weeks & Son, from Bath to Liverpool, consigned to Logan, Lenox & Co. with a cargo, which he delivered there;—their shipment afterwards of the salt and coals for the account of his owners, and consigned to them, for which he affirmed to the first bills of lading;—and that during a detention at Liverpool by contrary winds, a requisition was made upon him by Logan, Lenox & Co. in consequence of intelligence they had received of the failure of his owners, to have those bills of lading given up and others substituted, threatening to detain the ship, if this was refused. With this requisition he thought himself under a necessity of complying, and accordingly signed the second bills of lading; and received Mr. Stubbs, the present defendant, the consignee named in the second bills, and one of the firm of Logan, Lenox & Co. as a passenger; who came out for the purpose of having the possession and control of the cargo.—After their arrival at Portland, Joseph Weeks the master gave one of the bills of the first set, which he had retained, to Weeks & Son his owners, who endorsed it to the plaintiffs as aforesaid.

Whitman, for plaintiffs. Mellen and Emery, for defendant.

SEWALL, J. The general question to be decided in this case is, does the evidence establish the property of this cargo in the plaintiffs, claiming it under the bill of sale executed at Portland on the 8th of January 1808?

As to the effect of the bill of sale, restricting its operation to the words of it, there would be no question. For literally taken, the cargo claimed under it had no existence at the time of the bargain and transfer, under which the plaintiffs claim. But this is not the construction to be put upon a contract of this kind. As between Weeks & Son and the plaintiffs, the bill of sale undoubtedly gave the latter a right to take to their own use whatever articles did or should constitute the home-ward cargo of the ship Henry, when she should return from the voyage, in which she was then engaged; that is, such lading as she should have, which, independently of the bill of sale, would have been the property of the owners of the vessel; a sense latterly and not incorrectly given to the term cargo, as exclusive of any other lading, or goods taken on freight. The bill of sale may be considered as establishing an unquestionable claim and right against them, or any interest they might have in a cargo afterwards arriving in the ship Henry, from Liverpool.

When however the question of property is with third persons, it may be neces-

sary to examine the case with more strictness. And in deciding between parties, whose interests are not distinguishable in equity, the question may ultimately turn upon the nicest formalities of legal title.

Strictly speaking then, the contract between Weeks & Son and the plaintiffs gave them but a chose in action, and was rather a covenant than a sale. As transferring an expectation or demand against the correspondents of Weeks & Son, their factors at Liverpool, the vendors of the cargo to be shipped there, the bill of sale must be considered subject to all the rights and duties of the original parties to the shipment, when it should be made; the shippers and master acting without notice of the transfer at Portland. The rights of the shippers or vendors of the cargo are not to be affected by the bill of sale; and the property acquired by it is not to be carried beyond the legal demands of Weeks & Son, or their rights in the property in question, against the firm of Logan, Lenox & Co. The defendant in this action represents them; and all their rights, opposed to the claim of the plaintiffs, are to be allowed to him.

In this view of the case, the other circumstances and facts in evidence became material to the decision.

The agreement made for Logan, Lenox & Co. with Weeks & Son, dated November 4th 1807, which may be considered as resulting in the consignment of the ship Henry to them, if relied on for the plaintiffs as evidence of any contract to send them return cargoes for vessels consigned to the house of Logan, Lenox & Co. is very deficient in that respect, and not at all suitable to the purpose. It not only expressly negatives any intention of advancing for consignments, but it contains no stipulation, engaging them absolutely to the purchase of return cargoes, even when supplied with funds. But what is more material, the Henry was not consigned to them for the purpose of obtaining a return cargo. To the extent of her outward cargo, or as it proved, much exceeding the proceeds of it, had been drawn and accepted; and the vessel was placed entirely in the controul of Logan, Lenox & Co. to be employed by them on a freight or charter party, if to be obtained; and cargo of salt was only to be resorted to, if nothing better could be done.

The testimony of the master was, that he had no power to dispose of either ship or cargo, but was to follow the orders of Logan, Lenox & Co. in all things concerning the voyage; and in their letter under date of December 28th 1807, after the arrival of the Henry at Liverpool, they undertake to get a charter for the vessel if possible, and only to send a cargo of salt, if nothing better could be done. Until the departure of the vessel therefore, she continued under their controul, and the cargo was subject to their orders. And their power was not determined by a shipment intended for Weeks & Son, if afterwards a shipment for some other account, or upon a charter or freight, appeared to them advisable. The first bills of lading were evidence of an intention, which, un-

til the departure of the vessel, Logan, Lenox & Co. had authority to reconsider and reverse: and this authority they exercised in cancelling them, and substituting other bills of lading, which placed the articles of the cargo on freight, instead of being on account of the owners of the ship. Their authority in this respect was not impaired, nor was the determination on their part unjust or improper; because it became necessary as a measure for their own security upon an intended advancement, after the credit of Weeks & Son had become doubtful.

Besides, the first bills were cancelled with the consent of the master; a consent in which he was entirely justified, being conformable to the duties of his owners and employers. This was a restoration of property, which they could not, with any sense of justice, insist upon retaining, at the certain expense and loss of their correspondents.

If under similar circumstances, and at the instance of Logan, Lenox & Co. and their threatening to stop the vessel by virtue of their controul and authority over the voyage, the master had relanded his cargo and returned empty, is it possible to conceive that the bill of sale at Portland would have given a right of action to the plaintiffs against Logan, Lenox & Co. for the value of the cargo shipped or intended to be shipped, but finally restored, for the best of all reasons, viz. that the purchasers, those to whom it was going on credit, had no ability of paying for it, if they should take it?—And how does the reversal of the bills of lading differ materially from the case supposed?

If this reasoning is correct, there is no occasion of resorting in this case to the doctrine of stoppage in transitu. For Weeks & Son as consignees, or for their assigns under the bill of lading, there never was a cargo in the ship Henry in transitu: the authority of Logan, Lenox & Co. to reverse their intention, and their doing this, and substituting the second bills of lading, was tantamount to a restoration of the property intended to be shipped for Weeks & Son; and it must be considered as shipped from the beginning for another account. Their authority to demand a restoration, and that of the master to consent to it, were not restricted by the contract with the plaintiffs, unknown to those who were acting at Liverpool under an apprehension of an important change in the circumstances of Weeks & Son, which proved to be well founded. This becoming known to their correspondents, seasonably to enable them to provide for their own security, the provision was made, and was justifiable upon the principles of good faith and mercantile honour; and was, I think, legally effectual against the claim of the plaintiffs.

As a question of fact upon the whole evidence, whether the shipment for the account of Weeks & Son had been finally cancelled, or was only colourably changed, some doubt might be excited from the circumstance of the account produced by one of the firm of Logan, Lenox & Co. at

the reference between them and a third party, containing the charges of the salt and coals to Weeks & Son. But this doubt is removed by the testimony of the same witness, of the manner in which that account was obtained, and the actual state of it as a memorandum only; and that it had never constituted an account rendered, and had never been offered as an existing demand. And although this might be a question rather for the jury than the court, yet in the actual state of the evidence, a conclusion upon it for the defendant must be the only correct result, so far as the case is affected by that circumstance.

With the aid however of the doctrine of stoppage in transitu, the question in this case may be more conclusively, and with some, more satisfactorily decided. According to this rule of the law merchant, which has become ingrafted with the common law, the shipper or consignor of goods, sent upon a general or particular credit, as upon an order for a return cargo, when there is no specification, or a specific order and purchase of the articles shipped, has a right, in the event of an actual failure of the consignee or purchaser, to countermand the delivery, and cause them to be delivered to himself or to some other for his use; and this right ceases only with the transitus or passage of the goods, upon an actual or constructive delivery thereof to the consignee himself.

A foreign merchant, who for a commission only to himself, purchases upon his own credit, and ships upon the credit which he gives to his employer, is a consignor or vendor entitled to the benefit of this rule. Nor is the application of the rule to be restricted to those cases, where the contract of sale, as between the consignor and consignee, is to be considered executory; as where the consignee or vendee has not obtained upon the credit afforded him, what is by the principles of the common law, a vested property. On the contrary this is supposed; and the restrictions upon the exercise of this right, established by English decisions, have been derived from mercantile usages sanctioned by their expediency, and by principles of public policy, or by the precautions suggested by the system of the bankrupt laws. In itself, and as determining a question of right between the parties to the contract of sale, the rule is perfectly equitable and just, in every case of the actual insolvency of the consignee; and it has been allowed to be exercised, even where a part of the price had been paid, or a bill of exchange for it accepted and endorsed over to a third person.¹

When it is that the transitus is at an end, and a delivery has taken place, has been a question of some difficulty in particular cases. By one decision, goods have been

considered in transitu, notwithstanding a delivery to the master of a ship chartered solely by the consignee. In another case, where the goods attempted to be reclaimed had been delivered to the master of a ship chartered solely by the vendee for a term of years, and were put on board thereof destined by him on a particular adventure, for which they had been purchased, it was held that the vendor could not stop them. The distinction in these two cases, upon which these different decisions rest, is, as I apprehend, the circumstance of the ultimate destination of the consignment: for in both cases the consignee was the owner of the vessel; in one case for the term of years; in the other case for the voyage; so that this was not the ground of decision, as Abbott in citing the cases seems to suppose; but in the one case the goods had reached the constructive possession of the owner, the transitus was at an end, and the further direction of the goods, had been determined by the vendee; whereas in the other case, the transitus continued, the goods had not arrived to the possession of the owner, actual or constructive, considered as a termination of their passage from the vendor to the vendee.²

In the case at bar the consignee was the owner of the vessel, on board of which the articles, the property whereof is in question, were laden. And it is to be supposed in making this question, that they had been delivered to the agent of the consignee for his account and risk; but the delivery was for the purpose of carriage to him, and the vessel itself and the master, at the time the delivery was countermanded, were still under the direction of the consignor. The goods constituted a cargo on its passage to the vendee, to give the fullest effect to the first bills of lading, that can be contended for. The right to stop them therefore, proving the actual failure of the consignee, seems to result from a reasonable construction and application of the rule on this subject, and both the right and the exercise of it are, in our opinion, established by the whole evidence, not only against any claim of the consignee, but also against the claim of his assigns, under the deed to them, made prospectively and in fact before the shipment: for which the consignor was not engaged by any previous promise or consideration. The assignment relied on for the plaintiffs is not of a bill of lading in the possession of the consignee; and the case is not therefore to be decided by the usage found by the jury in the ultimate decision of the case of *Lickbarrow v. Mason*,³ if indeed a similar usage within this state is proveable in any case.

Upon the whole, the opinion of the court is in favour of the defendant; and judgment is to be entered upon the verdict taken for him, for a return of the articles replevied, with his damages and costs.

¹ Abbott on Shipping, c. 9, page 357. (Amer. Edit.); *Feise v. Wray*, 3 East, 93; *Mason v. Lickbarrow*, 1 H. Black, 365, note 9; *Newsom v. Thornton*, 6 East, 27, 28; *Hodgson v. Loy*, 7 D. & E. 440.

² *Stubbs v. Lund*, 7 Mass. 453.

³ 5 D. & E. 686. *Haille v. Smith*, 1 B. & P. 563.

INGALLS v. HERRICK.

(108 Mass. 351.)

Supreme Judicial Court of Massachusetts.
Essex. Nov. Term, 1871.

Tort for the conversion of 21 bales of flocks of wool, attached by a deputy of defendant sheriff as property of William H. Lougee, in a suit against Lougee by one of his creditors. The plaintiff introduced evidence that on December 16, 1868, he bargained with Lougee's agent, Lewis H. Bosworth, at an agreed price, to sell again; that the bales were numbered and marked, and were stored in Lougee's factory; that he told Bosworth that he wished to have them remain where they were for a while, and would pay storage on them, to which Bosworth agreed; that he also told Bosworth that he was going to New York the next day, and wished some samples to take with him; that the same day, at Lougee's counting room, he received a bill of the flocks, dated that day, and signed by Lougee, specifying the numbers, marks, and weights of the bales, and acknowledging the receipt of the price; that the flocks were of two qualities, and at the same time Bosworth gave him samples of each; and that he saw the flocks at the factory about December, but did not see them on the day of the sale nor afterwards, until they were attached by the defendant's deputy. Bosworth testified "that, after the bargain was made, he went to the factory, and examined the bales to get the numbers and weights, and wrote the bill which Lougee signed 'Lougee,' and delivered it to the plaintiff; that he took out the samples, which the plaintiff wanted, and then sewed up the bales; that he met the plaintiff in the afternoon, and told him that the bill and the samples would be ready for him that evening, at Lougee's counting room; and that he gave the samples to the plaintiff at the time of the delivery of the bill of sale." The court ruled that there was not sufficient evidence of the delivery of the goods against the attaching creditor of the seller, and directed a verdict for the defendants. The plaintiff alleged exceptions.

J. K. Tarbox, for plaintiff. S. B. Ives, Jr., and S. Lincoln, Jr., for defendant.

COLT, J. It was ruled as matter of law, in this case, that the jury would not be authorized upon this evidence to find a delivery of the baled flocks, sufficient to pass a title valid as against creditors of the seller. There was evidence tending to show that the bargain for the sale was made with one Bosworth, an agent of the seller. A receipted bill of parcels, signed by the seller himself, which contained a description of the bales by number, mark and weight, was afterwards delivered by the agent to the plaintiff. The subject matter of the sale was all the baled flocks then stored in the seller's factory. It was thus a completed contract of sale, and as between the parties the title passed to the plaintiff. Was there evidence to go to the jury of a delivery sufficient as to

creditors? This is the only question, and in disposing of it we must take the sale to have been made in good faith and for a valuable consideration.

Upon this question, there was evidence tending to show that the flocks were bought for resale; that the bales were large, not easily moved, and requiring room for storage; that the plaintiff, having no convenient place, agreed with Bosworth, at the time of the bargain, to let them remain where they were, and pay storage, and directed him to obtain samples of the flocks, which he, the plaintiff, could take with him to New York to sell by; and that Bosworth accordingly opened the bales, took out samples of two kinds of flocks, sewed up the bales, and gave the samples to the plaintiff at the time he delivered the bill of parcels. The plaintiff bought upon his own previous knowledge of the article, having seen the flocks at the store-room of the factory a week or two before. The samples were not required or used by him in reference to his own purchase, and Bosworth, in taking them from the bales, acted under the directions and as the agent of the plaintiff, and with reference to future sales by him. It was a significant act of ownership and possession on the part of the plaintiff, after the sale was agreed on, through Bosworth, acting in this respect as his agent. There is something more, therefore, here disclosed, than a mere contract of sale without delivery or possession under it. And we are of opinion, under the law heretofore laid down by the court, that the case should have been submitted, with proper instructions, to the jury.

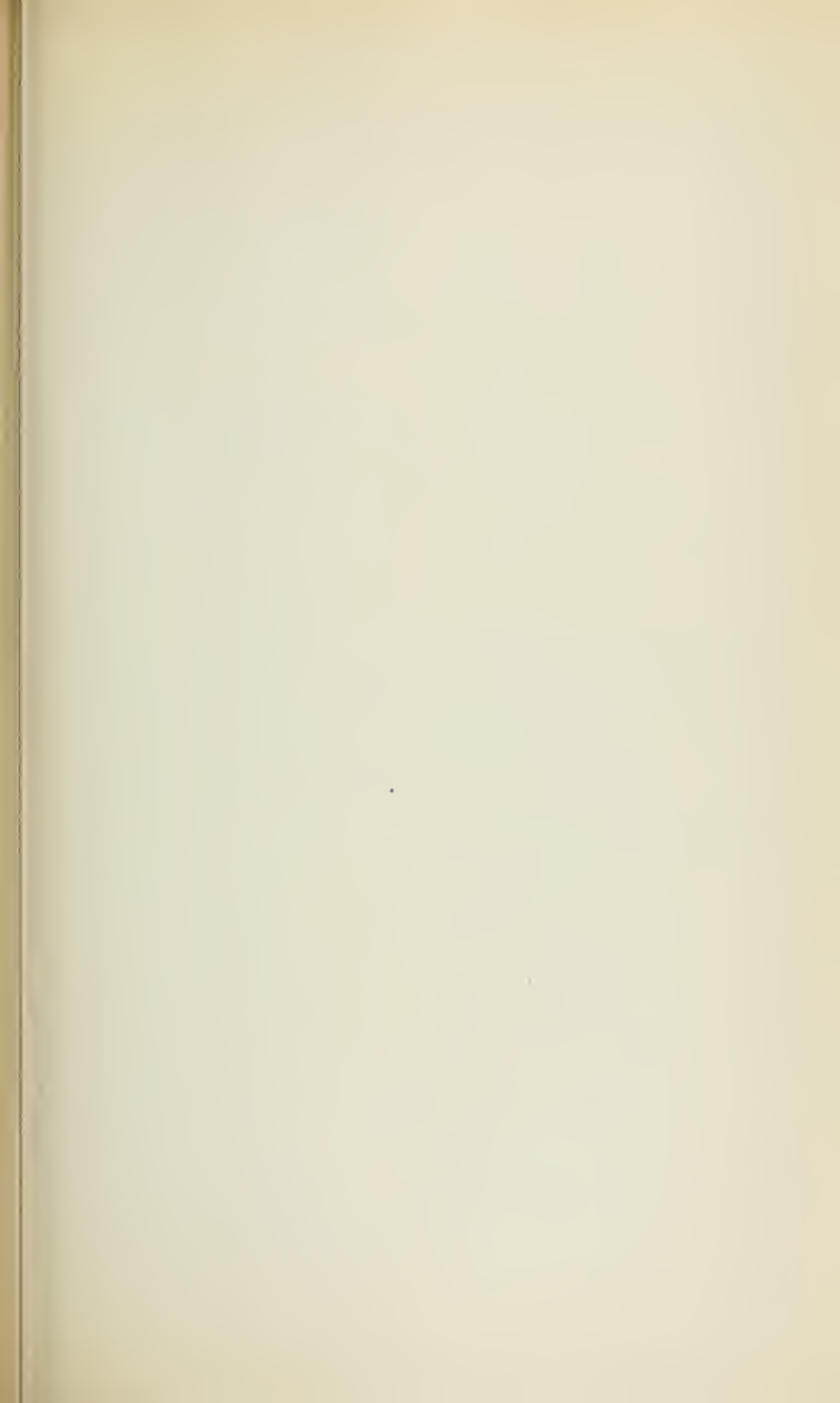
It was early held that the possession of personal chattels by the vendor after an alleged sale is not conclusive evidence of fraud. Upon proof that the sale was made in good faith and for a valuable consideration, and that the possession after the sale was in pursuance of some agreement not inconsistent with honesty in the transaction, the vendee might hold against creditors. *Brooks v. Powers*, 15 Mass. 244. It was declared by Morton, J., in *Shurtleff v. Willard*, 19 Pick. 202, 211, that, whatever the rule upon this point may be in England or elsewhere, it is perfectly well settled in a series of cases here, that the possession of the vendor is only evidence of fraud, which, with the manner of the occupation, the conduct of the parties, and all other evidence bearing upon the question of fraud, is for the consideration of the jury. It is certain that slight evidence of delivery is sufficient, and if the buyer with the consent of the seller obtains possession before any attachment or second sale, the transfer is complete without formal delivery. *Shumway v. Rutter*, 8 Pick. 433. A delivery of a portion in token of the whole is a sufficient constructive delivery as against creditors, although the goods are in the possession of various persons. *Legg v. Willard*, 17 Pick. 140. In *Hardy v. Potter*, 10 Gray, 89, the jury were told that, although the plaintiff only took a bill of sale, yet, if prior to the attachment he had been to the place where the lumber

was, and had exercised acts of ownership over it, by virtue of his purchase, that would constitute a delivery of it good against a subsequent attachment. And this instruction was held not open to exception, although the evidence was that the purchaser had only been to Beverly and seen the lumber there. See, also, *Phelps v. Cutler*, 4 Gray, 137; *Tuxworth v. Moore*, 9 Pick. 347; *Bullard v. Wait*, 16 Gray, 55; *Ropes v. Lane*, 9 Allen, 502, and 11 Allen, 591.

The fact that the possession of the property is retained by the vendor by agreement, and does not follow the bill of sale, is held by this court to be in most of the cases, evidence of fraud, to go to the jury. In many of the states, the fraud is held to

be an inference of law resulting inevitably from the possession. And such was supposed to be the earlier English rule, as laid down in *Edwards v. Harben*, 2 T. R. 587; but the only point there decided was, that an absolute conveyance without possession, if there be nothing but that, is in point of law fraudulent. In the more recent cases, it has been declared that the continued possession by the vendor, of goods sold, is a fact to be considered by the jury, as evidence of fraud, and is not in law a fraud in itself. *Martindale v. Booth*, 3 B. & Ad. 498. *Benjamin on Sales*, 363.

There was evidence here of delivery, which should have been submitted to the jury. Exceptions sustained.



INGLIS v. STOCK.

(10 App. Cas. 263.)

English House of Lords. March 30, 1885.

Appeal from an order of the court of appeal (Brett M. R. Baggallay and Lindley L. J.J.),¹ reversing a decision of Field J.² The facts are stated in the reports of the decisions below, and in the judgment of the lord chancellor in this house.

Sir F. Herschell, S. G., and A. Cohen, Q. C., (J. Gorell Barnes, with them,) for appellant. C. Russell, Q. C., R. T. Reid, Q. C., and Danckwerts, for respondent, were not heard.

Earl of SELBORNE, L. C. My lords, the question in this case is whether the plaintiff had, at the time of the loss of the steamer City of Dublin in the River Elbe, on the 4th of February 1881, an insurable interest in 3900 bags (or 390 tons weight) of sugar, part of that vessel's cargo? The court of appeal, reversing a judgment of Field J., decided in the plaintiff's favour.

By two contracts dated respectively the 7th and 12th of January 1881, which were (except as to dates and parties) identical in their terms, Messrs. Drake & Co. merchants of London, agreed to sell to one Beloe and to the plaintiff respectively, 200 tons each of German beetroot sugar to be shipped from Hamburg. The material terms of the contract between Drake and Beloe are these:—"London, 7th January 1881, Messrs. W. Beloe & Co. We have this day sold to you for your account 200 tons German beet sugar of the crop 1880-81, at 28s. 9d. per cwt. of 50½ kilos. net f. o. b. Hamburg for 88 degrees net saccharine contents." I need not read all the details. "The sugar shall analyse between 85.92 net both inclusive; six-pence per cwt. to be paid or allowed for each degree above or below 88, fractions in proportion; but anything above 92 not to be paid for. Should the average analysis of whole contract exceed 90, such excess is not to be paid for. The analysis is to be effected by a public German chemist." Then, omitting some immaterial points, it goes on: "For January delivery at Hamburg. Payment by cash in London in exchange for bill of lading less two months' interest at 5 per cent. per annum. Any dispute arising out of this contract to be settled by arbitration of two London brokers in the usual way."

By another contract, dated the 7th of January, the plaintiff bought from Beloe the sugar which Beloe had contracted to buy from Drake & Co., upon substantially the same terms, except that the price to be paid for it to Beloe was to be 28s. 10½d. per cwt., subject to like variations between the same limits; and that the average analysis of the whole contract was "not to exceed 90." The price, therefore, in each case was to be variable, according to the percentage of saccharine matter in the sugar; the goodwill, in each case, to be delivered at Hamburg free on board,

and (consequently) were, after shipment, to be at the purchaser's risk; and the bills of lading were to be retained by the vendors till the purchase-moneys were paid.

The plaintiff and Beloe at Bristol and the agents of Drake & Co. at Hamburg engaged space for these sugars in a general ship, the City of Dublin, one of a line of steamers trading between Bristol and Hamburg. The shipping agents at Bristol, being informed by the plaintiff of his two purchases from Beloe and Drake & Co., and learning from Beloe that Drake & Co. were his vendors, advised their correspondents at Hamburg that 400 tons of sugar would be coming for that ship's cargo from Drake. I do not think it material, but it is proper to notice that the plaintiff did not know from whom Beloe had bought, and Drake & Co. did not know that Beloe had sold to the plaintiff, till after the loss.

The quantity actually put on board the City of Dublin at Hamburg was only 3900 bags, or 390 tons. As to this, I think it enough to say, that if the plaintiff would have had an insurable interest in 4000 bags, under the circumstances of the case, he had, in my opinion, such an interest though the quantity was short by ten tons.

No other sugar belonging to Drake & Co. was put on board this ship. The 3900 bags were, therefore, specifically separated from the bulk of the vendor's own sugar; and they were shipped under Drake & Co.'s contracts with Beloe and the plaintiff, with a view to and in fulfilment of the agreement of Drake & Co., as vendors, to put the purchased sugars "free on board." The present controversy arises out of the manner in which this was done. Each bag was distinguished by a mark denoting its percentage (according to certified analysis) of saccharine matter; and ten bills of lading, for parcels bearing marks corresponding with those on the bags, were made out in an impersonal form, and sent (according to the contracts) to Drake & Co., to be retained by them till the time of payment should arrive. The aggregate consignment (except as to the deficiency of 100 bags) was proper and suitable to fulfill the two contracts, without exceeding, as to either of them, the average of 90 per cent. of saccharine matter; and (according to the evidence of Mr. Hales, a partner in the firm of Drake & Co.) it was made up and "ordered forward" as being "so divisible." But no particular bags were then set apart or marked as applicable to the one contract more than the other; it was thought sufficient by Drake & Co., or their agents, to leave this to be done when the bills of lading came forward. There would be no practical difficulty in doing it in a proper and reasonable way, even if the plaintiff had not purchased Beloe's contract, inasmuch as neither purchaser could claim, and Drake & Co. were not to be paid for, any excess beyond 90 per cent. of the average analysis of the whole contract; though it was conceivably possible that it might have been done perversely and unreasonably. The division was in fact made by Drake & Co.,

¹ 12 Q. B. D. 564.

² 9 Q. B. D. 708.

who forwarded invoices of the parcels attributed to each purchaser on the evening of the 4th of February, after they had received notice of the loss. In the division so made the deficiency of ten tons was ascribed to the plaintiff's contract, being the later in date. No question was raised by the plaintiff or by Beloe; and the purchase-moneys were paid by the plaintiff according to the contracts and invoices. But by this, which was done after the loss, the underwriters were (of course) not bound.

It is contended, on the part of the appellant, that, under these circumstances, and for want of a proper division before the loss, the shipment had not the effect of divesting the prior title of Drake & Co., the vendors, or of passing any interest in these sugars to the plaintiff. This argument appears to me to confound two very different things; the appropriation necessary as between vendor and purchaser, and the division, as between purchaser and purchaser, of specific goods, actually appropriated to the aggregate of the two contracts. I do not think it follows that there could be no appropriation by the vendor of which the purchasers might take the benefit, merely because the parcels of goods appropriated were mixed, in the act of appropriation, so as to require some subsequent division or apportionment. Whether this may have happened by previous agreement or course of dealing between all the parties (in which case there could be no serious doubt), or by accident, error, or want of proper care on the vendor's part, appears to me to make no difference in principle. The purchasers might possibly be entitled to reject, but the vendors could not, in my opinion, without their consent retract the appropriation.

In the present case, I see no reason to doubt that the difficulty arising from the confusion of parcels—material only to the settlement of the amounts payable by the plaintiff to his two vendors—if not solved by consent (or by arbitration, for which each contract provided) would have been soluble by principles of law, applied to the facts and the terms of the contracts. The necessity for doing this, and the fact that it had not been done at the time of the loss, do not, in my opinion, sufficiently distinguish this case from *Browne v. Hare*³ and earlier authorities to the same effect. The goods were, by the act of the vendors, separated from the bulk of all other goods belonging to them; they were shipped “free on board” in what (for that purpose) was the purchaser's ship, under two contracts so to deliver them; in both which contracts (subject to the payments to be made by him to Drake & Co. and Beloe) the plaintiff was then (although Drake & Co. did not know it) solely interested. I cannot infer from any part of the evidence that, in so shipping them indiscriminately, the vendors intended to break, instead of fulfilling, their contracts, and to take upon themselves (contrary to those contracts) the subsequent risk of loss, and the liability to freight. Yet this

(as it seems to me) would be the necessary consequence of the appellant's argument.

I think the order appealed from is right, and I move your Lordships to affirm it, and to dismiss the appeal with costs.

Lord BLACKBURN:—My lords, I also agree that there is no occasion to hear the counsel for the respondent.

The respondent (plaintiff below) had insured himself by floating policies to the extent of, as I understand, £5000. One of the policies is set out as a sample policy. It is a policy for £4000, part of £5000, and is marked on the margin No. 4247. By it the respondent caused himself to be insured in respect of goods conveyed in a steamer “from the continent of Europe between Havre and Hamburg, both ports included, and ^{or} Rouen and ^{or} Nantes to Bristol upon any kind of goods and merchandises,” “beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship at as above upon the said ship etc., including all risks of craft, and so shall continue and endure during her abode there upon the said ship etc. And further until the said ship with all her ordnance, tackle, apparel etc. and goods and merchandises whatsoever, shall be arrived at as above upon the said ship etc. until she hath moored at anchor twenty-four hours in good safety and upon the goods and merchandises until the same be there discharged and safely landed.” Then I pass over a sentence which is immaterial for the present purpose. “The said ship etc., goods and merchandises etc., for so much as concerns the assured by agreement between the assured and assurers in this policy are and shall be valued at £4000, part of £5000, on sugar to be hereafter valued and declared. To follow policy for £4000 No. ³/₄₂₄₆ dated 6th of December 1880.” The meaning of to be “hereafter valued and declared” is, that if the insured has several adventures, all within the description in the policy, out, he may select at his pleasure which is to be protected by the policy; and, on his giving notice of such a selection to the insurers, the policy is as if it had named that adventure from the beginning. Of course, if adventures have been previously named, these come first, and whether those prior subjects of insurance are lost or not, the policy is equally *pro tanto* functus officio. And I believe the practice is if there is nothing to shew that the first adventure which came in safe was selected not to be under the policy, it is taken to be so, though there is no declaration.

The meaning of “To follow policy for £4000 No. ³/₄₂₄₆” is, that there being consecutive policies any loss declared is to be borne first by the earlier policies, and that it is not till after the policy No. ³/₄₂₄₆ is exhausted, either by losses or declared adventures which have come in safe, that the underwriters on the policy which follows are to bear the balance of the loss if any. There is not, as far as I remember, any

³ 3 H. & N. 484; 4 H. & N. 822.

other difference between a policy in the present form with a declaration that it is on sugar valued at £3800 loaded in the City of Dublin steamer sailed from Hamburg to Bristol on the 3rd of February 1881, and an ordinary policy for the same sugar valued at the same sum on the same steamer on the same voyage.

The defendant below is an underwriter for £150 on each of these consecutive floating policies.

There is no dispute, at least now, that the City of Dublin is such a steamer, and the voyage such a voyage as was within the terms of the policies, nor that the values and declarations were properly given, nor that there was enough left unexhausted on the policies to enable the underwriters to pay a total loss. But it was said that the situation of the plaintiff with regard to the sugars was not such as to give him an insurable interest. And I have no doubt that in order to recover against an underwriter the assured must shew that he suffers loss in respect of the thing insured. In case of an insurance on goods if he shews that he had at the time of the loss the whole legal property in the goods which were lost, he undoubtedly does shew it. But I do not agree that this is the only way in which he can shew an insurable interest in goods, or that any relation to goods such that if the goods perish on the voyage the person will lose the whole, and if they arrive safe will have all or part of the goods, will not give an interest which may be aptly described as goods.

In the present case there has been a good deal of extraneous matter brought into the discussion. I think if it had been remembered that the three contracts, viz. that of the 7th of January, between Drake and Beloe, that of the same date between Beloe and the plaintiff, and the contract of the 12th of January between Drake and the plaintiff, were all in writing; and it had been seen that they are so expressed that, as in my opinion, there is no doubt as to their construction, the objection would have been much more clearly raised, not I think for its benefit.

Drake & Co., of London, who were large importers of beet sugar manufactured in Germany, made a contract with Beloe of Bristol, who sometimes, as we find, bought to sell again. There are, I gather from a letter of the 25th of January from Hermann of Hamburg to Drake, trading lines of steamers running twice a month from Hamburg to Liverpool, Leith, and Bristol, and it may be other places; but to London, and it may be other places, if a steamer was wanted from Hamburg it must be chartered, but of course it may be chartered.

And now by the contract Drake & Co. bound themselves to Beloe to supply 200 tons of German beet sugar of the crop of 1880-81. It was not only to be German beet sugar but it was to analyse between 85 and 92 "but anything above 92 not to be paid for;" so that it would seem that sugar below 85 would not fulfil the description in the contract, but sugar above 92 might be given in fulfilment of the contract,

though the excess was not to be paid for. No portion of the sugar now in dispute was either below 85 or above 92 so that this term does not come into operation. The sugar was to be "net free on board Hamburg" and it was for January delivery at Hamburg. The price was to depend on the "average analysis of the whole contract." "Should the average analysis of the whole contract exceed 90 such excess is not to be paid for." The collector-general raised an argument on this clause which I shall notice by-and-by. The price was to be paid in London in exchange for bill of lading.

Now under this contract the first thing to be done was by Beloe (the buyer). He must let Drake the seller, or rather supplier, know in due time on what ship the goods were to be shipped free on board, for till he knew that, Drake could not put the goods on board. Beloe might (as in fact he did), engage to put sugar on board several steamers bound to Bristol, but he might have made an engagement to ship sugar for Leith and wish to have the sugar put on board the Leith steamer. Or he might (though that was less likely) have chartered a steamer for London, or any other port, and wish the sugar to be put on board that. As soon as he had secured room in the steamer he did select, and let Drake & Co. know in good time on what steamer they were to ship them, Drake & Co.'s part of the contract begins; they are bound to have there at Hamburg, and to ship free on board that ship, 200 tons of sugar answering in all respects the description in the contract. Provided the sugar of the proper quantity and description was put on board that ship it was no concern of Beloe's where or how Drake & Co. got it. So soon as they had done that they had fulfilled their part of the contract so far. But the price was to be paid in London in exchange for bill of lading. And no doubt from that it is to be implied that Drake & Co. were to take a bill or bills of lading for the sugar they put on board and, were in due time to be ready and willing to give the bills of lading in London in exchange for the price. If Drake & Co. did this Beloe was bound to pay the price.

Now Beloe had on the same day, but whether before or after he had made the contract with Drake & Co. does not appear, made a contract with the plaintiff to supply him with 200 tons of sugar at 1½d a cwt. higher price than that at which Drake had agreed to supply Beloe. As the plaintiff knew where he wanted the sugar this was to be shipped "free on board A. 1 steamer to Bristol." The description of the sugar was the same as that in the contract between Drake and Beloe except that it was said "average analysis not to exceed 90." The collector-general said that if the average analysis exceeded 90, Beloe was bound to take it from Drake, but not to pay the excess in price; but the plaintiff was not bound to take this more valuable lot at all; but would be in his right if he rejected it. What would have been the case if that point was raised by the facts, we need

not inquire, though I have a strong suspicion that a jury would not much favour it.

But on looking at the documents it appears that not only were the averages under 90, but that by no possible shuffling of the 3900 bags actually put on board the City of Dublin could 2000 bags have been selected the average of which would exceed 90. The plaintiff did not know, and had no reason to inquire, where Beloe was to get the sugar with which he was to supply him. The plaintiff saw Edward Stock (his nephew as it happens, but that is immaterial), the agent for the Bristol line of steamers, and according to the evidence of both the Stocks, the plaintiff's directions were to secure room for the 200 tons in the steamer, which would leave at the end of the month; and on the 11th of January Edward Stock & Son, the Bristol agents for the steamers, wrote to Nisistle & Gunther the following letter:—"There are 200 tons of sugar sold for shipment the second half of this month, but we have not yet ascertained the names of the shippers. There are also further parcels in treaty," and so forth. This, it must be noticed, was before the contract between Drake and the plaintiff on the 12th of January, and how there can be any doubt raised that the plaintiff did his best as far as regards securing room on that steamer to take on board the sugar which Beloe was to ship or cause to be shipped, I am unable to conceive. He had to advise Beloe of this, and it is sworn that he did so, and I see no possible reason for doubting that he did.

The position of things then as between Beloe and the plaintiff was this,—The plaintiff had done his part, and unless Beloe, by himself or Drake, or any one else, put the proper quantity of sugar of the proper description on board the steamer the plaintiff had a cause of action against Beloe. If Beloe did put the proper quantity on board he was entitled to recover the price in exchange for bills of lading, and it was no answer that the goods had perished at sea before the bill of lading was offered. He did send an invoice specifying the marks and numbers of 2000 bags, undoubtedly put on board, which Beloe alleged had been shipped on plaintiff's account.

If these were proper bills of lading for the sugar shipped it is difficult to imagine a clearer case of a loss of sugar. It is said the bills of lading which he offered to give in exchange for the cash were not the bills of lading of goods shipped for him on the City of Dublin, and therefore he was not bound to pay in exchange for such bills of lading; instead of being liable to pay Beloe the price he had an action against him for breach of contract in not shipping as he ought to have done. This requires us to notice some more of the evidence. When on the 12th of January the plaintiff had made his contract with Drake he at once proceeded to Edward Stock & Sons, who on that very day advised Nisistle & Co. that the 200 tons were coming, so that plaintiff had done his part in securing room for that 200 tons, and if Drake

& Co. have not shipped them, he has a cause of action against them. They did not ship the whole 200 tons, but only 190 tons—ten tons or 100 bags meant to be shipped having been delayed—for that Drake & Co. sent an invoice and received payment. And as I said about Beloe, if Drake & Co. have offered the plaintiff bills of lading for goods which were not shipped for him he has a cause of action against Drake & Co., and was not bound to pay. But if Drake & Co. have fulfilled their contract and the bills of lading are those referring to the 1900 bags, then the subsequent loss by perils of the sea is no answer. The plaintiff must pay the price, and has lost it, and that is as clear a loss as can well be.

When Drake & Co., or rather their agents at Hamburg, were shipping the sugar and held the mate's notes, it was no doubt their business to see that a proper bill of lading for each separate shipment was signed; and if at any time before the bills of lading left Hamburg they had been allocated to each shipment, no objection, not even an idle one, could have been raised. But instead of doing so the whole of the bills were sent in a lump to London that they might be allocated there. This was perfectly bona fide. Drake & Co. had no interest in favouring one more than the other, and were to be paid exactly the same price per bag, whether they allocated it to the one or to the other. And if they had done this before the loss, I do not see what damage either Beloe or Stock could have sustained by the allocation being made in London instead of in Hamburg.

Now, I have been quite unable to see, even if the plaintiff had sustained some damage, that it could have been damage going to the whole root of the matter, so as to form a defence for the plaintiff against an action by either Drake & Co. or Beloe for not paying for the goods in exchange for the bills of lading; that is, supposing the plaintiff (because prices had greatly fallen, or from any other unworthy motive) had wished to get off.

And if it were so, I think the case would fall entirely within what Lord Hatherley, in *Anderson v. Morice*,⁴ says is the principle of *Sparkes v. Marshall*.⁵ The insurers have no right to call upon the insured to exercise a possible option to be released from their contract. But the loss having happened before the actual allocation, the plaintiff's loss, when it happened, was a loss not of 200 tons, but of 200 tons parcel of 390 tons, so that the loss, though exactly the same, is said not to be the same in description, because it is the loss of an undivided portion of the goods, instead of being the loss of the goods themselves. I am quite unable myself to perceive why that should make the slightest difference. In the merits, certainly it does not. I am quite unable to perceive why an undivided interest in a parcel of goods on board a ship may not be described as an interest

⁴ 1 App. Cas. 735.

⁵ 2 Eng. N. C. 761.

in goods just as much as if it were an interest in every portion of the goods. No authority was cited in order to shew that it was not so, and I can see no reason for it. Then, that being so, of course it follows that there is no defence at all, and this is my opinion.

This, however, is not the ground on which the court of appeal decided. They thought that there was shewn to be a custom or course of dealing which rendered Drake & Co.'s conduct a literal fulfilment of the contract. I am not satisfied that on the evidence such a custom or course

of trade is shewn. I do not say it is not, but I would at least wish to hear the respondent's counsel before deciding on that ground. On the other, as I have already intimated, I have no doubt at all.

Lord WATSON: My lords, I concur in the judgments delivered, and have nothing to add.

Lord FITZGERALD: My lords, I also concur.

Order appealed from affirmed, and appeal dismissed with costs.

IRON CLIFF CO. v. BUHL et al.

(3 N. W. Rep. 269, 42 Mich. 86.)

Supreme Court of Michigan. Oct. 30, 1879.

Error to Marquette.

W. P. Healy, for plaintiff in error. Dan. H. Hall, for defendants in error.

GRAVIES, J. In 1871 defendants in error, with one James Westernman, were pursuing the furnace business at Sharon, in the state of Pennsylvania, as copartners, under the name of the Westernman Iron Company, and the plaintiffs in error were a mining corporation under the laws of Michigan, and engaged in mining iron ore at Negaunee, in our northern peninsula. The corporation were from time to time shipping their ore to Erie, Pennsylvania, and the Westernman company were in the way of receiving ore from that point, by rail, for their business.

At this time Rhodes & Co., of Cleveland, Ohio, were agents for the corporation in contracting sales of their ore, and on the first day of August of that year they contracted on behalf of the Cliff company with the Westernman company for the sale of a quantity of ore.

The agreement was written, and in these terms: "Agreement between the Iron Cliffs Iron Company, of Negaunee, Lake Superior, by its agents, Rhodes & Co., of Cleveland, Ohio, and Westernman Iron Co., of Sharon, Pa., made at Cleveland, Ohio, August 1, 1871: Witnesseth, that the said Iron Cliffs Iron Company, for the considerations hereinafter named, hereby agree to sell to the said Westernman Iron Co. two thousand gross tons of Barnum iron ore, of its standard quality, deliverable at Erie, Pa., during the season of 1871, afloat at the docks of the Erie & Pitts. R. R. Co., and as near 500 tons per month as practicable, but with the agreement that if ore is lost by disasters of navigation too late to be replaced, said Iron Cliffs Iron Company shall not be held accountable for non-delivery thereby occasioned. Said ore is to be paid for by the said Westernman Iron Co. at the rate of \$20 dollars per ton, in equal payments of \$— each, payable on the first days of August, September, October and November next, respectively, each of which payments is to consist of the note of said Westernman Iron Company for 5.00 per ton dollars at four months, payable at Cleveland, Ohio, and 2.50 dollars in cash, all in funds par at Cleveland. Said Westernman Iron Co., for the above-named considerations, hereby agree to buy, receive and pay for said ore as above mentioned."

The Westernman company paid in full for the amount of ore contracted for, but some 300 tons out of the 2,000 agreed for failed to reach the works of the Westernman company at Sharon, and Westernman having retired and assigned his interest to defendants in error, they proceeded, after a lapse of nearly six years, to bring this action on account of the mining ore.

They were allowed to recover, and the corporation has brought error. The points agitated are numerous, but the

case depends on one or two main considerations.

The plaintiffs in error actually shipped to the railroad dock at Erie a considerably larger quantity than was bargained to the Westernman company, and they intended 2,000 tons of it for them.

As no one appeared to accept it afloat it was landed on the dock in charge of the railroad company for the benefit of the buyers. This was the only course fairly practicable, and it was the course the Westernman company expected would be taken, and the course which received their subsequent sanction. The position of defendants in error that the ore was to become the property of the Westernman company only as it was delivered to them at Sharon, and that during its deposit on the dock in a larger pile it remained the property of plaintiffs in error, cannot be sustained. Both parties understood that it should be left and was left for the railroad company to hold and carry for the buyers.

The circumstance that the pile contained more than was bargained to the Westernman company is of no importance under the facts in this record. It was all of the same kind and quality, and there was nothing to do except to take away from the common mass the required quantity, and the case is certain that it was fully contemplated that the railroad company should attend to that business. Rhodes & Co. notified the agent of the railroad company that 2,000 tons of the ore belonged to the Westernman company, and he forwarded over 1,600 tons which they received, and in the course of the fall, and whilst he was sending the ore forward, they interposed and required him to cease for a while. The explanation given is that they lacked room, and that the railroad company would charge them for the use of the cars if left unloaded at Sharon.

Here was a clear exercise of dominion over the ore, and an act inconsistent with the notion that it was not subject to their control, and that delivery was to be made by plaintiffs in error at Sharon.

According to the evidence the failure of the Westernman company to receive the missing ore at Sharon was owing to a miscarriage by the railroad company, and it appears that soon after discovery of the loss they sued the railroad company to recover for the ore as their property. This was an unequivocal assertion of their understanding that the ore was under their control as their property when piled upon the dock and ready for removal to Sharon by the railroad company, and by them known to be subject thereto.

The circuit judge allowed the jury to find, however, that of the ore in that situation the portion which was taken by the railroad company and by them miscarried was not at the risk of the Westernman company, or their property, but was still the property of the Cliff corporation, in the hands of the railroad company as the agents of the Cliff corporation. We think this was contrary to unquestionable facts.

The refusal to permit certain adjudged

cases in Pennsylvania to be read to the jury from the books of reports was not error. The law of Pennsylvania was not in dispute. The claim was that there existed at Erie a particular custom or usage in regard to the mode of handling and delivering ore, and this, if true, was a local fact, not necessarily stable, but subject to be changed as experience and altered circumstances might dictate, and it was not

a matter to be proved by law books. Much, however, of the way in which things were done there, and all of importance, was matter of necessity and of understanding rather than of custom. Further discussion does not appear necessary.

The judgment must be reversed, with costs, and a new trial granted.

The other justices concurred.



JACKSON *et al.* *v.* TUPPER *et al.*

(5 N. E. Rep. 65, 101 N. Y. 515.)

Court of Appeals of New York. March 2, 1886.

This action was brought to recover damages for an alleged breach of warranty in a contract of sale. The facts are stated in the case as follows: The defendants, at West Troy, N. Y., on the 28th day of February, 1880, orally sold to the plaintiffs about eight hundred tons of ice, which was being cut at Round pond, near Glens Falls, N. Y., and agreed to place the same in a house which they warranted should be a good, substantial house, which should stand a year. The plaintiffs orally agreed to pay for said ice the sum of eighty cents a ton. No memorandum was made in writing of this contract, and no money was paid at that time. Some time after this, said ice was received and accepted by the plaintiffs in said house built by the defendants. After this, about May 1, 1880, the plaintiffs gave the defendants \$615, in full for said ice, by crediting said amount on an account which had against Tupper. When said credit was given, nothing was said by either party about said contract or its terms. About May 10, 1880, the house fell. It was not properly constructed; it was neither good nor substantial; its defects were latent. They were not discovered by the plaintiffs before said house fell, and could not have been discovered by an inspection of the building before it fell. Its defects were known to the defendants. The plaintiffs suffered damages to the amount of \$4,131. The complaint was ordered amended to demand as damages the amount proved. The defendants on the trial introduced no evidence. At the close of the plaintiffs' case the defendants' counsel moved for a nonsuit.

N. P. Hiaman, for appellants. G. B. Wellington, for respondents.

ANDREWS, J. It is conceded that the oral contract of February 28, 1880, for the sale and storage of the ice, was, when made, void, under the statute of frauds. It must also be conceded, under the decisions in this state, that it was not validated by the payment made in May, 1880. By our statute, payment operates to take an oral contract for the sale of goods for the price of \$50 or more, out of the statute,

only when it is made at the time of the contract. 2 Rev. St. 136, § 3. The decisions have construed this provision of the statute with great strictness. *Hunter v. Wetsell*, 57 N. Y. 375, 84 N. Y. 549; *Allis v. Read*, 45 N. Y. 142. It is in substance held that payment subsequently made, although conforming to the oral agreement, is insufficient of itself to make the prior oral agreement valid. There must be enough, in addition to the act of payment, to show that the terms of the prior oral contract were then in the minds of the parties, and were reaffirmed by them, and this being shown a cause of action arises, not on the prior oral contract, but on the new contract made at the time of the payment. The plaintiffs did not bring their case within this principle. There was no restatement of the terms of the prior oral agreement when the payment of May 1, 1880, was made, and no express recognition thereof, nor was the payment made for the avowed purpose of binding the prior bargain. It is expressly found that nothing was said at the time by either party about the contract of February 28, 1880, or its terms. But a prior void contract may be validated by a subsequent receipt and acceptance by the buyer, pursuant thereto, of the goods, or part of them, which are the subject of the contract. 2 Rev. St. 136, § 3; *McKulight v. Dunlop*, 5 N. Y. 537. Where this has been done, the cause of action arises on the original oral agreement, authenticated by the act of acceptance. There is no statute difficulty, as in the case of a subsequent payment, because the statute does not, as in that case, require that the acceptance must be at the time of the making of the oral agreement.

It was found in this case that, after the oral agreement of February 28, 1880, was made, "the said ice was received and accepted by the plaintiffs." It is impossible to construe the finding except as referring to the ice which was the subject of the oral agreement of that date, and as referring to an acceptance thereunder. This relieved the contract from the ban of the statute.

No question is presented as to the right of the plaintiffs to the judgment recovered, assuming that the contract of February 28, 1880, was validated.

The judgment should be affirmed.

All concur.

JAMES v. PATTEN.

(6 N. Y. 2.)

Court of Appeals of New York. 1851.

This action was upon a contract, of which a memorandum was given, in the following words:

"Albany, March 12, 1847. Mr. Thomas James, bought of M. & S. Patten, for the relief committee, three thousand bushels yellow corn (fifty-six pounds per bushel), to be delivered at the opening of the Hudson river navigation, at our store in Albany, at eighty-one cents per bushel, \$2,430."

This memorandum was admitted to be in the handwriting of one of the defendants. The plaintiff tendered the price and demanded the corn, which the defendants refused. The price had risen from eighty-one to ninety-seven cents per bushel. The defendant moved for a nonsuit on the following grounds: First, that the contract was not subscribed by them; and second, that the contract was not made with the plaintiff, but with the relief committee. The motion was denied, and the defendants excepted. The defendants then offered to prove that the plaintiff purchased a large quantity of corn as agent of a committee, known as the Irish relief committee, and that the defendants, on the opening of the navigation in 1847, tendered to said committee the three thousand bushels of corn mentioned in the above memorandum or bill of sale. The court excluded this evidence, and the defendants excepted. Judgment was directed in favor of the plaintiff for \$544.45. The case was tried by the court without a jury. The judgment was affirmed at the general term of the supreme court, and the defendants appealed.

C. M. Jenkins, for appellants. S. H. Hammond, for respondents.

PAIGE, J. The principal question to be decided in this case is whether the memorandum of the contract entered into between the parties was a valid note or memorandum of such contract within the statute of frauds. The objection made to it is that it was not subscribed by the defendants, the parties to be charged thereby. The section of the chapter of frauds contained in the Revised Statutes relative to contracts for the sale of goods and chattels, declares that every contract for the sale of goods, etc., for the price of \$50, or more, shall be void; unless, 1, a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or 2, unless the buyer shall accept and receive part of such goods, etc.; or, 3, unless the buyer shall at the time pay some part of the purchase-money. (2 R. S. 136, § 3.) The old statute of frauds, passed February 26, 1787, as well as the British statute of 29 Charles II, chap. 3, were substantially in the same words, with the exception of the word "subscribed." (1 Rev. L. of 1813, p. 79, § 15; 1 Chit. on Cont. 385.) Those statutes required the note or memorandum of the contract to be signed by the parties instead of being subscribed by them. Un-

der the judicial construction of our old statute and of the British statute, it was not necessary to the validity of the contract, or of the note or memorandum thereof, that it should be signed underneath or at the end. It was held to be a compliance with the statute, if the name of the party to be charged appeared in any part of the instrument, either at the top, in the middle, or at the bottom, provided it was placed there by the party himself, or by his authority, and was applicable to the whole substance of the writing. (Clason v. Bailey, 14 Johns. 486; Merritt v. Clason, 12 id. 106, 107.) Thus the law stood at the time of the revision. The revisers, in their notes to the 8th section of the 1st title of the chapter of frauds as reported by them, say it had been held, under the former statute of frauds, "that the literal act of signing is not necessary, although the statute speaks of 'signing.'" After settling out with this principle, the courts found themselves perfectly at large as to what should be considered a signing. To prevent difficulties of this sort hereafter, the revisers propose to require that these agreements shall be subscribed." The revisers, at the end of the 3d section of the 2d title, which relates to contracts for the sale of goods, and in which they also substituted the word "subscribed" for the word "signed," refer to their notes to the preceding sections. The note to the 8th section of the 1st title is a plain expression of their understanding of the meaning of the word "subscribed;" and a clear manifestation of their intention in recommending its substitution for the word "signed." It is perfectly clear from the note of the revisers, that they intended by the word "subscribed," to require the manual signing of the agreement at the end thereof, by the party to be charged. When the members of the legislature passed upon the sections of the chapter of frauds as reported by the revisers, they had their notes before them, defining the meaning of the word "subscribed," and in substance declaring that the adoption of that word would require an actual, manual, subscription at the end of the note or memorandum of the contract. The legislature under these circumstances retaining the word "subscribed," as proposed by the revisers, must be understood to have done so, for the purpose of requiring an actual signing in writing of the agreement or memorandum thereof, underneath the same. We cannot now so construe these sections of the chapter of frauds, as to dispense with the necessity of an actual subscription, without disregarding the plainly declared will of the legislature. It is the office of the courts to administer the law as the legislature has declared it; not to alter the law by means of construction, in order to remedy an evil or inconvenience resulting from a fair interpretation of the law. The etymology and definition of the word subscribe, as given by lexicographers, show that its meaning when applied to the signature to an instrument in writing, as understood by men of letters, is the signature or writing of one's name beneath or at the end of the instrument. This is also its popular sig-

nification. I am aware that the popular meaning of the word "signed," when applied to a contract or other instrument, is generally writing one's name at the bottom; and that this is sometimes its literary meaning. But this is not so emphatically and universally its meaning, as it is the meaning of the word "subscribed." The derivation of that word from the Latin word *subscribo*, shows that literally and according to its derivation its meaning is "to write under," or "underneath." But this is not the primary or derivative meaning of the verb "to sign." Such meaning is, to write one's name on paper or to show or declare assent or attestation by some sign or mark.

I concede we are not always in the construction of a statute to be controlled by the literary signification of words, or their primary or derivative sense; and that where they have not by long habitual construction received a peculiar or technical meaning, they are to receive their natural and ordinary signification. (*Wain v. Wailers*, 5 East, 10.)

In all cases, the intention of the law-maker in using the words is to be sought after, and when that is ascertained, it must be followed with reason and discretion in the construction of the statute. Wherever any words are obscure or doubtful, the intention of the legislature must be resorted to, in order to find their meaning. (*Bac. Abr.*, Stat. 1, 5.) In the revision of the statute of frauds, no motive can be assigned for rejecting a word, the legal meaning of which had been established by a long line of adjudications, and substituting another, which had never received a judicial interpretation, but which had a known limited meaning; unless it was to change the law or the construction of the statute, so as to require an actual signing of the name of the party at the end of the contract or of the memorandum thereof, although in common parlance the word "signed" in reference to a contract or other instrument in writing is generally understood as a writing of the name at the bottom; yet now, neither in its ordinary or legal use is it confined to that office; but the word "subscribed," in its habitual use, and according to both its popular and literary signification, is limited to a signature at the end of a printed or written instrument. It has a secondary meaning, but that is purely metaphorical, denoting assent, without reference to any mode of expressing it by actual writing. It seems to me, therefore, that the legislature, by the substitution of the word "subscribed" for the word "signed," intended a change in substance of the statute of frauds, and to attain a greater degree of certainty in contracts, by requiring an authentication, by an actual subscription of the contract or of the memorandum thereof, by the party to be charged or his lawful agent. This alteration is more than a verbal one, or a mere change of phraseology. It is an alteration in substance; the rejection of a word, which by means of judicial interpretation, had an extensive legal signification; and the adoption of another in its place which had in its popular and litera-

ry use, and according to the general popular understanding, a known limited meaning. According to the familiar rules of construction, this substituted word must receive its natural and ordinary signification. (*5 East*, 17; *Bac. Abr.*, Stat. 1, 2.) And if that is accorded to it, the contract or memorandum must now be authenticated by a manual signature at the end. In neither a popular, literary or legal sense, are the words "signed" and "subscribed" synonymous, or of equivalent meaning. In the case of *Merritt v. Clason* (12 Johns. 102), it was conceded by the eminent counsel who argued that case, that there was a plain distinction between signing and subscribing.

Mr. Wells says "signing does not ex vi termini mean that the name of the party should be subscribed." Mr. D. B. Ogden replies, "I do not say that the agreement must be subscribed, but that it must be signed in some part of the contract."

I do not think that all the foregoing arguments can be overthrown by the mere circumstance that the legislature in the chapter in relation to wills, from abundant and unnecessary caution, added to the provision requiring the will to be subscribed by the testator, the words, "at the end of the will." The chapter in relation to wills was acted upon previous to the enactment of the chapter in relation to fraudulent conveyances and contracts. When the latter chapter was examined and passed, the legislature had the notes of the revisers before them which explained the distinction between the words signed and subscribed; and, I think, we must presume that the word "subscribed" was adopted in reference to its meaning as defined by the revisers.

This question was expressly determined by the court of errors in *Davis v. Shields* (26 Wend. 341), and is, therefore, no longer open for debate. In that case it was elaborately and learnedly discussed by the late chancellor and by Senator Verplanck, and both of them came to the conclusion that the word "subscribed," as used in the statute of frauds, requires an actual signing in writing of the name of the party who is to make a sale of an interest in lands or to be charged by a contract for the sale of goods, at the end of the contract or of the memorandum thereof. The ground on which the binding force of this decision is sought to be evaded or overthrown is, in my judgment, unsound. The argument is, that inasmuch as Chancellor Walworth and Senator Verplanck examined two questions in that case: 1. Whether as the memorandum of the broker, varied from the contract made by the parties, there was a contract binding on either party; and 2. Whether the word "subscribed" required an actual signing of the name of the party to be charged at the end of the contract or memorandum; and as all the other members of the court with one exception voted silently with them to reverse the judgment of the supreme court, that it is impossible to discover on which of the two questions a majority of the court voted for such reversal; although Chancellor Walworth and Senator Verplanck agreed that both

of the questions were erroneously decided by the supreme court.

If this argument is to prevail, it will unsettle a great portion of our law, which, by universal consent, has been regarded as definitely established. If in a case like that of *Davis v. Shields*, it is held that no point of law was decided, then no case is authority for any purpose which is decided by a court consisting of more than one judge, where one member of the court only delivers a written opinion, disposing of several questions distinctly arising in the cause, the decision of each of which is fatal to the recovery or defense, and the other members of the court concur without respectively declaring their individual views in regard to any of the questions discussed in such opinion. Such a doctrine is opposed to the general understanding of the bar, and to the uniform practice of the courts in recognizing such cases as binding authority as to all the questions which legitimately arose in the cause, and were passed upon by the judge who delivered the written opinion. Where a court consists of several judges two or more of whom deliver opinions, and all arrive at the same general result in the cause, but for different reasons, and the residue of the judges give a silent vote of concurrence with them, in a decision for the one party or the other; there, as it does not appear that a majority of the court agreed as to any one question in particular as the ground of the decision, the case cannot be considered as authority on any of the questions which arose in the cause. But where several questions arise in the cause, and the opinions delivered agree in regard to all of them, and the other members of the court give a silent vote of concurrence, there all the questions will be deemed to

have been determined by a majority of the court, and the case will be regarded and respected as an authoritative adjudication of all such questions.

It has been held by several of the courts of this state that the case of *Davis v. Shields* (26 Wend. 341), expressly determined that the word "subscribed" in the chapter of the Revised Statutes in relation to fraudulent conveyances and contracts, called for an actual subscription of the name of the party at the end of the contract. Chancellor Walworth so held in *Coles v. Bowne* (10 Paige, 537), and in *Champlin v. Parish* (11 Id. 410, 411), and a like decision was made by the supreme court for the fourth district in *Viele v. Osgood* (8 Barb. 134). As a member of the senate, I took a part in the decision of the case of *Davis v. Shields*, and, at the time that cause was decided, I had no doubt, nor have I any now, that a majority of the court, in voting for a reversal of the judgment of the supreme court, concurred with Chancellor Walworth and Senator Verplanck, as to both of the questions discussed in their opinions. I dissented from the opinion of the majority of the court on the ground that the legislature, by substituting the word "subscribed" for the word "signed," used in the former statute of frauds, did not intend to change the law. From my present examination of this question, I am satisfied that I was mistaken in the opinion I then expressed.

I am of opinion that the judgment of the supreme court should be reversed and a new trial granted.

GARDINER, J., also delivered an opinion in favor of reversing the judgment. Judgment reversed.

JENNER v. SMITH.

(L. R. 4 C. P. 270.)

Common Pleas. April 30, 1869.

Action for goods bargained and sold and goods sold and delivered. Pleas: Never indebted, payment, and payment of 8s. 2d. into court. Replication, taking issue, and damages ultra.

The cause was tried before Brett, J., at the sittings at Westminster after last Michaelmas term. The facts were as follows: On the 14th of October, 1867, the plaintiff, who is a hop-merchant in London, met the defendant, a maltster of Devizes, at Weyhill Fair, Wiltshire. The defendant wished to buy of the plaintiff four pockets of Carpenter's Sussex hops which the plaintiff had there; but, as the plaintiff had already sold two of them, he proposed to sell the defendant in lieu of them two pockets of Thorpe's, of which he showed him a sample, offering to let the defendant have the two pockets of Carpenter's at £9 per cwt. (the price of that day's fair being £9 9s.), if he would take two pockets of Thorpe's at £7 15s. per cwt. The plaintiff at the same time or shortly after informed the defendant that the last-mentioned two pockets were lying at Prid & Son's warehouse, Kentish Buildings, Southwark, and agreed that he should have them upon the same terms as if they had been in bulk at the fair, that is, that he should be at no expense for warehousing or carriage. The defendant consented to purchase the four pockets upon these terms, and took away with him the two pockets of Carpenter's, but requested that the two pockets of Thorpe's should not be sent until he wrote for them.

The plaintiff had at this time three pockets of Thorpe's hops at the warehouse of Prid & Son. On the 21st of October, the plaintiff's son went to the warehouse, and instructed the warehouseman to set apart two of the three pockets of Thorpe's for the defendant; and the warehouseman thereupon placed on two of them, numbered respectively one and three, what is called a "wait order card," that is, a card upon which was written, "To wait orders," and the name of the vendee. No alteration, however, was made in the warehouse books; and the plaintiff, the original depositor, still remained liable for the rent.

On the 4th of November, the plaintiff sent the defendant an invoice as follows, at the same time inclosing a draft for acceptance:—

Mr. S. Smith, Bought of Charles Jenner:
2 pockets Sussex hops (Carpenter, 1867),
No. 2 . . . 1 cwt. 2 qrs. 26 lbs.
4 . . . 1 cwt. 2 qrs. 13 lbs.
3 cwt. 1 qr. 11 lbs. @ £9 per cwt. £30 2s. 8d.
2 pockets Sussex hops (Thorpe, 1867),
No. 1 . . . 1 cwt. 2 qrs. 27 lbs.
3 . . . 1 cwt. 0 qr. 21 lbs.

2 cwt. 3 qrs. 20 lbs. @ £7 15s. per cwt. £22 13s. 10d.

£52 16s. 6d.

The two last pockets of hops are lying to your order.

On the 5th of November the defendant wrote to the plaintiff as follows:—

Sir,—I have returned your bill unsigned; but, as I have never received the two pockets of hops or heard any thing about them, I concluded you had not thought of sending them, and have made an exchange for some malt, and shall not require them. As I will never sign a bill, I will pay, as was agreed, in February, the weight of the two Carpenter's.

The defendant subsequently paid the price of the two pockets which he had received, all but a small balance which was covered by the payment into court.

It was objected on the part of the defendant that, as to the two pockets of Thorpe's hops, there was no contract binding within the statute of frauds, no delivery or acceptance, or part payment, and no evidence of goods bargained and sold.

For the plaintiff it was insisted that the whole was one bargain, and consequently that there had been a part delivery and part payment, and that the property in the whole four pockets passed by the contract.

The learned judge ruled that it was one entire contract, and that, therefore, there had been a part delivery so as to make a contract binding within the statute of frauds, that the plaintiff could not rely upon the part payment, because the defendant, at the time of making the payment, repudiated the bargain as to the two pockets in question; that, though there was a binding contract, the property did not pass thereby, inasmuch as the contract was to deliver two out of a larger number of pockets of Thorpe's hops equal to sample, the price to be determined according to the weight; and that there had been no sufficient appropriation afterwards to pass the property, because Prid & Son never bound themselves to hold for the defendant instead of for the plaintiff. He thereupon nonsuited the plaintiff, reserving him leave to move to enter a verdict for £22 13s. 10d., the court to draw inferences of fact.

Morgan Lloyd, in Hilary term last, obtained a rule nisi accordingly. H. T. Cole, Q. C., and Bromley showed cause. Morgan Lloyd, in support of the rule.

KEATING, J. I am of opinion that this rule should be discharged. The action is brought to recover the price of two pockets of hops as sold and delivered and bargained and sold. It appears that the parties met in October, 1867, at Weyhill Fair, and that it was orally agreed between them that the defendant should purchase of the plaintiff two pockets of Carpenter's Sussex hops, which were then in the fair, and had been inspected by the defendant, at £9 per cwt., and also two pockets of Thorpe's hops, of which a sample was shown, at £7 15s. per cwt. After the purchase had been agreed on, the defendant was informed that the latter were lying in a warehouse in London, and he requested that they might be left there until he sent word that he was ready to receive them. On the 4th of November the plaintiff sent an invoice describing the

numbers, weight, and price of the four pockets, with an intimation that the two pockets of Thorpe's were lying at the warehouse to the defendant's orders. The plaintiff had three pockets of Thorpe's hops at the warehouse; and he had in the mean time gone to the warehouse and directed the warehouse keeper to put certain marks upon two of them, to indicate that they were sold and were to wait the orders of the purchaser. No alteration, however, was made in the books of the warehouse-keeper; nor was any intimation of this appropriation of the two pockets given to the defendant until the 4th of November, when the invoice was forwarded to him. The defendant declined to accept the two pockets. At the trial various objections were urged. It was said, amongst other things, that there was no contract as to the two pockets of Thorpe's hops to bind the defendant within § 17 of the statute of frauds; that the contracts for the purchase of the two pockets of Carpenter's hops and for the two pockets of Thorpe's were distinct contracts; and that, consequently, there had been no delivery or part-payment to take the case out of the statute. My brother Brett ruled that the contract was entire, and the objection founded upon the statute of frauds was thus got rid of. Then came the question whether the count for goods sold and delivered or goods bargained and sold could be maintained, the property in the goods not having passed. Upon this my brother Brett nonsuited the plaintiff, but gave leave to move to enter a verdict for the plaintiff for the price of the two pockets in dispute, reserving power to the court to draw such inferences as a jury might draw. The question before us, therefore is, whether, upon the facts proved, we can see that the property in the hops passed to the defendant so as to make him liable in this action. The general rule of law was not contested on the part of the plaintiff, that, where an article (not specific) is sold, but something remains to be done by the vendor before it is despatched to the vendee, no property passes by the contract of sale. It was contended on the part of the defendant that much remained to be done here before the property could pass,—that, the hops having been sold by sample, they would require to be inspected, and to be weighed, in order to ascertain the price. On the other hand it was urged that, though that may be so as a general rule, *Aldridge v. Johnson*¹ and other cases show that, if it appears from the contract that the vendee has made the vendor his agent for the purpose of weighing and doing all the other acts necessary to be done to pass the property, the property in the goods will pass so soon as those acts are done. It is, however, observable that in *Aldridge v. Johnson* the bulk of the barley had been inspected and approved, and all that remained to be done was to sever and measure the portion to be appropriated to the vendee; and that the ven-

dor had filled a number of sacks which had been sent by the vendee, thereby measuring it. The barley which was to be appropriated to the fulfilment of the contract was therefore severed from the bulk and measured with the assent of both parties. There could be no doubt that the property in the barley so dealt with passed. Mr. Lloyd sought to bring the present case within that by saying that a similar extensive authority was conferred by the defendant on the plaintiff in this case. I cannot draw any such inference from the facts proved here; on the contrary, I think they negative it. I cannot suppose that the defendant meant to part with the right of objecting to the correspondence of the hops with the sample, or of insisting on the weight being ascertained, before the property passed. It is true, there was an intimation to the warehouse-keeper that the two pockets numbered one and three had been sold to the defendant; but no transfer was made in his books, and he still held them at the charge and at the risk of the vendor. I think it is impossible for the court to draw the inference that an authority such as was given in *Aldridge v. Johnson*² was given here; and if no such authority was given, the case is brought within the multitude of authorities in which it has been held that, where there is a sale of unascertained goods with reference to which something remains to be done by the vendor before delivery to the vendee, no property passes until that has been done.

BRETT, J. At the trial I proposed to nonsuit the plaintiff, on the ground that there was no evidence to go to the jury in support of the count for goods bargained and sold. It was not then suggested that there was any authority from the defendant to the plaintiff to select the two pockets for him. If it had been, I should not have nonsuited the plaintiff, but would have left that question to the jury. The question now is, not whether there was any evidence for the jury, but whether the court can infer from the facts proved, that the property in the two pockets of Thorpe's passed. It is clear that no property passed by the contract itself. The contract was for a sale by sample of unascertained hops, the price depending on the weight. Then comes the case put by my brother Blackburn in the passage at p. 127, to which I referred in the course of the argument. Here there was no previous authority given to the plaintiff to appropriate; and, if not, what evidence was there to show that the appropriation of the two pockets in Prid & Son's warehouse was ever assented to by the defendant? The defendant's assent might have been given in either of two ways,—by himself, or by an authorized agent. By himself, after the receipt of the letter containing the invoice; or by the warehouse-keepers, if there had been any evidence of agency or authority in them to accept, and assent by them to hold the hops for

¹ 7 E. & B. 885; 26 L. J. (Q. B.) 296.

² 7 E. & B. 885; 26 L. J. (Q. B.) 296.

him. I think the defendant's letter refusing to accept the draft was strong, if not conclusive, to show that there had been no such assent by the defendant. And, as to Prid & Son, the evidence fails on both points. They never agreed to hold the two pockets on behalf of the purchaser; and, if they did, there is no evidence of any authority from him that they might do so. Mr. Lloyd has strongly put forward a point which was not made at the trial, viz., that there was evidence that, by agreement between the parties, the purchaser gave authority to the seller to select the two pockets for him. If he did so,

he gave up his power to object to the weighing and to the goods not corresponding with the sample; for he could not give such authority and reserve his right so to object; and indeed it has not been contended that he gave up those rights. That seems to me to be conclusive to show that the defendant never gave the plaintiff authority to make the selection so as to bind him. Under the circumstances, therefore, it is impossible to say that the property passed; consequently the plaintiff cannot recover as for goods bargained and sold.

Rule discharged.

JOHNSTON v. TRASK et al.

(22 N. E. Rep. 377, 116 N. Y. 136.)

Court of Appeals of New York, Second Division.
Oct. 5, 1889.

Appeal from a judgment of the general term of the supreme court in the third judicial department, entered on an order made January 26, 1886, which affirmed a judgment in favor of plaintiff, entered upon a verdict directed at circuit.

This was an action for a breach of contract. Since January, 1882, the defendants have been bankers and brokers, doing business as partners under a firm name. On the trial of the issues, the plaintiff testified that on the 18th day of January, 1882, the managing partner of the firm, at its place of business, orally agreed with the plaintiff to purchase for him, if they could be bought in the market, income mortgage bonds of the Ohio Central Railroad of the par value of \$10,000, "and, (giving the language of said partner) any time you want to get rid of them, we will take them off of your hands at what they cost you." Later in the day, the defendants reported to the plaintiff that they had purchased the bonds for \$1,800, and their commissions were \$12.50; and thereupon the plaintiff paid \$1,000 towards the purchase price. The bonds were retained by the defendants as security for the sums due from the plaintiff to them until November 16, 1882, when the plaintiff paid the full purchase price for the bonds, commissions, and interest, and took them into his possession. The market price of the bonds declined until April 28, 1884, when they were selling for about 10 cents on a dollar. On this date the plaintiff tendered the bonds to the defendants, and demanded that they should pay him \$4,812.50, which they refused to do; and April 30, 1884, this action was brought, on contract, to recover that sum. The defendants did not contradict the plaintiff's evidence, which was corroborated by three witnesses; but at the close of his case they moved for a nonsuit on the grounds—*First*. That the oral contract was void for not complying with the following section of the statute of frauds: "Sec. 3. Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless (1) a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or (2) unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or (3) unless the buyer shall, at the time, pay some part of the purchase money." *Second*. That the evidence was insufficient to sustain the conclusion that the managing partner had authority to bind the firm by such a contract. *Third*. That the plaintiff did not tender the bonds, and demand the repayment of the price, within a reasonable time, and thereby lost his right of action. The motion was de-

nied, and, the defendant not asking to have any question submitted to the jury, a verdict was directed in favor of the plaintiff for \$1,800, with interest thereon from April 28, 1884.

Horace E. Smith, for appellants. *John M. Carroll*, for respondent.

FOLLETT, C. J., (*after stating the facts as above*.) An oral contract by which a person sells his own chattels or choses in action for more than \$50, payment and delivery being made, and agrees to take them back from, and repay the purchase price to, the purchaser on demand, is an entire contract; and the promise to take back the property, and repay the purchase price, is not void by the third section of the statute of frauds. *Wooster v. Sage*, 67 N. Y. 67; *Fitzpatrick v. Woodruff*, 96 N. Y. 561; *White v. Knapp*, 47 Barb. 549; *Williams v. Burgess*, 10 Adol. & E. 499; *Fay v. Wheeler*, 44 Vt. 292; *Dickinson v. Dickinson*, 29 Conn. 600; 1 Benj. Sales, (Corbin's Ed.) § 169. Executed contracts of sale, embracing a promise by vendors of chattels that in case they do not suit the purchaser, or do not possess certain specified qualities, the vendor will repay to the vendee the purchase price upon their return, have been frequently considered by the courts, (*Towers v. Barrett*, 1 Term R. 133; *Thornton v. Wynn*, 12 Wheat. 183;) but no case has been cited holding that such a promise on the part of a vendor is an independent contract. When an agent, by an oral contract, sells and delivers the goods of a disclosed principal, his personal oral warranty of quality is not a contract independent of the contract of sale, but is a part of it, and one consideration is sufficient to support the sale and warranty. The oral contract of the defendants that they would purchase for the plaintiff in the market, at market rates, the bonds, for the usual compensation, and, in case he should thereafter become dissatisfied with the bonds, that they would, on demand, take them off his hands at what they cost him, was a single contract. Under this contract, the bonds were purchased and held by the defendants until the purchase price and their commissions were paid, and then they delivered the bonds to the plaintiff. The promise of the defendants that they would take the bonds off the plaintiff's hands at what they cost him, upon request, is not a contract for the sale of goods, chattels, or things in action, within the third section of the statute of frauds, but is a provision for the rescission of the entire contract, and is valid. The learned counsel for the appellant, in support of his contention, cites *Hagar v. King*, 38 Barb. 200. In that case a firm was indebted to the plaintiffs in the action for work performed in constructing part of a railroad. The defendant, who was one of the firm, asked the plaintiffs to take from the railroad corporation its bonds in payment of the debt, orally agreeing with the plaintiffs,

for himself, that, if they would so take the bonds, he (not the firm) would, within 10 days, take the bonds from and pay to the plaintiffs the amount of the firm's debt. The plaintiffs assented to the proposal. Afterwards they accepted from the corporation its due-bill for the amount due them for their work, payable in the bonds of the corporation, and gave a receipt for all of their demands for work done on the road. The plaintiffs then indorsed the due-bill, delivered it to the corporation, and received the bonds. Within 10 days the plaintiffs tendered the bonds to the defendant, and demanded the amount for which they were taken in payment. It was held that the oral agreement embraced two contracts,—one to accept the bonds in payment of the debt, and another to purchase the bonds at a future day at a given price,—and that the latter contract was within the third section of the statute of frauds, and void. That case is easily distinguishable from the one at bar. The defendant in that case, as an individual, was not indebted to the plaintiffs, and his individual contract to take back the bonds was held to be distinct from the contract by which the firm's debt was paid in the manner described.

Was the evidence sufficient to sustain the conclusion that the managing partner was authorized to make the contract in behalf of the firm? The defendants admitted, in their answer, that they were bankers and brokers, and that they entered into that part of the contract by which they agreed to purchase the bonds for the plaintiff, which, by their concession, was within the ordinary business of the firm. But they neither averred in their answer, nor gave evidence tending to show, that the promise to take back the

bonds was beyond the scope of their business. There being no evidence which shows that the transaction was actually beyond the scope of the business of the firm, the question arises whether it was apparently beyond the scope of its business. *Bank v. Underhill*, 102 N. Y. 336, 7 N. E. Rep. 293. The case shows that, in addition to the business usually done by bankers and brokers, the defendants were accustomed to purchase and carry securities on margins for their customers. The undisputed evidence is that the managing partner did make the promise upon which the plaintiff recovered; thus asserting his authority to make it in the name and in behalf of the firm. No evidence is found in the record which would justify the court in holding, as a matter of law, that the promise upon which the action was brought was so far beyond the scope of the business of the firm that the plaintiff had no right to rely upon it. The evidence was sufficient to cast upon the defendants the burden of rebutting the presumption arising from the evidence and the pleadings, and, they having failed to do this, no error was committed in refusing to nonsuit on the ground that the managing partner had no authority to bind the firm by this contract.

The third ground upon which a nonsuit was asked for is not supported by the evidence. The undisputed evidence is that the managing partner of the firm, on several occasions, advised the plaintiff not to part with the bonds, assured him that they were good, and would ultimately advance in the market. Under these circumstances the plaintiff was not guilty of laches in not earlier returning the bonds, and demanding the price paid. *Wooster v. Sage*, *supra*. The judgment should be affirmed, with costs. All concur.

JONES v. EARL.

(37 Cal. 630.)

Supreme Court of California. July, 1869.

Appeal from the district court, sixth judicial district, Sacramento county.

The action was against a forwarder for the conversion of goods. The following is a copy of the letter which is referred to in the opinion of the court:

"San Francisco, November 18th, 1867. Messrs. D. W. Earl & Co.: Gents—On the eleventh instant we shipped to your care the following goods, viz.: Two barrels whisky. Two casks ale. Two casks porter. Four baskets champagne. Four cases Hostetter's bitters. Marked: F. M. A., Virginia City. Care 'Earl,' Cisco.

"If the goods have not been forwarded yet from Cisco, please hold on to them till you hear from us again, as the party to whom they were consigned at Virginia has been attached, and we want to save the goods. If they have been forwarded from Cisco, please instruct your agent at Virginia to deliver the goods to no one but our agent, Mr. J. A. Byers, who will be at Virginia on the lookout for the goods. Please write us immediately whether the goods have been sent; if not, Mr. Byers will call for them at Cisco. Very respectfully, Biggs & Jones."

Coffroth & Spaulding, for appellant. M. A. Wheaton, for respondent.

SANDERSON, J. Stoppage in transitu is a right which the vendor of goods upon credit has to recall them, or retake them, upon the discovery of the insolvency of the vendee, before the goods have come into his possession, or any third party has acquired bona fide rights in them. It continues so long as the carrier remains in the possession and control of the goods, or until there has been an actual or constructive delivery to the vendee, or some third person has acquired a bona fide right to them. Upon demand by the vendor, while the right of stoppage in transitu continues, the carrier will become liable for a conversion of the goods, if he declines to redeliver them to the vendor, or delivers them to the vendee. (Markwald v. His Creditors, 7 Cal. 213; Blackman v. Pierce, 23 Cal. 508; O'Neil v. Garrett, 6 Iowa, 480; Reynolds v. Railroad, 43 N. H.

580.) And a notice by the vendor, without an express demand to redeliver the goods, is sufficient to charge the carrier. If the carrier is clearly informed that it is the intention and desire of the vendor to exercise his right of stoppage in transitu, the notice is sufficient. (Reynolds v. Railroad, supra; Litt v. Cowley, 7 Taunton, 169; Whitehead v. Anderson, 9 M. & W. 518; Bell v. Moss, 5 Wharton, 189.) And notice to the agent of the carrier, who in the regular course of his agency is in the actual custody of the goods at the time the notice is given, is notice to the carrier. (Bierce v. Red Bluff Hotel Co., 31 Cal. 160.)

The case made by the record shows that the goods in question were consigned to the care of the defendant at Cisco, to be forwarded by him in the usual course of business to the vendee at Virginia City. That the defendant was engaged in the forwarding business at Sacramento, and had an agent at Cisco whose business it was to receive all goods shipped to the care of defendant, and deliver them to the order of the vendee upon payment of charges and commissions. That, while the goods were at Cisco and in the custody of the defendant's agent, who had full charge of the forwarding business at that place, a letter from the plaintiff, addressed to the defendant at Cisco, containing a bill of the goods, and informing the defendant that the vendee had been attached, and that he wanted to save the goods, and directing the defendant not to deliver the goods to any one except his (the plaintiff's) agent at Virginia, who would be looking out for them, was received by the defendant's agent at Cisco. That the defendant, by his agent, acknowledged the receipt of the letter, and stated that the goods were "in store and he would hold them subject to the order of Byers" (plaintiff's agent). That afterwards the vendee of the goods came to the agent of defendant and, tendering charges and commissions, demanded the goods, and that the demand was complied with. That the vendee was insolvent at the date of the notice to defendant's agent that the plaintiff desired to stop the goods in his hands.

In view of these facts, and the law as above declared, the defendant is clearly liable for a conversion of the goods.

Judgment and order affirmed.

JONES v. PADGETT.

(24 Q. B. Div. 650.)

Queen's Bench Division. March 27, 1890.

Appeal from the Westminster county court.

The plaintiff carried on the business of a woolen merchant at one address, and of a tailor at another. As a woolen merchant, he ordered of the defendants, who were woolen manufacturers, a quantity of "indigo blue cloth," to be made according to sample. He intended to use the cloth in his business as a tailor for the purpose of making it into servants' liveries; but the fact that he was a tailor as well as a woolen merchant was unknown to the defendants, and he did not communicate to them the particular purpose for which he wanted the cloth. The defendants made and supplied to the plaintiff cloth which was of the description ordered, and which corresponded with the sample. The plaintiff made the cloth into liveries which he supplied to a London club for the use of its servants. After the liveries had been in use for a few weeks, they showed signs of wear, the surface of the cloth came off, and the dye came out. It was admitted that the cloth was not strong enough in texture for the hard usage to which servants' liveries are subjected, and that it was altogether unsuitable for that purpose. There was evidence that one of the ordinary uses to which indigo blue cloth was applied was the making of servants' liveries, though it was also frequently used for other purposes, such as carriage linings, caps, and boots. There was no evidence that the cloth supplied by the defendants was unsuitable for these latter purposes. Before ordering the cloth the plaintiff subjected the sample to the ordinary tests for the purpose of ascertaining whether it was suitable for liveries, and failed to discover that it was not so. The plaintiff having sued the defendants for breach of an implied warranty that the cloth was merchantable, the judge left to the jury the question whether it was merchantable as supplied to woolen merchants, and refused to leave to them the question whether an ordinary and usual use of cloth of the description ordered was the making of it into liveries. The verdict having passed for the defendants, the plaintiff moved for a new trial on the ground of misdirection.

Danckwerts, for plaintiff. Gulry, for defendants, was not called upon.

Lord COLERIDGE, C. J. I am of opinion that in this case the direction of the county court judge to the jury was right, and that there was not any such non-direction as made his direction amount to a misdirection. There is no doubt that if a manufacturer sells an article which he knows is bought for a particular purpose, he impliedly warrants that it is fit for that particular purpose. That is a principle which was established some sixty years ago in the case of Jones

v. Bright,¹ and has been acted upon ever since. But the present case is not within that rule, because nothing was mentioned to the seller as to the particular purpose for which this cloth was bought, and there was nothing to fix him with knowledge of that purpose. Here all that was shown was that the seller on the one side was a manufacturer, and the buyer on the other side was a woolen merchant. No doubt it was possible that the buyer might sell the goods to some person or other who might use them for a purpose for which they were not fit, and I may assume that the goods here were unfit for the particular purpose to which the plaintiff applied them. But there was nothing, beyond the position of the parties, to show that the seller knew the specific purpose for which they were bought, and it could not be denied that they might have been used for a variety of other purposes for which they were fitted. The plaintiff might have sold them to be used for purposes for which they were applicable. But then it is said that the case of *Drummond v. Vann Ingen*² in the house of lords carries the law farther than *Jones v. Bright*.³ In my opinion that is not so. There was no intention on the part of the lords to extend the old rule. Lord Macnaghten expressly said that he did not go beyond it; so also did Lord Selborne. And Lord Herschell, on whose judgment special reliance has been placed, was particularly careful to explain that he did not intend to carry the doctrine farther. He said: "It was urged for the appellants by the attorney-general, in his able argument at the bar, that it would be unreasonable to require that a manufacturer should be cognizant of all the purposes to which the article he manufactures might be applied, and that he should be acquainted with all the trades in which it may be used. I agree. Where the article may be used as one of the elements in a variety of other manufactures, I think it may be too much to impute to the maker of this common article a knowledge of the details of every manufacture into which it may enter in combination with other materials." If the plaintiff is to succeed, it must be on the ground of the reasonableness of imputing such knowledge to the manufacturer. I do not see that there was any evidence that the making of liveries was the only purpose, or even the most usual purpose, for which this particular kind of cloth was ordinarily used, and unless that is so, there is nothing to fix the manufacturer with knowledge which would bring the case within the rule.

Lord ESHER, M.R. The question which was left by the judge to the jury, and the sufficiency of which is now complained of, was whether the cloth supplied by the defendants to the plaintiff was merchantable as supplied to woolen merchants. The cloth in question was ordered under

¹ 5 Bing. 531.² 12 App. Cas. 284.³ 5 Bing. 533.

a particular name, namely, "indigo blue cloth," by a woollen merchant of a woollen cloth manufacturer, to be made according to sample. It was not denied that the cloth supplied answered the name, nor was it disputed that it agreed with the sample. But it was said that there was a breach of an implied warranty that it should be fit for the particular purpose of being made into liveries. Now the rule with regard to the implied warranty of fitness which arises in the case of a sale of goods is that which is laid down in *Jones v. Just*⁴ in the fourth of the five classes of cases there enumerated: "Where a manufacturer or a dealer contracts to supply an article which he manufactures, or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied." Those are the limits of the warranty. Here the goods were ordered by a woollen merchant. He no doubt happened also to be a tailor; but that fact was unknown to the defendant. The purpose for which a woollen merchant buys cloth is to sell it again to others. There was indeed evidence that such cloth as this, if sold to a tailor, was not fit for one of the purposes to which a tailor might apply it. But there was no evidence that it was not fit for other of the purposes even of a tailor. Moreover, the cloth might have been sold by woollen merchants to fifty other classes of persons besides tailors. There was no evidence that wool manufacturers know that woollen merchants sell to tailors at all. The manufacturer here was not told, either expressly or by implication, that the goods were ordered that they might be sold to tailors. Then is there any authority which establishes that where goods are ordered by a woollen merchant of a cloth manufacturer the latter must be taken to know that they may be ordered to be sold to tailors? The case referred to in the house of lords is no authority for such a proposition, for there the goods were ordered under the design-

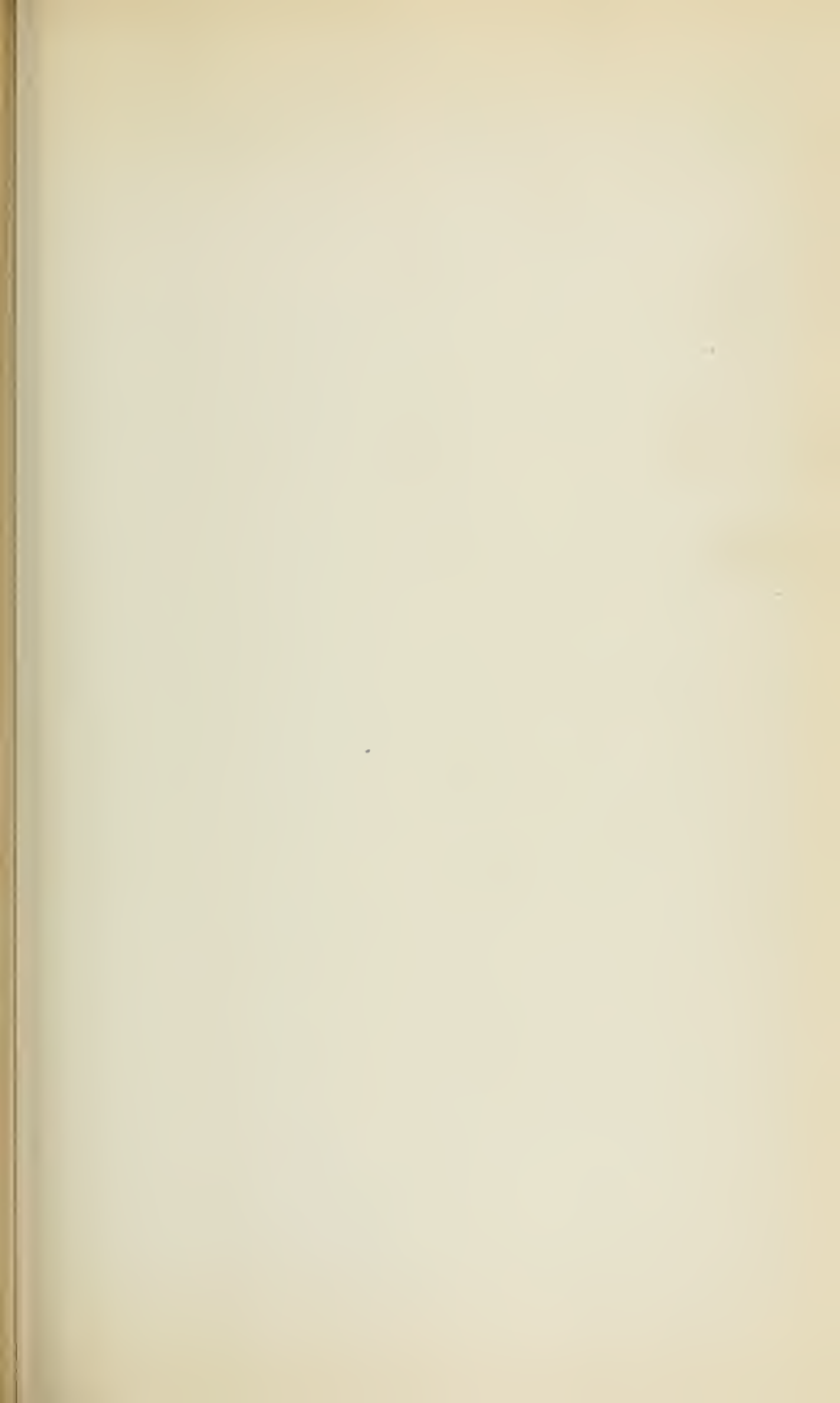
ation of "coatings," which necessarily imported that they were intended to be made up into coats, and therefore the facts of that case came within the precise terms of the fourth rule in *Jones v. Just*.⁵ It is suggested that every wool manufacturer is bound to know all the ordinary purposes to which a woollen merchant may put the cloth which he buys—that is to say, he is bound to be acquainted with all the trades to which the woollen merchant may re-sell it; but that is the very proposition which Lord Herschell expressly denies. "It would be unreasonable," he says, "to require that a manufacturer should be cognizant of all the purposes to which the article he manufactures might be applied, and that he should be acquainted with all the trades in which it may be used." Though he adds that "There seems nothing unreasonable in expecting that the maker of 'coatings' should know that they are to be turned into coats." And Lord Selborne says, that although, "if the goods being of a class known and understood, between merchant and manufacturer, as in demand for a particular trade or business, and being ordered with a view to that market, are found to have in them, when supplied, a defect practically new, not disclosed by the samples, but depending on the method of manufacture, which renders them unfit for the market for which they were intended," the doctrine of implied warranty applies; yet that doctrine "ought not to be unreasonably extended, so as to require manufacturers to be conversant with all the specialties of all trades and businesses which they do not carry on, but for the purposes of which goods may be ordered from them." The lords decided that case on the ground that it came within the fourth proposition in *Jones v. Just*,⁶ which proposition they held to be applicable to a case in which the goods were bought by sample. But here there is no evidence to bring the case within that proposition. The direction of the county court judge was right, and this appeal must be dismissed.

Appeal dismissed.

⁴L. R. 3 Q. B. 197.

⁵L. R. 3 Q. B. 197.

⁶L. R. 3 Q. B. 197.



JONES v. UNITED STATES.

(96 U. S. 24.)

Supreme Court of the United States. Oct.
Term, 1877.

Appeal from the court of claims.

Mr. James Lowndes, for appellant. The
Solicitor-General, contra.Mr. Justice CLIFFORD delivered the
opinion of the court.

Time is usually of the essence of an executory contract for the sale and subsequent delivery of goods, where no right of property in the same passes by the bargain from the vendor to the purchaser; and the rule in such a case is, that the purchaser is not bound to accept and pay for the goods, unless the same are delivered or tendered on the day specified in the contract. Addison, Contr. 185; Gath v. Lees, 3 H. & C. 558; Coddington v. Paleologo, Law Rep. 2 Exch. 196.

Articles of agreement were made June 1, 1864, between an assistant-quartermaster of the army and the petitioner, who contracted to manufacture and deliver at the clothing depot of the army in Cincinnati, by or before the 15th of December then next, two hundred thousand yards of dark-blue uniform-cloth; and it was agreed that deliveries under the contract should be made as follows: five thousand yards in June, twenty-five thousand yards in July, twenty-five thousand yards in August, thirty-five thousand yards in September, fifty thousand yards in October, fifty thousand yards in November, and ten thousand yards on or before the 15th of December in the same year.

Other persons were interested with him in the contract at the time it was made; but one after another retired, until the petitioner is the only one that retains any interest. His claim is fully set forth in his petition.

Certain instalments of the cloth were delivered, for which the United States paid the contract price, excepting ten per cent reserved by the United States, pursuant to the written contract. Neither party complains of any default prior to August of that year, when the mill in which the cloths were manufactured was destroyed by fire, and the petitioner, in consequence of the loss, failed to make the deliveries of the cloth as the contract required; and the assistant-quartermaster called his attention to the fact, and notified the sureties that he should proceed against their principal for his delinquency.

Unable to fulfil the terms of the contract, he applied by letter to the person in charge of the depot to be released from the obligation, and for the payment of the reserved ten per cent. Being unsuccessful in that application, he visited Washington, for the purpose of applying to the department to be released from the unfinished part of his contract; and with that view sought an interview with the quartermaster-general, who referred him to the head of the bureau of clothing, where he

was told that there was no power out of congress to release him, and that he must furnish the goods. Had the conversation between the parties stopped there, the case would be destitute of any color of equity; but the finding of the court below shows that the head of the bureau remarked, that, upon application to the assistant-quartermaster, sufficient time would be allowed to deliver the goods.

Though told that there was no power out of congress to release him from his contract, he procured the necessary quantity of such cloth to be manufactured, and applied by letter to the assistant-quartermaster for leave to complete the contract, who referred the letter to the quartermaster-general for decision; and his reply to the petitioner, as given in the findings, was, that he could not authorize the release from contracts, nor the extension of time for the delivery of articles under a contract, nor any action whatever not in accordance with their terms and conditions.

Prices in the market fell one-half; but the petitioner tendered the cloths to the assistant-quartermaster, who refused to receive the same, because the time for deliveries under the contract had passed.

Damages are claimed by the petitioner, upon the ground that the time for the delivery of the cloths, as specified in the contract, was extended; but the court of claims decided that the theory of fact involved in the defence was not proved; that the remarks of the head of the bureau of clothing were not sufficient to support that theory, as they might not imply any thing more than the opinion of that officer as to what the assistant-quartermaster would do.

The petition having been dismissed, due appeal was taken by the petitioner; and he assigns the following errors: 1. That the court erred in holding that time was of the essence of the written contract. 2. That the court erred in deciding that there was not a valid extension as to the time for delivering the cloths. 3. That the court erred in overruling the proposition of the petitioner, that the United States were estopped from denying the existence of the contract when the goods were tendered. 4. That the court erred in holding that there was not a new contract, and that such new contract was void because not in writing.

Whether one promise be the consideration for another, or whether the performance, and not the mere promise, be the consideration, is to be determined by the intention and meaning of the parties, as collected from the instrument, and the application of good sense and right reason to each particular case. Instructive rules for the accomplishment of that purpose have been stated in various decisions of the court and in treatises of high authority, some few of which may be consulted in this case to advantage. Chitty, Contr. 668.

Where an act is to be performed by the plaintiff before the accruing of the defendant's liability under his contract, the plaintiff must prove either his performance

of such condition precedent, or an offer to perform it which the defendant rejected, or his readiness to fulfil the condition until the defendant discharged him from so doing, or prevented the execution of the matter which the contract required him to perform. For, where the right to demand the performance of a certain act depends on the execution by the promisee of a condition precedent or prior act, it is clear that the readiness and offer of the latter to fulfil the condition, and the hindrance of its performance by the promisor, are in law equivalent to the completion of the condition precedent, and will render the promisor liable upon his contract. *Graves v. Legg*, 9 Exch. 769; *Morton v. Lamb*, 7 Term. 125; *Peeters v. Opie*, 2 Wms. Saund. 352b; *Cutter v. Powell*, 2 Smith, Lead. Cas. 13.

Well-considered authorities everywhere agree that a contract may be so framed that the promises upon one side may be dependent upon the promises upon the other; so that no action can be maintained, founded on the written contract, without showing that the plaintiff has performed, or at least has been ready, if allowed by the other party, to perform, his own stipulations, which are a condition precedent to his right of action: nor is it necessary to enter into much discussion in this case to prove that the described instalments of clothing were required, by the true intent and meaning of the parties, as expressed in the written contract, to be delivered at the time and place therein specified and set forth, as the manifest purpose and object of the contract was to procure necessary supplies of clothing for an army in the field.

None will pretend that any right of property in the clothing passed to the United States by the bargain between the parties; and the rule in such cases is, that time is and will be of the essence of the contract, so long as the contract remains executory, and that the purchaser will not be bound to accept and pay for the goods, if they are not delivered or tendered on the day specified in the contract. *Addison, Contr.* 185.

Suppose that is so, still it is contended by the petitioner that the time of performance was extended by the remarks of the head of the bureau of clothing when the contractor applied to be released from the obligation to complete the unfinished part of his contract; but the court is unable to concur in that proposition. The finding of the court below shows that no such extension was ever made.

Conditions precedent may doubtless be waived by the party in whose favor they are made; but the findings of the court below do not afford any ground to support any such theory. Cases arise where either party, in case of a breach of the contract, may be compensated in damages; and in such cases it is usually held that the conditions are mutual and independent: but where the conditions are dependent and of the essence of the contract, it is everywhere held that the performance of one depends on the performance of another, in which case the rule is universal,

that, until the prior condition is performed, the other party is not liable to an action on the contract. *Addison, Contr.* 925.

Where time is of the essence of the contract, there can be no recovery at law in case of failure to perform within the time stipulated. *Slater v. Emerson*, 19 How. 224.

Additional authorities to show that a party bound to perform a condition precedent cannot sue on the contract without proof that he has performed that condition, is scarcely necessary, as the principle has become elementary. *Gouverneur v. Tillotson*, 3 Edw. (N. Y.) Ch. 348.

Conditions, says Story, may be either precedent or subsequent, but a condition precedent is one which must happen before either party becomes bound by the contract. Thus, if a person agrees to purchase a cargo of a certain ship at sea, provided the cargo proves to be of a particular quality, or provided the ship arrives before a certain time, or at a particular port, each proviso is a condition precedent to the performance of such a contract; and unless the cargo proves to be of the stipulated quality, or the ship arrives within the agreed time or at the specified port, no contract can possibly arise. *Story, Contr.* 33.

Impossible conditions cannot be performed; and if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obliged to perform an impossibility; but where the contract is to do a thing which is possible in itself, the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party, nor was within his control. *Chitty, Contr.* 663; *Jervis v. Tompkinson*, 1 H. & N. 208.

Other defenses failing, the petitioner insists that the United States are estopped to deny that the time of performance was extended, as set up in his second assignment of error; but the court is unable to sustain that proposition, as the remark of the head of the bureau does not amount to a contract for such an extension, being nothing more than the expression of an opinion that the assistant-quartermaster would grant the applicant some indulgence.

Viewed in that light, it is clear that the United States did not do any thing to warrant the contractor in changing his position, and, if not, then it is settled law that the principle of estoppel does not apply. *Pickard v. Sears*, 6 Ad. & E. 474; *Freeman v. Cooke*, 2 Exch. 654; *Foster v. Dawber*, 6 id. 854; *Edwards v. Chapman*, 1 Mee. & W. 231; *Swain v. Seamens*, 9 Wall. 254.

Estoppel does not arise in such a case, unless the party for whom the service is to be performed induced the other party by some means to change his position and act to his prejudice in consequence of the inducement; but in the case before the court, the remark made by the head of the bureau was not of a character to warrant the petitioner to assume that it was

agreed that any such indulgence would be given. Benjamin, Sals, 45; United States v. Shaw, 1 Cliff. 317.

Conclusive evidence that the time of performance had expired is found in the findings of the court, and the petitioner failing to establish his theory that the time of performance had been extended, it is clear that there is no error in the record.

Judgment affirmed.

KIMBERLY *et al.* *v.* PATCHIN.

(19 N. Y. 330.)

Court of Appeals of New York. June Term, 1859.

Appeal from the supreme court. Action to recover the value of 6000 bushels of wheat, alleged to have been the property of the plaintiffs, and to have been converted by the defendant. Upon the trial before Mr. Justice Greene, at the Erie circuit, it was proved that one Dickinson had in warehouse, at Littlefort, in Wisconsin, two piles of wheat, amounting to 6249 bushels. John Shuttleworth proposed to purchase 6000 bushels of wheat. Upon being shown the piles, he expressed a doubt whether they contained that quantity. Dickinson declared his opinion that they did, and agreed to make up the quantity if they fell short. A sale was then made at seventy cents per bushel, Dickinson signing and delivering to Shuttleworth a memorandum, as follows:—

"Littlefort, February 17, 1848.

"John Shuttleworth bought of D. O. Dickinson.

6000 bushels of wheat, delivered on board, 70 cents.....	\$4,200
Received his draft upon John Shuttleworth, of Buffalo, for..	\$2,100
To remit me.....	1,600
Five drafts of \$100 each.....	500
	4,200

"D. O. Dickinson."

He also signed and delivered to Shuttleworth, this paper, viz.:—

"Littlefort, February 18, 1848. 6000 bushels wheat. Received in store 6000 bushels of wheat, subject to the order of John Shuttleworth, free of all charges, on board. D. O. Dickinson."

The wheat was left undisturbed in the warehouse. Shuttleworth sold the wheat to the defendant, assigning to him the bill of sale and warehouse receipt. Dickinson, shortly afterwards, sold the whole quantity of wheat in the two piles to a person under whom the plaintiffs derived title. The defendant having obtained the possession of the wheat, this action was brought. The judge, under exception by the defendant, directed a verdict for the plaintiffs, which was rendered, and the judgment thereon having been affirmed at general term, in the eighth district, the defendant appealed to this court.

John H. Reynolds, for appellant. John L. Talcott, for respondents.

COMSTOCK, J. Both parties trace their title to the wheat in controversy to D. O. Dickinson, who was the former owner, and held it in store at Littlefort, Wisconsin. The defendant claims through a sale made by Dickinson to one Shuttleworth on the 18th of February, 1848. If that sale was effectual to pass the title, it is not now pretended that there is any ground on which the plaintiffs can recover in this suit. The sale to the person under whom they claim, was about two and a half months junior in point of time.

The sale to Shuttleworth was by a writing in the form of a present transfer of 6000 bushels of wheat, at seventy cents per bushel. No manual delivery was then made, but instead thereof the vendor executed and delivered to the vendee another instrument, declaring that he had received in store the 6000 bushels subject to the vendee's order; of the price \$2640 was paid down, and the residue \$1600, which was to be paid at a future day, the purchaser afterwards offered to pay, according to the agreement. So far the contract had all the requisites of a perfect sale. The sum to be paid by the purchaser was ascertained, because the number of bushels and the price per bushel were specified in the contract. Although the article was not delivered into the actual possession of the purchaser, yet the seller, by the plain terms of his agreement, constituted himself the bailee, and henceforth stood in that relation to the purchaser and to the property. That was equal in its results to the most formal delivery, and no argument is required to show that the title was completely divested, unless a difficulty exists yet to be considered.

The quantity of wheat in store to which the contract related, was estimated by the parties at about 6000 bushels. But subsequently, after Dickinson made another sale of the same wheat to the party under whom the plaintiffs claim, it appeared on measurement that the number of bushels was 6249, being an excess of 249 bushels. When Shuttleworth bought the 6000 bushels, that quantity was mixed in the storehouse with the excess, and no measurement or separation was made. The sale was not in bulk, but precisely of the 6000 bushels. On this ground it is claimed, on the part of the plaintiffs, that in legal effect the contract was executory, in other words a mere agreement to sell and deliver the specified quantity, so that no title passed by the transaction. It is not denied, however, nor does it admit of denial, that the parties intended a transfer of the title. The argument is, and it is the only one which is even plausible, that the law overrules that intention, although expressed in plain written language, entirely appropriate to the purpose.

It is a rule asserted in many legal authorities, but which may be quite as fitly called a rule of reason and logic as of law, that in order to an executed sale, so as to transfer a title from one party to another, the thing sold must be ascertained. This is a self-evident truth, when applied to those subjects of property which are distinguishable by their physical attributes from all other things, and, therefore, are capable of exact identification. No person can be said to own a horse or a picture, unless he is able to identify the chattel or specify what horse or what picture it is that belongs to him. It is not only legally, but logically, impossible to hold property in such things, unless they are ascertained and distinguished from all other things; and this, I apprehend, is the foundation of the rule that, on a sale of chattels, in order to pass the title, the articles must, if not delivered, be designated, so

that possession can be taken by the purchaser without any further act on the part of the seller.

But property can be acquired and held in many things which are incapable of such an identification. Articles of this nature are sold, not by a description which refers to and distinguishes the particular thing, but in quantities, which are ascertained by weight, measure, or count; the constituent parts which make up the mass being undistinguishable from each other by any physical difference in size, shape, texture, or quality. Of this nature are wine, oil, wheat, and the other cereal grains, and the flour manufactured from them. These can be identified only in masses or quantities, and in that mode, therefore, they are viewed in the contracts and dealings of men. In respect to such things, the rule above mentioned must be applied according to the nature of the subject. In an executed and perfect sale, the things sold, it is true, must be ascertained. But as it is not possible in reason and philosophy to identify each constituent particle composing a quantity, so the law does not require such an identification. Where the quantity and the general mass from which it is to be taken are specified, the subject of the contract is thus ascertained, and it becomes a possible result for the title to pass, if the sale is complete in all its other circumstances. An actual delivery indeed cannot be made unless the whole is transferred to the possession of the purchaser, or unless the particular quantity sold is separated from the residue. But actual delivery is not indispensable in any case in order to pass a title, if the thing to be delivered is ascertained, if the price is paid or a credit given, and if nothing further remains to be done in regard to it.

It appears to me that a very simple and elementary inquiry lies at the foundation of the present case. A quantity of wheat being in store, is it possible in reason and in law for one man to own a given portion of it and for another man to own the residue without a separation of the parts? To bring the inquiry to the facts of the case: in the storehouse of Dickinson there was a quantity not precisely known. In any conceivable circumstances could Shuttleworth become owner of 6000 bushels, and Dickinson of the residue, which turned out to be 249 bushels, without the portion of either being divided from the other? The answer to this inquiry is plain. Suppose a third person, being the prior owner of the whole, had given to S. a bill of sale of 6000 bushels, and then one to D. for the residue more or less, intending to pass to each the title, and expressing that intention in plain words, what would have been the result? The former owner most certainly would have parted with all his title. If, then, the two purchasers did not acquire it, no one could own the wheat, and the title would be lost. This would be an absurdity. But if the parties thus purchasing could and would be the owners, how would they hold it? Plainly according to their contracts. One would be entitled to 6000 bushels, and the other to

what remained after that quantity was subtracted.

Again suppose, Dickinson having in store and owning 249 bushels, Shuttleworth had deposited with him 6000 bushels for storage merely, both parties agreeing that the quantities might be mixed. This would be a case of confusion of property where neither would lose his title. In the law of bailments it is entirely settled that S., being the bailor of the 6000 bushels, would lose nothing by the mixture, and, it being done by consent, it is also clear that the bailee would lose nothing. Story on Bailments, § 40; 2 Bl. Com. 403.

These and other illustrations which might be suggested, demonstrate the possibility of a divided ownership in the 6249 bushels of wheat. If, then, the law admits that the property, while in mass, could exist under that condition, it was plainly competent for the parties to the sale in question, so to deal with each other as to effectuate that result. One of them being the owner of the whole, he could stipulate and agree that the other should thenceforth own 6000 bushels without a separation from the residue. And this, I think, is precisely what was done. The 6000 bushels might have been measured and delivered to the purchaser, and then the same wheat might have been redelivered to the seller under a contract of bailment. In that case the seller would have given his storehouse receipt in the very terms of the one which he actually gave; and he might, moreover, have mixed the wheat thus redelivered with his own, thereby reducing the quantity sold and the quantity unsold again to one common mass. Now the contract of sale and of bailment, both made at the same time, produced this very result. The formalities of measurement and delivery pursuant to the sale, and of redelivery according to the bailment—resulting in the same mixture as before—most assuredly were not necessary in order to pass the title, because these formalities would leave the property in the very same condition under which it was in fact left; that is to say, in the actual custody of the vendor, and blended together in a common mass. Those formal and ceremonial acts were dispensed with by the contract of the parties. They went directly to the result without the performance of any useless ceremonies, and it would be strange, indeed, if the law denied their power to do so.

There are in the books a considerable number of cases having a real or some apparent bearing upon the question under consideration. Some of them very unequivocally support the defendant's title under the sale to Shuttleworth. A few only of these will be cited. In *Whitehouse v. Frost*, 12 East, 614, the vendors owned forty tons of oil secured in one cistern, and they sold ten tons out of the forty, but the quantity sold was not measured or delivered. The purchaser sold the same ten tons to another person, and gave a written order on the original vendors, which, on being presented, they accepted, by writing the word "accepted"

on the face of the order, and signing their names. It was held by the English common pleas that the title passed; considerable stress being laid on the acceptance of the order, which, it was said, placed the vendors in the relation of bailees to the quantity sold. This was in 1810. In the following year the case of *Jackson v. Anderson*, 4 Taunt. 24, was decided in the king's bench. That was an action of trover for 1960 pieces of coin called Spanish dollars. Mr. Fielding, at Buenos Ayres, remitted to Laycock & Co., at London, \$4700, and advised the plaintiffs that 1960 of the number were designed for them in payment for goods bought of them. Laycock & Co. received the 4700 pieces, and pledged the whole of them to the defendant, who sold them to the Bank of England. It was held: 1. That the letter of advice was a sufficient appropriation of \$1960 to the plaintiffs. 2. That the plaintiffs and defendant did not become joint-tenants or tenants in common of the dollars. 3. That although no specific dollars were separated from the residue for the plaintiffs, yet as the defendant had converted the whole, trover would lie for the plaintiffs' share. Of course the action in its nature directly involved the plaintiffs' title, and it was held that the sale or appropriation of a part without any separation was a perfect sale. In *Pleasants v. Pendleton*, 6 Rand. 473, the sale (omitting immaterial circumstances) was of 119 out of 123 barrels of flour, situated in a warehouse, all of the same brand and quality. It was held by the Virginia court of appeals, upon very elaborate consideration, and after a review of all the cases, that the title was transferred by the sale. See also *Damon v. Osborn*, 1 Pick. 477; *Croloot v. Bennett*, 2 Comst. 278. In the last mentioned, which was decided in this court, the sale was of 43,000 bricks in an unfinished kila containing a larger quantity. A formal possession of the whole brick-yard was taken by the purchaser. It was held that he acquired title to the 43,000, although no separation was made. In the opinion of Judge Strong, the case was made to turn mainly on a supposed delivery of the whole quantity. But, with deference, that circumstance does not appear to me to have been the material one, inasmuch as all the bricks confessedly were not sold. The delivery, therefore, did not make the sale, and if part could not be sold without being separated, I do not see how a formal delivery of the whole brick-yard could cure the difficulty. The learned judge speaks of the transaction as a delivery of the whole quantity "with the privilege of selection." But assuming, as he did, that the want of selection or separation was the precise difficulty to be overcome, it is not easy to see how a privilege to select could change the title before the selection was actually made. The case, therefore, it seems to me, can only stand on the ground that the sale was, in its nature, complete; the formal delivery of the whole being doubtless a circumstance entitled to weight in arriving at the intention of the parties. The case is, in short,

a strong authority to prove that, in sales by weight, measure, or count, a separation of the part sold from the mass is not in all cases a fundamental requisite.

Referring now to cases where it has been held that sales of this general nature were incomplete, it will be found that they are not essentially and necessarily opposed to the conclusion that, in the instance before us, the title was changed. In *White, assignee, &c., v. Wilks*, 5 Taunt. 176, a merchant sold twenty tons of oil out of a stock consisting of different large quantities in different cisterns, and at various warehouses. The note of sale did not express the quality or kind of oil sold, or the cistern or warehouse from which it was to be taken, and the purchaser did not even know where the particular oil lay which was to satisfy the contract. Very clearly the title could not pass upon such a sale; and so it was held, although the seller was entitled by the contract to charge "1s. per ton per week rent," for keeping the oil. A very different question would have been presented if the cistern from which the twenty tons were to be taken had been specified. The mass and quality would then have been ascertained. As it was, the subject of the contract was not identified in any manner. The remarks of the judge, evidently not made with much deliberation, must be construed with reference to the particular facts of the case.

In *Austen v. Craven*, 4 Taunt. 644, there was a contract to sell 200 hogsheds of sugar, to be of four different kinds and qualities which were specified. It did not appear that the seller, at the time of the contract, had the sugar on hand, or any part of it, and the fact was assumed to be otherwise. The sale was, moreover, at so much per cwt., requiring that the sugar should be weighed in order to ascertain the price. In these circumstances the case was considered plainly distinguishable from *Whitehouse v. Frost*, supra, and it was held that the title did not pass. I do not see the slightest ground for questioning the decision, although, perhaps, one or two remarks of Chief Justice Mansfield are capable of a wider application than the facts of the case would justify.

The two cases last mentioned have been not unfrequently cited in various later English and American authorities, which need not be particularly referred to. Some of these authorities may suggest a doubt whether the title passes on a mere sale note by measure or weight out of a larger quantity of the same kind and quality, there being no separation and no other circumstances clearly evincing an intention to vest the title in the purchaser. It is unnecessary now to solve that doubt, because none of the decisions announce the extreme doctrine, that where, in such cases, the parties expressly declare an intention to change the title, there is any legal impossibility in the way of that design. Upon a simple bill of sale of gallons of oil or bushels of wheat, mixed with an ascertained and defined larger quantity, it may or may not be considered that the parties intend that the portion sold shall

be measured before the purchaser becomes invested with the title. That may be regarded as an act remaining to be done, in which both parties have a right to participate. But it is surely competent for the vendor to say in terms, that he waives that right, and that the purchaser shall become at once the legal owner of the number of gallons or bushels embraced in the sale. If he cannot say this effectually, then the reason must be that two men cannot be owners of separate quantities or proportions of an undistinguishable mass. That conclusion would be a naked absurdity, and I have shown that such is not the law. In the case before us the vendor not only executed his bill of sale professing to transfer 6000 bushels of wheat, but, waiving all further acts to be done, in order to complete the transaction, he acknowledged himself, by another instrument, to hold the same wheat in store as the bailee thereof for the purchaser. If his obligations from that time were not simply and precisely those of a bailee, it is because the law would not suffer him to stand in that relation to the property for the reason that it was mixed with his own. But no one will contend for such a doctrine.

I repeat it is unnecessary to refer to all the cases, or to determine between such as may appear to be in conflict with each other. None of them go to the extent of holding that a man cannot, if he wishes and intends so to do, make a perfect sale of part of a quantity without actual separation, where the mass is ascertained by the contract and all parts are of the same value and undistinguishable from each other.

One of the cases, however, not yet cited, deserves a brief consideration, because it was determined in this court, and has been much relied on by the plaintiffs' counsel. I refer to *Gardiner v. Snyder*, 3 Seld. 357. The owner of flour delivered it in various parcels to a warehouseman, and from time to time took receipts from him. One of these receipts was held by the defendants and others by the plaintiffs, both parties having accepted and paid drafts on the faith thereof. The defendants' receipt was the first in point of time, and was for 536 barrels, being given at a time when in fact there were but 201 barrels in the warehouse, so that it covered 335 more than were then on hand. But other quantities were subsequently delivered at the warehouse, all of the same kind and quality, and the defendants, in fact, received by shipment to them, 500 barrels. For the conversion of this quantity they were sued by the plaintiffs, who had failed to receive the flour which their receipts called for. It cannot fail to be seen from this statement that the defendants, having the first receipt and receiving no more flour than it specified, were entitled to judgment by reason of the priority of their title; and this ground of decision is very clearly stated in the opinion of the chief judge. He thought if the transfer of the receipts could pass the title to the flour,

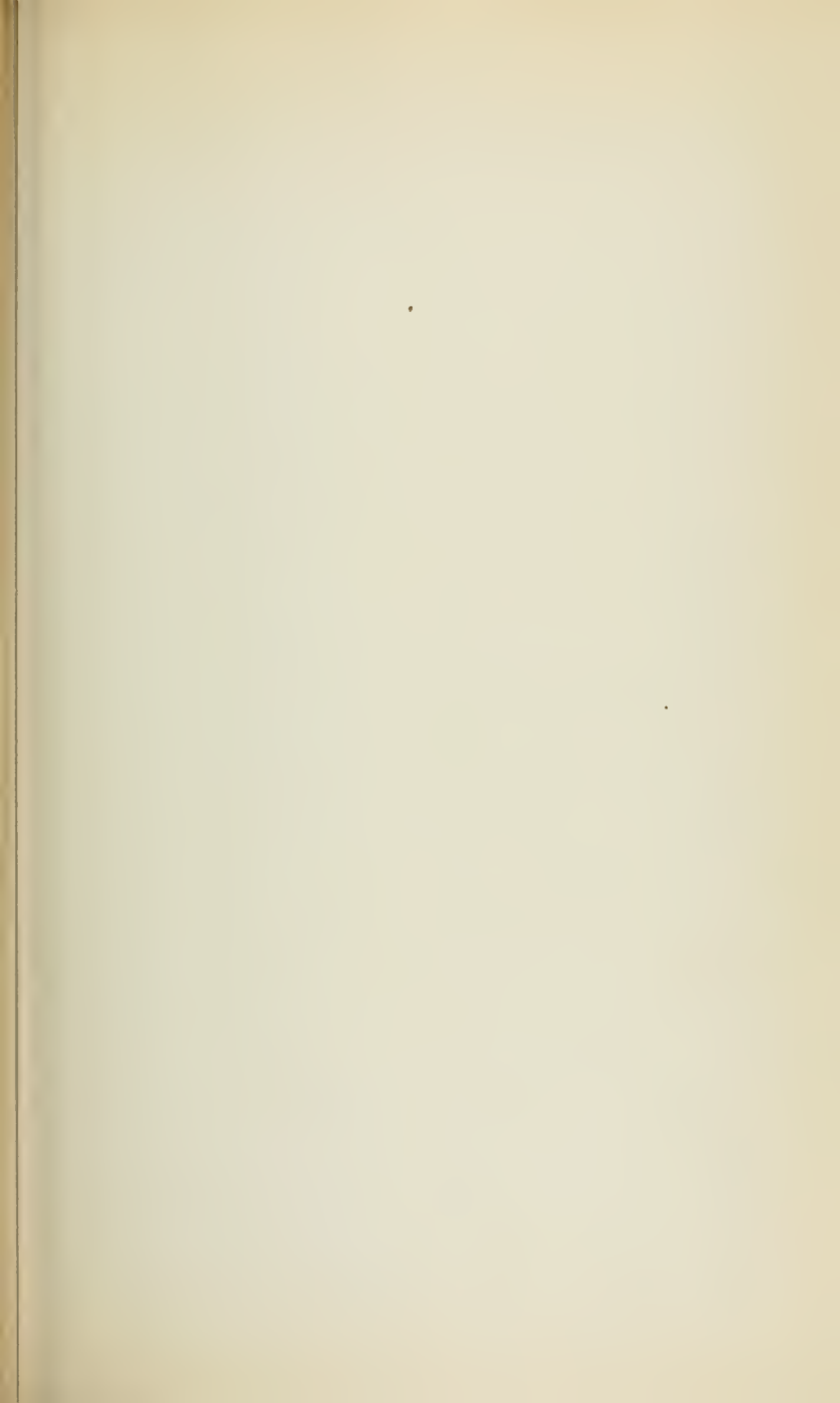
notwithstanding the mixture of all the quantities together, that the one held by the defendants entitled them not only to the 201 barrels in store when it was given, but also to so many barrels delivered in store afterwards as were necessary to make up their number. This view, which appears to me correct, was fatal to the plaintiffs' case. But in another aspect of the controversy, the learned chief judge was of opinion that the transfer to the plaintiffs of the receipts held by them passed no title, on the ground that the quantities which they respectively covered were all mixed together in the storehouse. Assuming the correctness of that view—which I am constrained to question—the case is still unlike the present one. The transfer of a warehouseman's receipt, given to the owner, was certainly no more than a simple sale note of the specified number of barrels; and where, in such cases, that is the whole transaction between vendor and vendee I have already admitted a doubt, suggested by conflicting cases, whether the title passes. If the owner of the flour had held it in his own warehouse, and had not only given a bill of sale of a portion of it, but had himself executed to the purchaser another instrument declaring that he held the quantity sold as bailee and subject to order, then the case would have resembled the one now to be determined.

We are of opinion, therefore, both upon authority and clearly upon the principle and reason of the thing, that the defendant, under the sale to Shuttleworth, acquired a perfect title to the 6000 bushels of wheat. Of that quantity he took possession at Buffalo, by a writ of replevin against the master of the vessel in which the whole had been transported to that place. For that taking the suit was brought, and it results that the plaintiff cannot recover. It is unnecessary to decide whether the parties to the original sale became tenants in common. If a tenancy in common arises in such cases, it must be with some peculiar incidents not usually belonging to that species of ownership. I think each party would have the right of severing the tenancy by his own act; that is, the right of taking the portion of the mass which belonged to him, being accountable only if he invaded the quantity which belonged to the other. But assuming that the case is one of strict tenancy in common, the defendant became the owner of 6000 and the plaintiffs of 249 parts of the whole. As neither could maintain an action against the other for taking possession merely of the whole, more clearly he cannot if the other takes only the quantity which belongs to him.

The judgment must be reversed and a new trial granted.

GRAY and GROVER, JJ., dissented; STRONG, J., expressed himself as inclined to concur, if necessary to a decision, but it being unnecessary, he reserved his judgment.

Judgment reversed and new trial ordered.



KINGMAN et al., a Corporation, v. DENISON et al.

(48 N. W. Rep. 24, 84 Mich. 608.)

Supreme Court of Michigan. Feb. 27, 1891.

Error to circuit court, Kent county; WILLIAM E. GROVE, Judge.

Replevin by Kingman & Co. against William C. Denison and the McCormick Harvesting Machine Company. There was a judgment in defendants' favor, and plaintiffs bring error.

Taggart & Denison, for appellants. Sweet & Perkins, for appellees.

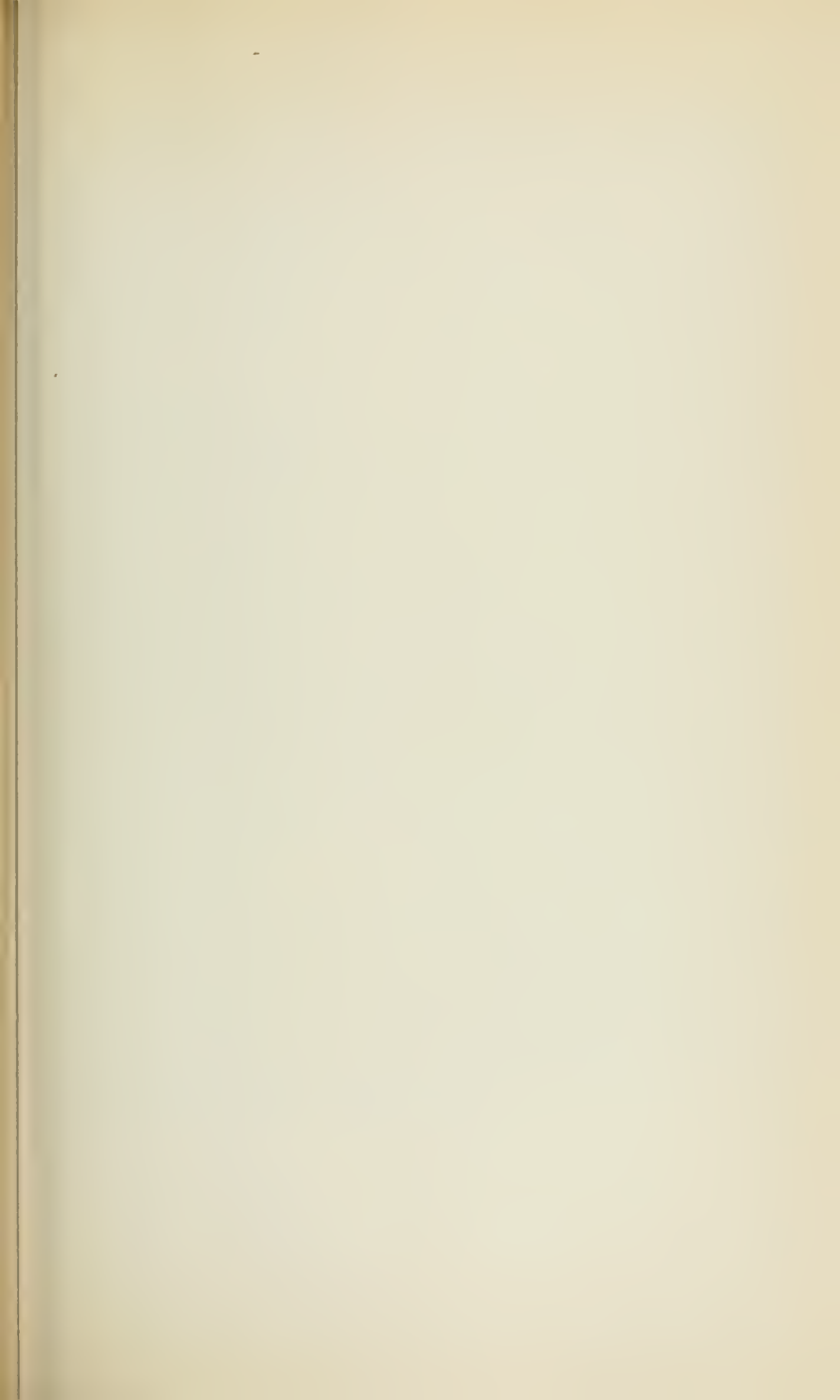
LONG, J. On July 8, 1889, defendant Denison wrote the plaintiffs at Peoria, Ill., ordering 5,000 pounds of twine. No dealings had ever been had between the parties prior to that time. The plaintiffs received the letter next day, and at once wrote Denison: "We have entered your order, and twine will go forward to-morrow." On July 11th the twine was shipped to W. C. Denison, Grand Rapids, Mich., plaintiffs taking shipping bill from the railroad company there, and on same day sent it to Denison, with statement of account for value of the twine. The twine was received at Grand Rapids by the Grand Rapids & Indiana Railroad Company, July 17th, and on the 18th they turned it over to a teamster, who delivered it at the store which was occupied by Denison at the time the order was made. It appears that on July 9th the Grand Rapids Savings Bank caused an attachment to be levied upon Denison's property. On that evening Denison gave the bank a chattel mortgage on all the goods in the store and at a warehouse there, and a store situate at another place outside of Grand Rapids. July 10th, 11th, and 12th he gave mortgages on the same property to several other creditors, two of them being given to the defendant the McCormick Harvesting Machine Company. The goods mortgaged were held in the store by the agents of the bank until they were sold under one of the mortgages, which was about July 18th, at which time the defendant the McCormick Harvesting Machine Company bid the goods in, and continued to occupy the store, putting Mr. Denison in as its agent. The McCormick Harvesting Machine Company mortgage contained a clause, after a description of the property mortgaged, as follows: "And all additions to and substitutes for any and all the above-described property." On September 7th plaintiffs, who had no notice or knowledge of the changed condition of Mr. Denison's affairs, drew on him at sight for the amount of the bill. This draft was not paid, and on September 14th plaintiffs wrote him for prompt remittance, which was not made. On September 19, 1889, plaintiffs brought replevin against the defendants for the twine, finding about one-half of it; the balance having been sold out of the store by the McCormick Harvesting Machine Company. On the trial of the cause the defendants waived return of the property, and had verdict and judgment against the plaintiff

for \$351.91, the value of the twine taken, and costs. Plaintiffs bring error.

The plaintiffs asked the court to instruct the jury that plaintiffs were entitled to a verdict; and in the ninth request asked an instruction that "if Mr. Denison did not in fact receive the twine at his store, but was not there when it was delivered, and never received and accepted it for his use in any way, except that, finding it in the store, he allowed the mortgages to assume control of it, plaintiffs could retake it as against him." And in the fourteenth request it was asked that the jury be instructed that the McCormick Company, as mortgagee, is in no better position than Mr. Denison. Its mortgage does not cover this twine, nor is it a bona fide purchaser. Several requests were also asked for instructions to the jury relating to the insolvency of Mr. Denison at the time of the purchase, and his intent not to pay for the twine at the time of its purchase, or at the time when it was received at the store, on the 18th of July. These last-named requests we do not deem it necessary to set out here for an understanding of the points involved. The requests set out were refused by the trial court, and upon such ruling the plaintiff assigns error. The court, in its charge to the jury, stated: "Plaintiff claims the right to the possession of these goods at the time this suit was commenced—First, because as counsel claims, the goods were ordered, were purchased, by Mr. Denison at a time when he was insolvent, and knew that he was insolvent, and had no intention, or at least no reasonable expectation, of paying for them according to the terms of the contract; and the plaintiff's counsel also claims the right of stoppage in transit. All I need to say in regard to the latter claim is that I think the right of stoppage in transit, under the facts of this case as shown by the evidence, has no application whatever; there is no such right existing." This part of the charge relating to the right of stoppage in transit is assigned as error. The court was in error in refusing these requests to charge and in the charge as given. It is not seriously contended here but that, under the evidence given on the trial, the defendant Denison was insolvent at the time the goods were ordered. At least this was a question of fact which should have been submitted to the jury; and, if so found, the question of the right of stoppage in transit was an important question in the case. The right of stoppage in transit is a right possessed by the seller to resume the possession of goods not paid for while on their way to the vendee, in case the vendee becomes insolvent before he has acquired actual possession of them. It is a privilege allowed to the seller for the particular purpose of protecting him from the insolvency of the consignee. The right is one highly favored in the law, being based upon the plain reason of justice and equity that one man's property should not be applied to the payment of another man's debts. *Gibson v. Carruthers*, 8 Mees. & W. 337. But it is properly exercised only upon goods which are in passage and are in the hands of

some intermediate person between the vendor and vendee in process, and for the purpose of delivery, and this right may be exercised whether the insolvency exists at the time of the sale or occurs at any time before actual delivery of the goods, without the knowledge of the consignor. O'Brien v. Norris, 16 Md. 122; Reynolds v. Railway Co., 43 N. H. 580; Blum v. Marks, 21 La. Ann. 268; Benedict v. Seacattle, 12 Ohio St. 515. This right of stoppage in transit will not be defeated by an apparent sale, fraudulently made, without consideration, for the purpose of defeating the right. There must be a purchase for value without fraud, to have this effect. Harris v. Pratt, 17 N. Y. 249. In the present case it appears that the goods arrived in Grand Rapids July 17th, and were taken to the store on the 18th. Mr. Denison was not in the store at the time they were taken in. Mr. Talford was in possession of all the goods and of the store at this time for all the mortgagees, and after the sale under the mortgage the McCormick Company took possession, and was in possession at the time this replevin suit was commenced. The testimony tends to show that at the time demand was made upon the McCormick Company and Mr. Denison for the twine Mr. Denison stated that he thought the plaintiff, having heard of his financial affairs, would not ship the twine, and that he did not know it had been shipped until it was in the store; and he was very sorry it had come, under the circumstances. The McCormick Company claimed that by the terms of their mortgage they were entitled to hold the twine. The court was in error in not submitting to the jury the question whether the goods had come actually to the possession of

Mr. Denison. The circumstances tend strongly to show that he never had actual possession of them, and never claimed them as owner. He had made the order, and was notified that they would be shipped; but from that time forward it is evident that he made no claim to them. The McCormick Company claimed that they passed to it under the terms of its mortgage. It however, stood in no better position than Denison. If the goods never actually came into the possession of Denison as owner, the mortgage lien would not attach, even under the clause in the mortgage covering after-acquired property. It does not stand in the position of a *bona fide* purchaser of the property. The right of stoppage could not be divested by a purchase of the goods under the mortgage sale. The transit had not ended unless there was actual delivery to Mr. Denison. These were questions of fact for the jury, which the court refused to submit. If the jury had found that Denison was insolvent at the time the order was made, or became insolvent at any time before the claimed delivery of the goods, and that the goods were never actually delivered to the possession of Mr. Denison, then the vendors' rights would have been paramount to any right which the McCormick Company could have acquired at the mortgage sale. Underhill v. Booming Co., 40 Mich. 660; Lentz v. Railway Co., 53 Mich. 444, 19 N. W. Rep. 138; White v. Mitchell, 38 Mich. 390; James v. Griffin, 2 Mees. & W. 623. In the view we have taken of the case, we think the other questions raised are unimportant, and we will not pass upon them. The judgment of the court below must be reversed, with costs, and a new trial ordered. The other justices concurred.



KINNEY v. McDERMOTT.

(8 N. W. Rep. 656, 55 Iowa, 674.)

Supreme Court of Iowa. April 20, 1884.

Appeal from Buena Vista circuit court.

This is an action of replevin, and the amount in controversy is less than \$100. There was a trial by jury. There was no conflict in the evidence. The court instructed the jury to return a verdict for the plaintiff. Defendant appeals.

H. W. Weeden, Wm. Wart, and Robinson & Milchrist, for appellant. C. D. Goldsmith, for appellee.

ROTHROCK, J. The trial judge made the following certificate, upon which we are authorized, under the statute, to entertain the appeal:

"(1) On Sunday plaintiff agreed with defendant, at the house of the latter, to give defendant a horse and \$25 in exchange for a horse of defendant. This was consented to, and on the same day, pursuant to said agreement, plaintiff left his horse with defendant, and took the horse of the latter away. The money was to be paid the following Sunday at the house of plaintiff. On Tuesday, following the exchange, defendant, in the absence of plaintiff, and without his knowledge or consent, returned to the stable of the latter the horse received of him, and took the horse he let plaintiff have away. A day or two later plaintiff replevied the horses so taken, and has since kept both horses, using the one returned by defendant, and not offering to return either horse or money. Under these facts can the plaintiff recover in his action of replevin?"

"(2) Under the facts hereinbefore stated, can plaintiff recover in replevin when his alleged right of possession, under the issues made in the pleadings, depends upon the ownership of the property?"

"(3) Is the plaintiff entitled to recover under the issues in this action, and the facts as stated above?"

A contract made and concluded on Sunday cannot be enforced by action. *Pike v. King*, 16 Iowa, 50. It is illegal, and the law in such cases will leave the parties where it finds them, or rather where they have placed themselves. If one party sells property to another on Sunday, and delivers it, no action will lie for the price agreed to be paid therefor. *Pike v. King*, supra. If the defendant in the action had brought replevin for the horse, instead of taking him by force, he would have been defeated, because he would have been obliged to introduce evidence to overcome the presumption arising from plaintiff's

possession. By the acts of the parties in violation of law the plaintiff became entitled to the possession of the horse. This possession was such that the defendant could not have recovered by action the price, if sold and not paid for, and could not maintain an action of replevin. He, however, wrongfully and by a trespass, deprived the plaintiff of the possession. The question is, will he be allowed to recover by force what the law would not have aided him to recover peaceably? It is insisted by counsel for appellant that, because the plaintiff claims title to the horse, he was bound to introduce evidence of such title, and could only do so by showing the Sunday contract. But, according to the certificate of the trial judge, the plaintiff was in possession, and the defendant, by force, and without the knowledge of the plaintiff, removed the horse from plaintiff's stable. The question is, by what right did the defendant possess himself of the horse? The burden was on him to show his right. In doing so he would necessarily be compelled to introduce the Sunday contract as evidence.

In *Smith v. Bean*, 15 N. H. 577, referring to a contract of sale made on Sunday, it is said: "The transaction being illegal, the law leaves the parties to suffer the consequences of their illegal acts. The contract is void so far as it is attempted to be made the foundation of legal proceedings. The law will not interfere to assist the vendor to recover the price. The contract is void for any such purpose. It will not sustain the vendee upon any warranty or fraud in the sale. It is void in that respect. The principle shows that the law will not aid the vendor to recover the possession of the property if he has parted with it. The vendee has the possession as of his own property by the assent of the vendor, and the law leaves them where it finds them. If the vendor should attempt to retake the property without process, the law, finding that the vendee had a possession which could not be controverted, would give a remedy for the violation of that possession." See, also, 2 *Parsons on Contracts*, 764, and notes. The author admits there is some conflict of authority upon the question whether a vendee will be allowed to retain the property without paying the price. In our opinion he should, on the ground that the law will leave the parties where it finds them. It was held in *Pike v. King*, supra, that the plaintiff could not recover the value of the property aside from the price agreed upon, or, in other words, could not recover upon the quantum valent.

Affirmed.

KOUNTZ v. KIRKPATRICK et al.

(72 Pa. St. 376.)

Supreme Court of Pennsylvania. Jan. 6, 1873.

Assumpsit by Joseph Kirkpatrick and James Lyons, trading as Kirkpatrick & Lyons, to the use of Frederick Fisher and others, trading as Fisher Bros., against William J. Kountz, for failure to deliver a certain quantity of crude petroleum, when called upon to do so December 31, 1869, in compliance with his contract previously made. Judgment for plaintiffs, and defendant brings error. Reversed.

Before THOMPSON, C. J., and READ, AGNEW, SHARSWOOD, and WILLIAMS, J.

S. H. Geyer and G. Shiras, Jr., for plaintiff in error. M. W. Acheson, for defendants in error.

AGNEW, J. The second, third, fifth, sixth, seventh, eighth, eleventh, twelfth, thirteenth, fourteenth, fifteenth and sixteenth errors, are not well assigned, for all the answers of the court to the points were omitted. When a court simply refuses a point, the error is well assigned by reciting the point, and stating that it was refused. But when the judge answers specially, in order to introduce a qualification he deems necessary to make his instruction correct, the answer must be recited as well as the point. We shall not decline considering, however, all the important questions; and in order to discuss them, we may state succinctly the nature of the case. On the 7th of June 1869, Kountz sold to Kirkpatrick & Lyon, two thousand barrels of crude petroleum, to be delivered at his option, at any time from the date, until the 31st of December 1869, for cash on delivery, at thirteen and a half cents a gallon. On the 24th of June 1869, Kirkpatrick and Lyon assigned this contract to Fisher & Brothers. Kountz failed to deliver the oil. He defends on the ground that Kirkpatrick & Lyons, and others holding like contracts for delivery of oil, entered into a combination to raise the price, by buying up large quantities of oil, and holding it till the expiration of the year 1869, and thus to compel the sellers of oil on option contracts, to pay a heavy difference for non-delivery. Fisher & Brothers, the assignees of Kountz's contract, were not in the combination, and the principal questions are whether they are affected by the acts of Kirkpatrick & Lyons, subsequent to the assignment; whether notice of the assignment to Kountz was necessary to protect them, and what is the true measure of damages. The court below held that Fisher & Brothers, as assignees of the contract, were not affected by the acts of Kirkpatrick & Lyons, as members of the combination in the following October and subsequently, and that notice in this case was not essential to the protection of Kountz.

The common-law rule as to the assignability of choses in action no longer prevails, but in equity the assignee is looked upon as the true owner of the chose. He

may set off the demand as his own: *Morgan v. Bank of North America*, 8 S. & R. 73; *Ramsay's Appeal*, 2 Watts 228. The assignee takes the chose subject to the existing equities between the original parties before assignment, and also to payment and other defences to the instrument itself, after the assignment and before notice of it; but he cannot be affected by collateral transactions, secret trusts, or acts unconnected with the subject of the contract: *Davis v. Barr*, 9 S. & R. 137; *Blackley v. Eckert*, 3 Barr 292; *Mott v. Clark*, 9 Id. 399; *Taylor v. Gitt*, 10 Id. 428; *Northampton Bank v. Ballet*, 8 W. & S. 318; *Corser v. Craig*, 1 Wash. C. C. R. 424; 1 *Parsons on Cont.* 193, 196; 2 *Story on Cont.*, § 396, n.

The act of Kirkpatrick & Lyons, complained of as members of an unlawful combination to raise the price of oil, was long subsequent to their assignment of Kountz's contract, and was a mere tort. The contract was affected only by its results as an independent act. It does not seem just, therefore, to visit this effect upon Fisher & Brothers, the antecedent assignees. The act is wholly collateral to the ownership of the chose itself, and there is nothing to link it to the chose, so as to bind the assignors and assignees together. After the assignment, there being no guaranty, the assignors had no interest in the performance of this particular contract, and no motive, therefore, arising out of it to raise the price on Kountz. The acts of Kirkpatrick & Lyons seem, therefore, to have no greater or other bearing on this contract than the acts of any other members of the combination, who were strangers to the contract.

In regard to notice of the assignment to Kountz, it is argued, that having had no notice of it, if he knew of the conspiracy to raise the price of oil, and thus to affect his contract, and that Kirkpatrick & Lyons were parties to it, he might have relied on that fact as a defence, and refused to deliver the oil, and claimed on the trial a verdict for merely nominal damages for his breach of his contract. Possibly in such a special case, want of notice might have constituted an equity, but the answer to this case is, that no such point was made in the court below, and there does not seem to be any evidence that Kountz knew of the conspiracy, and Kirkpatrick & Lyons's privity, and relying on these facts, desisted from purchasing oil to fulfil his contract with them. As the case stood before the court below, we discover no error in the answers of the learned judge on this part of it.

The next question is upon the proper measure of damages. In the sale of chattels, the general rule is, that the measure is the difference between the contract price and the market value of the article at the time and place of delivery under the contract. It is unnecessary to cite authority for this well established rule, but as this case raises a novel and extraordinary question between the true market value of the article, and a stimulated market price, created by artificial and fraudulent practices, it is necessary to fix the true meaning of the rule itself, before we can ap-

proach the real question. Ordinarily, when an article of sale is in the market, and has a market value, there is no difference between its value and the market price, and the law adopts the latter as the proper evidence of the value. This is not, however, because value and price are really convertible terms, but only because they are ordinarily so in a fair market. The primary meaning of "value" is worth, and this worth is made up of the useful or estimable qualities of the thing: See Webster's and Worcester's Dictionaries. "Price," on the other hand, is the sum in money or other equivalent set upon an article by a seller, which he demands for it: *Id.* Value and price are, therefore, not synonyms, or the necessary equivalents of each other, though commonly, market value and market price are legal equivalents. When we examine the authorities, we find also that the most accurate writers use the phrase market value, not market price. Mr. Sedgwick, in his standard work on the Measure of Damages, 4th ed. p. 260, says: "Where contracts for the value of chattels are broken by the vendors failing to deliver property according to the terms of the bargain, it seems to be well settled, as a general rule, both in England and the United States, that the measure of damages is the difference between the contract price and the market value of the article at the time it should be delivered upon the ground; that this is the plaintiff's real loss, and that with this sum, he can go into the market and supply himself with the same article from another vendor." Judge Rogers uses the same term in *Smethurst v. Woolston*, 5 W. & S. 109: "The value of the article at or about the time it is to be delivered, is the measure of damages in a suit by the vendee against the vendor for a breach of the contract." So said C. J. Tilghman, in *Girard v. Taggart*, 5 S. & R. 32. Judge Sergeant, also, in *O'Connor v. Forster*, 10 Watts 422, and in *Mott v. Danforth*, 6 Id. 308. But as even accurate writers do not always use words in a precise sense, it would be unsatisfactory to rely on the common use of a word only, in making a nice distinction between terms. It is therefore proper to inquire into the true legal idea of damages in order to determine the proper definition of the term value. Except in those cases where oppression, fraud, malice or negligence enter into the question, "the declared object (says Mr. Sedgwick, in his work on Damages) is to give compensation to the party injured for the actual loss sustained." 4th ed., pp. 28, 29; also, pp. 36, 37. Among the many authorities he gives, he quotes the language of C. J. Shippen, in *Bussy v. Donaldson*, 4 Dallas 206. "As to the assessment of damages (said he), it is a rational and legal principle, that the compensation should be equivalent to the injury." "The rule," said C. J. Gibson, "is to give actual compensation, by grading the amount of the damages exactly to the extent of the loss." "The measure is the actual, not the speculative loss;" *Forsyth v. Palmer*, 2 Harris, 97. Thus, compensation being the true purpose of the law, it is obvious that the means em-

ployed, in other words, the evidence to ascertain compensation, must be such as truly reaches this end.

It is equally obvious, when we consider its true nature, that as evidence, the market price of an article is only a means of arriving at compensation; it is not itself the value of the article, but is the evidence of value. The law adopts it as a natural inference of fact, but not as a conclusive legal presumption. It stands as a criterion of value, because it is a common test of the ability to purchase the thing. But to assert that the price asked in the market for an article is the true and only test of value, is to abandon the proper object of damages, viz., compensation, in all those cases where the market evidently does not afford the true measure of value. This thought is well expressed by Lewis, C. J., in *Bank of Montgomery v. Reese*, 2 Casey 146. "The paramount rule in assessing damages (he says), is that every person unjustly deprived of his rights, should at least be fully compensated for the injury he sustained. Where articles have a determinate value and an unlimited production, the general rule is to give their value at the time the owner was deprived of them, with interest to the time of verdict. This rule has been adopted because of its convenience, and because it in general answers the object of the law, which is to compensate for the injury. In relation to such articles, the supply usually keeps pace with the demand, and the fluctuations in the value are so inconsiderable as to justify the courts in disregarding them for the sake of convenience and uniformity. In these cases, the reason why the value at the time of conversion, with interest, generally reaches the justice of the case, is that when the owner is deprived of the articles, he may purchase others at that price. But it is manifest that this would not remunerate him where the article could not be obtained elsewhere, or where from restrictions on its production, or other causes, its price is necessarily subject to considerable fluctuation." This shows that the market price is not an invariable standard, and that the converse of the case then before Judge Lewis is equally true—that is to say—when the market price is unnaturally inflated by unlawful and fraudulent practices, it cannot be the true means of ascertaining what is just compensation. It is as unjust to the seller to give the purchaser more than just compensation, as it is to the purchaser to give him less. Right upon this point, we have the language of this court in the case of a refusal by a purchaser to accept: *Andrews v. Hoover*, 8 Watts 240. It is said: "The jury is bound by a measure of damages where there is one, but not always by a particular means for its ascertainment. Now the measure in a case like the present, is the difference between the price contracted to be paid and the value of the thing when it ought to have been accepted; and though a resale is a convenient and often satisfactory means, it does not follow that it is, nor was it said in *Girard v. Taggart*, to be the only one. On the contrary, the propriety of the direction there,

that the jury were not bound by it, if they could find another more in accordance with the justice of the case, seems to have been admitted; the very thing complained of here." Judge Strong took the same view in *Trout v. Kennedy*, 11 Wright 393. That was the case of a trespasser, and the jury had been told that the plaintiff was entitled to the just and full value of the property, and if at the time of the trespass the market was depressed, too much importance was not to be given to that fact. "If (says Judge Strong) at any particular time, there be no market demand for an article, it is not of course on that account of no value. What a thing will bring in the market at a given time, is perhaps the measure of its value then; but it is not the only one." These cases plainly teach that value and market price are not always convertible terms; and certainly there can be no difference in justice or law, in an unnatural depression and an unnatural exaltation in the market price—neither is the true and only measure of value.

These general principles in the doctrine of damages and authorities, prove that an inflated speculative market price, not the result of natural causes, but of artificial means to stimulate prices by unlawful combinations for the purposes of gain, cannot be a legitimate means of estimating just compensation. It gives to the purchaser more than he ought to have, and compels the seller to pay more than he ought to give, and it is therefore not a just criterion. There is a case in our own state, bearing strongly on this point: *Blydenburgh et al. v. Welsh*, Baldwin's Rep. 331. Judge Baldwin had charged the jury in these words: "If you are satisfied from the evidence, that there was on that day a fixed price in the market, you must be governed by it; if the evidence is doubtful as to the price, and witnesses vary in their statements, you must adopt that which you think best accords with the proof in the case." In granting a new trial, Judge Hopkinson said: "It is the price—the market price—of the article that is to furnish the measure of damages. Now what is the price of a thing, particularly the market price? We consider it to be the value, the rate at which the thing is sold. To make a market, there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar, they may rate it much above what any one would give for it. Is that the value? Further, the holders of an article, flour, for instance, under a false rumor, which, if true, would augment its value, may suspend their sales, or put a price upon it, not according to its value in the actual state of the market, but according to what in their opinion will be its market price or value, provided the rumor shall prove to be true. In such a case, it is clear, that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day,

if the contingency shall happen which is to give it this additional value. To take such a price as the rule of damages, is to make the defendant pay what in truth never was the value of the article, and to give to the plaintiff a profit by a breach of the contract, which he never would have made by its performance."

The case of suspended sales upon a rumor tending to enhance the price, put by Judge Hopkinson, bears no comparison to the case alleged here, where a combination is intentionally formed to buy up oil, hold it till the year is out, and thus force the market price up purposely to affect existing contracts, and compel the sellers to pay heavy damages for non-fulfilment of their bargains. In the same case, Judge Hopkinson further said: "We did not intend that they (the jury) should go out of the limits of the market price, nor to take as that price whatever the holders of the coffee might choose to ask for it; substituting a fictitious, unreal value, which nobody would give, for that at which the article might be bought or sold." "In determining," says an eminent writer on contracts, "what is the market value of property at any particular time, the jury may sometimes take a wide range; for this is not always ascertainable by precise facts, but must sometimes rest on opinion; and it would seem that neither party ought to gain or lose by a mere fancy price, or an inflated and accidental value, suddenly put in force by some speculative movement, and as suddenly passing away. The question of damages by a market value is peculiarly one for a jury." Parsons on Contracts, vol. 2, p. 482, ed. 1857. In *Smith v. Griffith*, 3 Hill 337—S. C. J. Nelson said: "I admit that a mere speculating price of the article, got up by the contrivance of a few interested dealers, is not the true test. The law, in regulating the measure of damages, contemplates a range of the entire market, and the average of prices, as thus found, running through a reasonable period of time. Neither a sudden and transient inflation, nor a depression of prices, should control the question. These are often accidental, promoted by interested and illegitimate combinations, for temporary, special and selfish objects, independent of the objects of lawful commerce; a forced and violent perversion of the laws of trade, not within the contemplation of the regular dealer, and not deserving to be regarded as a proper basis upon which to determine the value, when the fact becomes material in the administration of justice." I may close these sayings of eminent jurists with the language of Chief Justice Gibson, upon stock-jobbing contracts; *Wilson v. Davis*, 5 W. & S. 523: "To have stipulated," says he, "for a right to recruit on separate account, would have given to the agreement an appearance of trick, like those of stock-jobbing contracts, to deliver a given number of shares at a certain day, in which the seller's performance has been forestalled by what is called cornering; in other words, buying up all the floating shares in the market. These contracts, like other stock-jobbing transactions, in

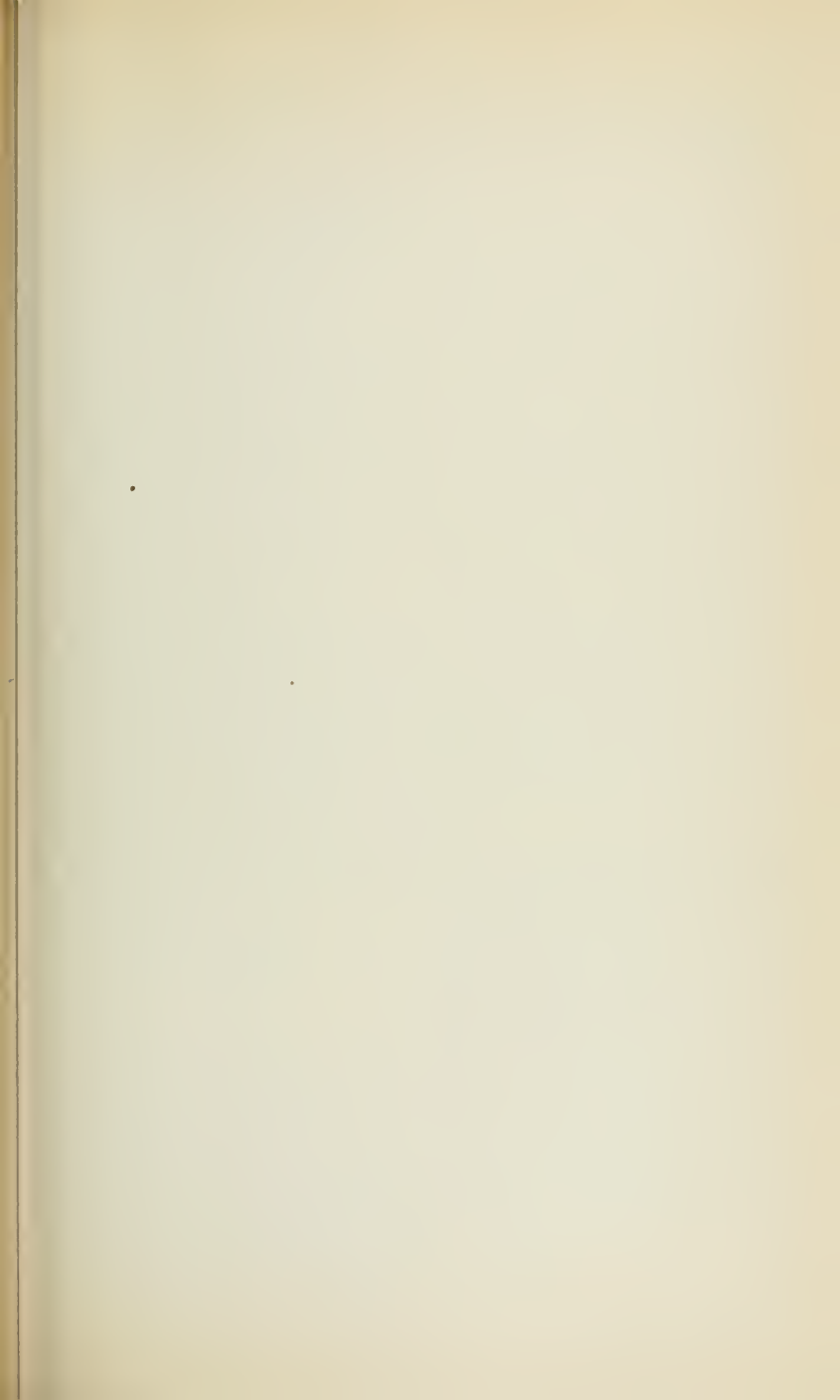
which parties deal upon honor, are seldom subjected to the test of judicial experiment, but they would necessarily be declared fraudulent."

Without adding more, I think it is conclusively shown that what is called the market price, or the quotations of the articles for a given day, is not always the only evidence of actual value, but that the true value may be drawn from other sources, when it is shown that the price for the particular day had been unnaturally inflated. It remains only to ascertain whether the defendant gave such evidence as to require the court to submit to the jury to ascertain and determine the fair market value of crude oil per gallon, on the 31st of December 1869, as demanded by the defendant in his fifteenth point. There was evidence from which the jury might have adduced the following facts, viz.: That in the month of October 1869, a number of persons of large capital, and among them Kirkpatrick & Lyons, combined together to purchase crude oil, and hold it until the close of the year 1869; that these persons were the holders, as purchasers, of a large number of sellers' option contracts, similar to the one in suit, that they bought oil largely, and determined to hold it from the market until the year 1870 before selling; that oil, in consequence of this combination, ran up in price, in the face of an increased supply, until the 31st day of December 1869, reaching the price of seventeen to eighteen cents per gallon, and then suddenly dropped as soon as the year closed. Major Frew, one of the number, says: "It was our purpose to take the oil, pay for it, and keep it until January 1st 1870, otherwise we would have been heading the market on ourselves. Mr. Long says that on the 3d of January 1870 he sold oil to Fisher & Brother (the plaintiffs) at thirteen cents a gallon, and could find no other purchaser at that price. Several witnesses, dealers in oil, testify that they knew of no natural cause to create such a rise in price, or to make the difference in price from December to January. It was testified, on the contrary,

that the winter production of oil was greater in December 1869 than in former years by several thousand barrels per day, a fact tending to reduce the price, when not sustained by other means. Mr. Benn says he knew no cause for the sudden fall in price on the 1st January 1870, except that the so-called combination ceased to buy at the last of December 1869.

It was, therefore, a fair question for the jury to determine whether the price which was demanded for oil on the last day of December 1869 was not a fictitious, unnatural, inflated and temporary price, the result of a combination to "bull the market," as it is termed, and to compel sellers to pay a false and swollen price in order to fulfil their contracts. If so, then such price was not a fair test of the value of the oil, and the jury would be at liberty to determine, from the prices before and after the day, and from other sources of information, the actual market value of the oil on the 31st of December 1869. Any other cause would be unjust and injurious to fair dealers, and would enable gamblers in the article to avail themselves of their own wrong, and to wrest from honest dealers the fruits of their business. It cannot be possible that a "corner," such as took place a few weeks since in the market for the stock of a western railroad company, where shares, worth in the ordinary market about sixty dollars each, were by the secret operations of two or three large capitalists, forced up in a few days to a price over two hundred dollars a share, can be a lawful measure of damages. Men are not to be stripped of their estates by such cruel and wrongful practices; and courts of justice cannot so wholly ignore justice as to assume such a false standard of compensation. Our views upon the effect of the affidavit of defence, on which the learned judge in a great measure rules the question of damages, will be expressed in the case of *Kountz v. The Citizens' Oil Refining Co.*, [72 Pa. St. 392,] in an opinion to be read immediately.

Judgment reversed, and a venire facias de novo awarded.



LEE v. GRIFFIN.

(1 Best & S. 272.)

Queen's Bench. May 9, 1861.

Declaration against the defendant, as the executor of one Frances P., for goods bargained and sold, goods sold and delivered, and for work and labor done and materials provided by the plaintiff as a surgeon-dentist for the said Frances P.

Plen, that the said Frances P. never was indebted as alleged.

The action was brought to recover the sum of £21 for two sets of artificial teeth ordered by the deceased.

At the trial, before Crompton, J., at the sittings for Middlesex after Michaelmas term, 1860, it was proved by the plaintiff that he had, in pursuance of an order from the deceased, prepared a model of her mouth, and made two sets of artificial teeth; as soon as they were ready he wrote a letter to the deceased, requesting her to appoint a day when he could see her for the purpose of fitting them. To this communication the deceased replied as follows:—

"My Dear Sir,—I regret, after your kind effort to oblige me, my health will prevent my taking advantage of the early day. I fear I may not be able for some days. Yours, &c., Frances P."

Shortly after writing the above letter Frances P. died. On these facts the defendant's counsel contended that the plaintiff ought to be nonsuited, on the ground that there was no evidence of a delivery and acceptance of the goods by the deceased, nor any memorandum in writing of a contract within the meaning of the 17th section of the statute of frauds, 29 Car. 2, c. 3, and the learned judge was of that opinion. The plaintiff's counsel then contended that, on the authority of *Clay v. Yates*,¹ the plaintiff could recover in the action on the count for work and labor done, and materials provided. The learned judge declined to nonsuit, and directed a verdict for the amount claimed to be entered for the plaintiff, with leave to the defendant to move to enter a nonsuit or verdict.

In Hilary term following a rule nisi having been obtained accordingly,

Patchett now shewed cause. Griffiths, in support of the rule, was not called upon to argue.

CROMPTON, J. I think that this rule ought to be made absolute. On the second point I am of the same opinion as I was at the trial. There is not any sufficient memorandum in writing of a contract to satisfy the statute of frauds. The case decided in the house of lords, to which reference has been made during the argument, is clearly distinguishable. That case only decided that its document, which is silent as to the particulars of a contract, refers to another document which contains such particulars, parol evidence is admissible for the purpose of shewing what document is referred to.

Assuming, in this case, that the two documents were sufficiently connected, still there would not be any sufficient evidence of the contract. The contract in question was to deliver some particular teeth, to be made in a particular way, but these letters do not refer to any particular bargain, nor in any manner disclose its terms.

The main question which arose at the trial was, whether the contract in the second count could be treated as one for work and labor, or whether it was a contract for goods sold and delivered. The distinction between these two causes of action is sometimes very fine; but where the contract is for a chattel to be made and delivered, it clearly is a contract for the sale of goods. There are some cases in which the supply of the materials is ancillary to the contract, as in the case of a printer supplying the paper on which a book is printed. In such a case an action might perhaps be brought for work and labor done and materials provided, as it could hardly be said that the subject-matter of the contract was the sale of a chattel: perhaps it is more in the nature of a contract merely to exercise skill and labor. *Clay v. Yates*² turned on its own peculiar circumstances. I entertain some doubt as to the correctness of that decision; but I certainly do not agree to the proposition that the value of the skill and labor, as compared to that of the material supplied, is a criterion by which to decide whether the contract be for work and labor, or for the sale of a chattel. Here, however, the subject-matter of the contract was the supply of goods. The case bears a strong resemblance to that of a tailor supplying a coat, the measurement of the mouth and fitting of the teeth being analogous to the measurement and fitting of the garment.

HILL, J. I am of the same opinion. I think that the decision in *Clay v. Yates*³ is perfectly right. That was not a case in which a party ordered a chattel of another which was afterwards to be made and delivered, but a case in which the subject-matter of the contract was the exercise of skill and labor. Wherever a contract is entered into for the manufacture of a chattel, there the subject-matter of the contract is the sale and delivery of the chattel, and the party supplying it cannot recover for work and labor. *Atkinson v. Bell*⁴ is, in my opinion, good law, with the exception of the dictum of Bayley, J., which is repudiated by Maule, J., in *Grafton v. Armitage*,⁵ where he says: "In order to sustain a count for work and labor, it is not necessary that the work and labor should be performed upon materials that are the property of the plaintiff." And Tindal, C. J., in his judgment in the same case, page 310, points out that in the application of the observations of Bayley, J., regard must

¹ 1 H. & N. 73.² 1 H. & N. 73.³ 8 B. & C. 277.⁴ 2 C. B. 339.⁵ 1 H. & N. 73.

be had to the particular facts of the case. In every other respect, therefore, the case of *Atkinson v. Bell*⁶ is law. I think that these authorities are a complete answer to the point taken at the trial on behalf of the plaintiff.

When, however, the facts of this case are looked at, I cannot see how, wholly irrespective of the question arising under the statute of frauds, this action can be maintained. The contract entered into by the plaintiff with the deceased was to supply two sets of teeth, which were to be made for her and fitted to her mouth, and then to be paid for. Through no default on her part, she having died, they never were fitted; no action can therefore be brought by the plaintiff.

BLACKBURN, J. On the second point, I am of opinion that the letter is not a sufficient memorandum in writing to take the case out of the statute of frauds.

On the other point, the question is whether the contract was one for the sale of goods or for work and labor. I think that in all cases, in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labor done and materials provided, we must look at the particular contract entered into between the parties. If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed is

an illustration of this latter proposition. It cannot be said that the paper and ink he uses in the preparation of the deed are goods sold and delivered. The case of a printer printing a book would most probably fall within the same category. In *Atkinson v. Bell*⁷ the contract, if carried out, would have resulted in the sale of a chattel. In *Grafton v. Armitage*,⁸ Tindal, C. J., lays down this very principle. He draws a distinction between the cases of *Atkinson v. Bell*⁹ and that before him. The reason he gives is that, in the former case "the substance of the contract was goods to be sold and delivered by the one party to the other;" in the latter, "there never was any intention to make any thing that could properly become the subject of an action for goods sold and delivered." I think that distinction reconciles those two cases, and the decision of *Clay v. Yates*¹⁰ is not inconsistent with them. In the present case the contract was to deliver a thing which, when completed, would have resulted in the sale of a chattel; in other words, the substance of the contract was for goods sold and delivered. I do not think that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill and labor, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel. Rule absolute.

⁷ 8 B. & C. 277.

⁸ 2 C. B. 340.

⁹ 8 B. & C. 277.

¹⁰ 1 H. & N. 73.

* 8 B. & C. 277.

LINCOLN v. GALLAGHER.

(8 Atl. Rep. 883, 79 Me. 189.)

Supreme Judicial Court of Maine. Feb. 28, 1887.

On exceptions by defendant from supreme judicial court, Washington county.

Assumpsit for damages on a breach of contract for the purchase and sale of a vessel. The defense was that the vessel was not delivered by plaintiff within a reasonable time, and that the defendant had no opportunity to examine the vessel in order to see that she was in good order, as stipulated in the contract. A verdict was rendered for the plaintiff, and the defendant alleged exceptions.

Thomas L. Talbot, for plaintiff. John F. Lynch, for defendant.

PETERS, C. J. It was said in *Howard v. Miner*, 20 Me. 330, that, on a contract for the delivery of specific articles which are ponderous or cumbersome, when it is not designated in the contract, and there is nothing in the condition and situation of the parties to determine the place of delivery, it is the privilege of the creditor to name a reasonable and suitable one; that the debtor should request the creditor to select the place; and, if the creditor fails to do so, the debtor may appoint the place. In the case at bar a vessel was purchased on the eastern coast somewhere, to be delivered to the buyer in Portland. Had the defendant provided a suitable place at some dock or wharf which could have been reached by the use

of reasonable exertion, the delivery should have been made there. The purchaser, after notice, failing to provide a place, we think the seller would be justified in tendering a delivery at safe anchorage in the harbor. He should not be required to go to special expenses to himself to obtain a place at the wharf or upon the shore. By the bill of exceptions examined with the judge's charge we find that a controversy arose between the parties over the requirement of the purchaser that the seller should go to the expense himself of placing the vessel in a dry-dock in order that the seller could there examine her. There was some reason to suspect that the vessel had been ashore on her voyage to Portland, and the purchaser desired an inspection to see whether she had escaped injury or not. There can be no doubt that, in offering delivery, the seller was under obligation to afford an opportunity to the purchaser to make the examination. But any expenses to be incurred thereby, beyond what would be necessary in putting the vessel in a proper place for delivery, would fall upon the buyer and not upon him. The seller was under no obligation to incur any unusual expense. He could not be called upon to place the vessel in a dry-dock. He tenders the property as sound according to the agreement under which he acted. The buyer must accept or reject it at his risk. *Benj. Sales*, § 635; *Croninger v. Crocker*, 62 N. Y. 151.

Exceptions overruled.

WALTON, DANFORTH, EMERY, FOSTER, and HASKELL, J.J., concurred.

LITCHFIELD v. HUTCHINSON.

(117 Mass. 195.)

Supreme Judicial Court of Massachusetts. Middlesex. February 1, 1875.

Tort for deceit in the sale of a horse. The declaration alleged that the defendant sold plaintiff a horse for \$325; that defendant falsely represented that the horse was sound in every way, to induce plaintiff to buy; that the plaintiff, believing that said representation was true, was thereby induced to buy the horse, but the horse was not sound in every way, but was lame and foundered, and lame in the fore legs and shoulders, and was unsound and of little value, as defendant well knew. Answer a general denial. The court allowed a bill of exceptions to the effect that there was evidence that the defendant made the representations as alleged; that they were false, and known by defendant to be false; that the plaintiff, relying thereon, was induced to purchase the horse as alleged; and that the horse was then in fact lame and unsound. The evidence was conflicting on all these points. Plaintiff paid defendant \$325 for the horse, and there was evidence that he was not worth at the time of the sale over \$100. The defendant testified that he made no representations whatever, and that he had worked the horse almost every day for three weeks, and did not observe any lameness or that he was unsound. Upon this evidence the plaintiff requested the judge to charge that, if the defendant made a representation of the soundness of the horse as of his own knowledge, he might have known by reasonable inquiry and examination whether he was sound or not, and the horse was not sound, and if the plaintiff relied on such representations, and was induced thereby to purchase the horse, and thereby sustained damage, the defendant was liable. If the defendant represented that the horse was sound, when he was unsound, and the plaintiff was thereby induced to buy the horse, and was thereby injured, then the defendant was liable. If the defendant knew the horse was unsound, and did not make such fact known to the plaintiff, but allowed him to purchase the same at a fair market price as a sound horse, then the defendant was guilty of fraud, and was liable. If the defendant had no knowledge one way or the other as to the soundness of the horse, but represented to the plaintiff that he was sound, and he was in fact unsound, it would support the allegation that he made to the plaintiff a false allegation knowingly. If the defendant made the representations to the plaintiff without any knowledge, information, or ground of belief, and they were in fact false, it would not differ legally from a representation known by the defendant to be false. The judge, instead, instructed the jury that if the defendant made the representations alleged, as matter of fact within his own knowledge, and the representations in any material respect were not true, and the defendant knew they were false, or he did not honestly believe them to be true, and

the plaintiff, relying upon them as true, was induced to purchase the horse and pay therefor, the defendant was liable. But that the action could not be maintained by merely proving that the defendant had reasonable cause to believe the representations were untrue; the declaration alleging that they were fraudulently made, and that the defendant knew them to be false, and that a false representation is knowingly made when a party, for a fraudulent purpose, states what he does not believe to be true, even though he may have no knowledge on the subject. The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

D. S. Richardson, (G. F. Richardson, with him,) for plaintiff. W. S. Gardner, for defendant.

MORTON, J. This is an action of tort, in which the plaintiff alleges that he was induced to buy a horse of the defendant by representations made by him that the horse was sound, and that the horse was, in fact, unsound and lame, all of which the defendant well knew.

To sustain such an action it is necessary for the plaintiff to prove that the defendant made false representations, which were material, with a view to induce the plaintiff to purchase, and that the plaintiff was thereby induced to purchase. But it is not always necessary to prove that the defendant knew that the facts stated by him were false. If he states, as of his own knowledge, material facts susceptible of knowledge, which are false, it is a fraud which renders him liable to the party who relies and acts upon the statement as true, and it is no defence that he believed the facts to be true. The falsity and fraud consists in representing that he knows the facts to be true, of his own knowledge, when he has not such knowledge. *Page v. Bent*, 2 Met. 371. *Stone v. Denny*, 4 Met. 151. *Miliken v. Thorndike*, 103 Mass. 382. *Fisher v. Mellen*, 103 Mass. 503.

In the case at bar the plaintiff asked the court to instruct the jury "that if the defendant made a representation of the soundness of the horse, as of his own knowledge, and the jury are satisfied that he might have known by reasonable inquiry and examination whether he was sound or not, and the horse was not sound as a matter of fact, and if the plaintiff relied on such representations, and was induced thereby to purchase the horse, and thereby sustained damage, then the defendant is liable." We are of opinion that this instruction should have been given in substance. If the defect in the horse was one which might have been known by reasonable examination, it was a matter susceptible of knowledge, and a representation by the defendant made as of his own knowledge that such defect did not exist, would, if false, be a fraud for which he would be liable to the plaintiff, if made with a view to induce him to purchase, and if relied on by him.

A false representation of this character is sufficiently set forth in the declaration to constitute a cause of action, without the further allegation that the defendant

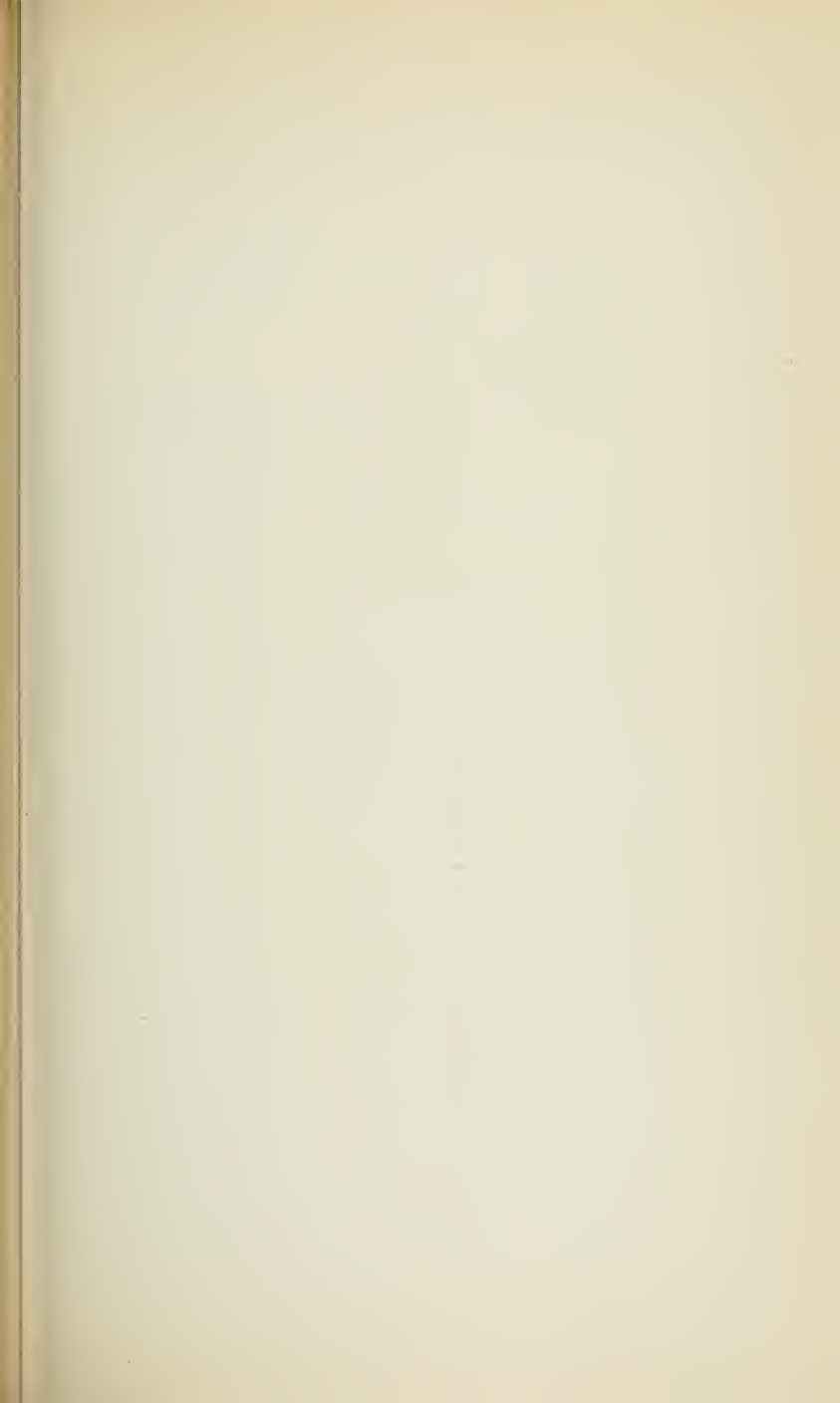
well knew the representations to be false. It is not necessary that all the allegations should be proved if enough are proved to make out a cause of action.

The instructions given upon the subject embraced in this prayer required the plaintiff to prove, not only that the defendant made the false representations al-

leged, as of his own knowledge, but also, that the defendant knew that they were false, or that he did not honestly believe them to be true. In this respect the instructions were erroneous.

Exceptions sustained.

AMES & ENDICOTT, JJ., absent.



LOEB et al. v. PETERS et al.

(63 Ala. 243.)

Supreme Court of Alabama. Dec. Term, 1879.

Action by J. M. Peters & Brother against the South & North Alabama Railroad Company for certain chattels. J. Loeb & Brother intervened as claimants, and obtained possession of the goods on making the proper affidavit and giving bond. From a judgment for plaintiffs said claimants appealed. Affirmed.

Sayre & Graves, for appellants. L. A. Shaver, contra.

MANNING, J.—Munter & Brother, being largely in debt, and insolvent, by an order requesting shipment to them, bought of plaintiffs, J. M. Peters & Brother, of Virginia, twenty-five boxes of tobacco; which they accordingly sent as directed, to Munter & Brother, at Montgomery, Alabama, by railroad, forwarding to them by mail a bill of lading therefor. On receipt of this, several days before the boxes arrived, Munter & Brother indorsed it, and transferred their right to the goods to J. Loeb & Brother, who gave them credit for the same, on a debt past due, which Munter & Brother owed them. There was no other consideration for this transfer. Soon afterwards, Peters & Brother, being informed of the insolvency of Munter & Brother, and claiming the right to stop the tobacco in transitu, demanded it of the carrier, the South & North Alabama Railroad Company, and sued the same in detinue for it, having first offered to pay the freight money. Loeb & Brother intervened as claimants, and thereby obtained possession of the goods. Whereupon, the suit was prosecuted against them, to a verdict and judgment in favor of Peters & Brother, from which Loeb & Brother have appealed to this court.

We do not concur in the opinion expressed in *Rogers v. Thomas* (20 Conn. 54), that a vendor of goods, in transit to an insolvent vendee, can not stop them on the way, before delivery, unless the insolvency of the vendee occurred after the sale to him of the goods. We think, with the supreme court of Ohio, that the vendor may stop the goods upon a subsequent discovery of insolvency existing at the time of the sale, as well as upon a subsequent insolvency. If there be a want of ability to pay, it can make no difference, in justice or good sense, whether it was produced by causes, or shown by acts, at a period before or after the sale.—*Benedict v. Schaettle*, 12 Ohio St. 515; *Reynolds v. Boston & M. R. R. Co.*, 43 N. H. 589; *O'Brien v. Norris*, 16 Md. 122; *Blum v. Marks*, 21 La. Ann. 268. The best definition of the right which we have seen, is that in *Parsons's Mercantile Law*, as follows: "A seller, who has sent goods to a buyer at a distance, and, after sending them, finds that the buyer is insolvent, may stop the goods at any time before they reach the buyer. His right to do this is called the right of stoppage in transitu."—Chap. X, p. 60.

If, before this right is exercised, the buyer sells the goods, and indorses the bill of lading for them to a purchaser in good faith, and for value, the right of the first vendor to retake them is extinguished.—*Lickbarrow v. Mason*, 1 Smith's Lead. Cases, 388. Evidence, therefore, that Loeb & Brother knew, when they took a transfer of the bill of lading, that Munter & Brother were insolvent, was relevant and proper to show, in connection with other testimony, that Loeb & Brother were not bona fide purchasers. And there was no error in permitting a witness to testify what one of that firm had previously said, tending to show such knowledge, when he was giving evidence in another cause. Statements and declarations, relevant to the matter in hand, which have been made by a party to a cause, may be proved against him, without his adversary being compelled to use such party as a witness in a suit in which he is interested.

The two judgments against Munter & Brother, in favor of creditors, confessed by the former before the tobacco had reached its destination, and the seizure upon execution the next day of property of Munter & Brother, by the sheriff, tended to prove their insolvency; and the evidence of those facts was, therefore, properly admitted.

The transfer of a bill of lading, as a collateral to previous obligations, without anything advanced, given up, or lost on the part of the transferee, does not constitute such an assignment as will preclude the vendor from exercising the right of stoppage in transitu. Said *Bradley, Circuit Justice, in Lesossier v. The Southwestern*, 2 Woods, 35: "Nothing short of a bona fide sale of the goods for value, or the possession of them by the vendee, can defeat the vendor's right of stoppage in transitu; and hence it has been held, that an assignee in trust for creditors of the insolvent vendee is not a purchaser for value, and, consequently, takes subject to the exercise of any right of stoppage in transitu which may exist against the assignor.—*Harris v. Pratt*, 17 N. Y. 249." Wherefore, it was held in the latter case, that an attachment in the suit of the vendee's creditor, of goods handed by the carrier upon a wharfbont at the place of delivery, did not prevent the vendor from stopping them in transitu.—See, also, *O'Brien v. Norris*, 16 Md. 122; *Naylor v. Denne*, 8 Pick. 199; *Nicholls v. LeFevre*, 2 Bingh. (N. C.) 83. The doctrine is based upon the plain reason of justice and equity, enunciated in *D'Aquila v. Lambert* (2 Eden's Ch. 77), that "one man's property should not be applied to the payment of another man's debt." The right itself is regarded as an extinction merely of the lien for the price, which the seller of goods has on them while remaining in his possession; which lien the courts will not permit to be superseded, before the vendee, who has become insolvent, obtains possession, unless, in the meantime, the goods have been sold to a person who, in good faith, has paid value for them, and so would be a loser by his purchase, if that were held invalid. Ap-

pellants having only credited Munter & Brother on a debt previously due from them, with the price of the tobacco, have nothing more to do, in order to get even, than to debit them with the same sum, for the non-delivery of the goods in consequence of the defect in Munter & Brother's title.

The case of Crawford v. Kirksey (55 Ala. 282), so much relied on by appellants, is wholly unlike this. The question of stoppage in transitu was in no way involved in it. The controversy there

was, whether a conveyance by a debtor in a failing condition, of property which was indisputably and entirely his, in payment of a debt to one of his creditors, was not void as to the others; and this court decided, that the law permitted such a preference, and that the transaction was not fraudulent in fact.

It results from what we have said, that there was no error in the charges to the jury.

Let the judgment of the circuit court be affirmed.

LUPIN et al. v. MARIE et al.

(6 Wend. 77.)

Court of Errors of New York. December, 1830.

Appeal from chancery. On the 24th August, 1826, Marie bought of an agent of the complainants in the city of New York, 18 packages of goods, amounting to \$7,993.58, for which he agreed to give his own notes, payable in 5 equal proportions, at 6, 7, 8, 9 and 10 months; the goods were sold at 14 cents per franc, short price, when goods of the same quality were publicly selling at from 20 to 22 cents per franc, and not at a larger credit than six months. On the 25th August the goods were delivered to Marie, who represented to the agent of the complainants that he intended to ship them to Havana for sales and returns; and on the next day did ship them on board a vessel, which shortly thereafter set sail from New York, bound to Havana. The notes which Marie was to give were not made or delivered to the agent of the complainants at the time of the delivery of the goods. On the fourth September, 1826, Marie, by an accumulation of disastrous circumstances, and in consequence of advices received by him from Vera Cruz and from Europe, was compelled to suspend payment, and suffer his bonds and notes to be dishonored. At the time of the purchase of the goods, Marie enjoyed a high commercial credit and standing in the city of New York, was reputed and considered himself perfectly solvent and amply able to pay all his debts and responsibilities, and not until one o'clock in the afternoon of the fourth of September did he perceive that he would be compelled to suspend payments; and so unconscious was he of his situation, that after the purchase of the goods from the complainants, and previous to his failure, he made payments to the amount of about \$18,000. On the fifth of September, the insolvency of Marie having become notorious, the agent of the complainants requested him to re-deliver the goods by giving an order for the same upon the captain of the vessel in which they were shipped. Marie refused to give such order, and on the ninth of September executed an assignment to Varet, the other defendant, of four several shipments of goods, including the merchandise purchased of the complainants, to secure him nearly \$70,000, for which he was responsible as the endorser of Marie, and as his surety on custom-house bonds. The vessel in which the goods were embarked met with a disaster at sea, and was obliged to put into Norfolk, in Virginia, for repairs. Whilst she was there, and about the thirtieth day of September, the agent of the complainants applied to Varet for permission that the goods be delivered to him; Varet refused to give such consent, and instructed his agents at Norfolk to re-ship the goods to him at New York, where they accordingly arrived, and were disposed of by him, some being sold at New York, and the residue being shipped to Havana. The net proceeds of the goods amounted to \$6,601.29. After the return of the goods to New York, the complainants demanded

them of Varet, which demand was not complied with.

The complainants filed their bill, relying upon the non-delivery of the notes, and the non-payment of the consideration money as entitling them to a decree in their favor for the value of the goods, and also charging the defendants with fraud. In their answers the defendants insisted that the goods had become absolutely the property of Marie; that he had not been requested to give the notes, and that in consequence of his failure, it was believed that the complainants were unwilling to receive them; that since the failure of Marie, the other defendant, Varet, had paid and satisfied all the custom-house bonds and notes for which he was responsible. Varet denied all knowledge on his part of the terms of the sale to Marie, that such terms were not complied with, or that the goods were not paid for; and both defendants denied all fraud, &c.

The cause was heard on bill and answer, and the chancellor decreed that the bill be dismissed. For the reasons of his decision, see 2 Paige, 169. The complainants appealed.

C. Graham and J. Tallmadge, for appellants. C. Baldwin, for respondents.

Mr. Justice MARCY. The questions presented by this case for our determination, are: 1. Was there a sale of the 18 packages of merchandise by the appellants to Marie? 2. Had the appellants a lien on the property when they demanded it at Norfolk or New York?

The validity of the sale is questioned upon two grounds: 1. The contract of sale was never complete, it is said, because the purchaser Marie did not comply with the condition upon which its validity depended. The position that where any thing remains to be done to complete a contract of sale, the title of the property does not pass to the purchaser, has had the sanction of too many decisions, and is too generally acquiesced in, to require the citation of authorities to sustain it. Indeed it was not questioned on the argument. By the terms of the sale, promissory notes were to be given by Marie for the goods, payable at six, seven, eight, nine and ten months. These notes have never been given, and if the giving of them has not been waived by the appellants or their agent, the title to the goods has not vested in the purchaser. The goods were delivered without requiring the notes. Marie says the notes have never been demanded, and he has been willing at all times to give them, but believes the appellants since his failure are unwilling to receive them. It is contended that there has been a waiver of this condition of the contract. Where the delivery is absolute it is a waiver of the condition of payment or giving security; and we search this case in vain for any facts that can warrant an inference that the delivery of the goods was not fair and unconditional. If the appellants did not intend that Marie should become vested with the absolute property in the goods, "they were bound," as Ch. J. Parsons said in the case of *Hussey v.*

Thornton, 4 Mass. R. 405, "to recollect the conditions they had themselves made, and not to deliver the packages till the conditions were complied with." It has been held, where goods were sold to be paid for in cash down, that the delivery, without demanding the money, vested the title of them in the purchaser. *Haswell v. Hunt, assignee, &c.*, cited in 5 T. R. 231. The delivery of the things sold, made unconditionally, and not procured by fraud, vests the absolute property in the purchaser. *Chapman v. Lathrop*, 6 Cowen, 110, and *cases cited*, and *note*.

The second ground of objection to the validity of the sale is mistake or error. The alleged mistake was not in the article sold, or in the identity of the person purchasing, but in the ability of the purchaser to pay. The appellants sold to one whom they believed to be solvent, but who was not so in fact. The case shows that there was in this respect a mutual misapprehension. No objection can therefore be raised to the contract on the ground of fraud. Marie did believe and had good reason to believe, that he was solvent when he entered into the contract. To invalidate contracts upon the ground that one of the parties was mistaken in the ability of the other to execute, would be establishing a doctrine unknown, I think, to any code, and of the most dangerous consequences. If the circumstances of the purchaser may be inquired into whenever the seller wishes to disaffirm a contract, the commercial world, by the exercise of this right of inquiry, would be thrown into the greatest confusion. I presume that the appellants do not contend for an application of this doctrine beyond a case like their own—a case where the insolvency of the purchaser is notorious and acknowledged; but if the principle of the doctrine is that the seller can disaffirm the sale because the purchaser has been dealt with as a solvent person, when he was in fact insolvent, the mistake, whenever it existed, would authorize the original owner to reclaim the property the moment of a default in the payment and perhaps anticipation of it; and he might allege this insolvency and default to exist in any case, and seek to enter upon an inquiry into the circumstances of the purchaser while he was in active business and his credit unimpaired. I cannot consent to yield the least countenance to such a doctrine.

The remaining question to be settled relates to the lien which the appellants claim to have had on the property. The assignment of it to Varet was not in the usual course of trade; it was voluntary on the part of Marie and for the purpose of indemnifying Varet against antecedent responsibilities. If there would have been a lien without the assignment, the assignment did not operate to discharge it. The rule of law in relation to real estate is, that the vendor has without any express agreement for that purpose, a lien on the premises conveyed, even after possession thereof is delivered to the purchaser, for the purchase money, provided he has not taken a distinct and independent security therefor, and the land has not passed by a bona fide sale to a third person. The

chancellor held in this case that such a rule does not exist in relation to personal property. Whether it does or not we are now to determine. By the Roman law the vendor could in such a case as this resort to the property; and so, I think, he may by the civil code of France, notwithstanding article 1583, which changes the civil law and conforms to the common law, so far as to vest the title in the purchaser without delivery or payment of the price. Code Napoleon, art. 1654, 1183, 4. Dig. Lib. 18, tit. 1, l. 19. All contracts of sale, although positive in their terms, according to these laws, have, it is said, this implied condition; "provided the price is paid." 7 *Cours de Code Civil*, 152, par Delvincourt. It was admitted on the argument by the counsel for the appellants, that the decisions of the English courts furnished but little or no countenance to the doctrine they advanced; but this was ascribed to a provision in the bankrupt law of that country, which declares that the goods found in the possession of the bankrupt subject to his order or disposition as owner, shall pass to his assignee, though they be in fact the property of others. This statute would cut off this lien in cases of bankruptcy where it would most frequently arise; but it would often arise where there was no bankruptcy. If it is a rule of the common law, it must be shown to have existed at some period. This is not a matter confined exclusively to commercial dealings and to be settled by commercial usage. In France it is not a provision of the commercial code alone; it is founded in the Civil Code, and has a general application to all sales. Are we then to recognize the rule as a part of the common law? This, I think, we cannot do unless we have some proof that it is so. We are asked to infer its existence in relation to personal property, because it exists in the case of real property; but even in relation to real property it does not exist as a rule of the ancient common law; it is a doctrine of equity, and not of law, and was transplanted into equity from the civil law. But it may be said that if equity can adopt the rule of the civil law as applicable to real estate, it may adopt it in extenso. If we find it as it is claimed in this case in our system of equity, without inquiring how or when it came there, whether by a bold act of adoption or by insinuation, whether it is to be revered for its age or admired as a modern improvement, we ought to give the benefit of it to the appellants. We are referred to no case on the argument, and I think the search would be in vain to find one, wherein it has been decided in a court of law or equity in this country or in England, that after a sale of personal property and a fair and absolute delivery to the purchaser personally, the vendor can reclaim the property because the consideration has not been paid.

There is an intimation of Lord Hardwicke, in *Snee v. Prescott*, 1 Atk. 245, which conveys his opinion of the reasonableness of the doctrine, that the seller of goods should have a right, in cases of insolvency, to resort to the goods sold, even after delivery, to secure himself for the pur-

chase money; but the case did not present a state of facts on which such a question could arise for his determination; it was a clear case of stoppage in transitu. Some expressions of Lord Loughborough, in the case of *Mason v. Lickbarrow*, 1 H. Black. 366, would seem to place the right of stoppage in transitu upon the ground that the sale is so far incomplete, until the purchase money is paid, as to prevent the title from vesting absolutely in the purchaser. "The admitted right of the consignor, he says, to stop the goods in transitu as against the consignee, can only rest upon his original title as owner not divested, or upon a legal title to hold the possession of the goods till the price is paid as a pledge for the price." Putting the right upon the latter alternative, no inference can be drawn from it to countenance the doctrine contended for in this case. Although the cases in relation to the stoppage of property in transitu were referred to on the argument, and the doctrine discussed somewhat at large, an examination of these cases, or a particular consideration of that doctrine, does not seem to me to be called for to enable us to come to a right conclusion in this case. If there is

any principle established in law, it is that the right to stop in transitu exists only during the transit of the property; when that is complete, and the property has come fairly and fully to the possession of the purchaser, the right is at an end.

It was urged on the argument, that the doctrine contended for on the part of the appellants is so salutary, if we did not find it sanctioned by any other court, we ought to take this occasion to legitimize it. In reply to this suggestion, I will borrow the language of Mr. Justice Story, in the case of *Conyers v. Ennis*, 2 Mason, 236, in which questions, in all respects similar in principle to those now under consideration, were decided as I propose to decide these: "I do not sit here to revise the general judgment of the common law, or to establish new doctrines, merely because they seem to be more convenient or equitable. My duty is to administer the law as I find it, and I have not the rashness to attempt more than this humble duty." I am of opinion that the decree of the chancellor ought to be affirmed.

This being the unanimous opinion of the court, the decree of the chancellor was thereupon affirmed, with costs.

MACOMBER et al. v. PARKER.

(13 Pick. 175.)

Supreme Judicial Court of Massachusetts. Middlesex. Oct. 20, 1832.

Replevin for three kilns of bricks attached by the defendant on several writs against Joseph Evans. Plea, property in Evans. Replication, property in the plaintiffs. Trial before Shaw, C. J.

It was proved that Hunting and Lawrence had a certain brick-yard in Cambridge, originally leased by A. Binney to J. Wilson, who assigned the lease to Hunting & Lawrence.

On the 1st of March 1829, the following agreement was made between Hunting & Lawrence on one part and Evans on the other:—"Memorandum of an agreement &c. sheweth, that said Evans has agreed to make or cause to be made from eight to ten hundred thousand good merchantable brick in the brick-yard at Cambridge &c.; said Evans agrees to hire the men and board to the best advantage, to perform the manufacturing of said brick, and said Evans agrees to give in his time and services in making said brick; and said Hunting & Lawrence agree to attend to selling of brick, purchasing of wood and all necessary materials for the manufacturing, collecting the bills &c. to the best advantage, and after the brick are made, and the labor and board of the men are paid, and all materials and tools of every kind are paid for, and the said Evans paying to said Hunting & Lawrence sixty cents per thousand for each and every thousand brick made or clay sold, as rent therefor, then the parties agree to share the profits or loss, as the case may be, one half each; said Evans agrees to pay every attention to have the brick made in the best manner and in good season for making brick; said Hunting & Lawrence shall have full power to retain said Evans's part of the brick or money collected or debts due for brick &c., in their possession, to the amount of all sums of money now due from said Evans and such other sums of money, goods &c., as they may from time to time advance him; all of which the parties agree to perform according to the true intent and meaning."

No lease of the yard was given to Evans, and Hunting testified that Hunting & Lawrence expected to secure to themselves, by the foregoing contract, a lien on the bricks to be manufactured in pursuance thereof, for the payment of any balance that might be due them.

The plaintiffs offered to prove, that under such contracts for the manufacture of bricks, it is customary for the owners of yards to retain all in their hands and account with the makers of bricks for their share of the profits, after the sales are made and the proceeds collected. This evidence was rejected by the Court.

On the 3d of July 1829, Hunting & Lawrence stopped payment and assigned all their property, including the brick yard and all their interest therein and property thereon, to the plaintiffs, for the benefit of the creditors of the assignors, and on

the same day delivered possession of the yard and all the property thereon to the plaintiffs, in presence of Evans; and the plaintiffs then and there appointed Evans their agent, by a writing as follows:—"You will please take the charge and care of all the property and effects in and about the brick-yard &c., the said property having been this day assigned to us &c., you will proceed to sell the same at retail until further orders from us, for cash only, and whenever \$100 is received, you will deposit the same in the Branch bank to our credit. Please keep and render us an exact account of your doings here-in."

Hunting & Lawrence made large advances for the yard in 1829. Evans as agent of the plaintiffs, thus appointed, sold bricks to divers persons.

On Friday, February 26, 1830, the plaintiffs put a stop to sales by Evans, and directed Hunting, who had been their agent in the business of the yard, to make a final settlement with Evans; and Hunting and Evans thereupon looked over the statements and accounts and cast them up for that purpose.

Hunting testified that at this settlement Evans agreed to cart all the bricks; the common bricks, at five shillings per thousand. No price was fixed for the faced bricks. Upon the settlement, the witness, in behalf of the assignees, agreed to take all the bricks at certain estimated prices. The assignees meant to take all the property and allow Evans his half in account. The bricks were estimated at 350 thousand, and at the estimated prices amounted to \$1830; the board &c. at \$200; making \$2030. Taking the whole to the account of the assignees and crediting Evans his part, there would still be a balance due to the assignees, which was to be paid in carting. It was agreed, that if the bricks overran the estimated number, the assignees should account to Evans, and if they fell short, he should account to them, for the difference. They were to be counted in the course of the ensuing week. It was agreed that this should be a definitive settlement, as Evans was not to take the yard again. Nothing remained but to count the bricks, and make the allowance on the one side or the other, if the number varied from the estimate. On cross-examination the witness testified, that at this settlement there was an express understanding with Evans, that the assignees were to take the bricks to their own account; it was a sale of his half. Evans stated expressly that the workmen had all been paid, and that he had paid all charges. Evans after this settlement carried one load of bricks to G. W. Blake. The assignees were to take Evans's half, as they owned one half before. The witness considered the bargain and sale complete, except that the bricks were to be counted. That was to be done the forepart of the ensuing week. When the witness went over to take the count, he found the bricks had been attached as the property of Evans. Had it not been for the attachment, a regular account current would have been settled. The witness understood that Evans was to proceed immediately to cart the bricks to Boston,

which he solicited, but the final settlement was not to wait till the bricks were carted, but was to be finished as soon as they were counted.

The defendant was proceeding in his defence, when a question arose, whether the plaintiffs had made out a *prima facie* case. It being necessary that they should show that they were the sole owners of the property in these bricks, two preliminary questions arose, viz:—

1. Whether by the terms of the contract Evans was interested in the bricks, as joint tenant or tenant in common, when they were made in pursuance of the contract and were fit for market;—

2. If that were so, then whether upon the facts stated, such a sale and delivery had been made by Evans before the attachment, as to divest his interest.

A nonsuit was ordered, subject to the opinion of the whole court.

D. A. Simmons and Gay, for plaintiffs.
Buttrick and Ashmun, for defendant.

WILDE J. delivered the opinion of the court. It was objected at the trial, that the plaintiffs had not made out a *prima facie* case, and two questions were thereupon reserved for the consideration of the whole court.

1. Whether by the terms of the contract between Hunting & Lawrence and Evans, the latter, under whom the defendant claims, was interested in the bricks in question as joint tenant or tenant in common, when they were made in pursuance of that contract and were fit for market.

2. If that were so, then whether, upon the facts proved, such a sale and delivery had been made by Evans at the time of the defendant's attachment, as to divest his interest.

As to the first question, we are of opinion, that by the terms of the contract, the bricks when made were the joint property of the contracting parties. By this contract Hunting & Lawrence were to furnish the materials for manufacturing the bricks, and to attend to the sale of them; Evans on his part undertook to manufacture the bricks, to hire and board the laborers employed for that purpose, and to allow Hunting & Lawrence sixty cents per thousand for every thousand of bricks made or clay sold, as rent thereof; and after all expenses should be paid, then the parties agreed to share the profit and loss, as the case might be, one half each. That this amounts to a complete contract of partnership, cannot, we think, admit of a doubt. Partnership is defined to be a voluntary contract between two or more persons, for joining together their money, goods, labor, and skill, or either or all of them, upon an agreement, that the gain or loss shall be divided proportionably between them. Gow, 2. With this definition the contract in question fully agrees. It contains every essential requisite in a contract of partnership. The parties agreed to join together their property, skill and labor, for the purpose of accomplishing an enterprise, in which they were to have a communion of interest and a communion of profit and loss. The

bricks, therefore, when made were their joint property, and when the partnership was dissolved, and Hunting & Lawrence assigned their share to the plaintiffs, the latter became tenants in common with Evans.

The plaintiffs offered to prove, for the purpose of showing that Evans had no property in the bricks, and was only entitled to a share of the proceeds of sale of them when disposed of, that it was usual and customary for the owners of yards, under similar contracts, to retain all in their hands, and account with the makers of the bricks for their share of the profits after the sales were made and proceeds collected. This evidence was rejected by the judge who presided at the trial, and we think very properly. The usages of trade may be admitted to aid in the construction of doubtful contracts; but the terms of the present contract are by no means doubtful. So far as the question of partnership or of the right of property is concerned, the contract is clearly and explicitly expressed, and the supposed usage, if admitted, could not affect its construction. It would only prove how other parties had considered similar contracts. Indeed, it would hardly prove so much, for if other owners of yards had retained possession of the property there manufactured, it might be by consent, or for the convenience of the parties, and not under the claim of any legal right. Besides, the contract expressly admits that Evans would be entitled to a share of the bricks, and stipulates that Hunting & Lawrence might retain the same as security for any balance which was or might be due from him to them; so that the evidence of usage, if it were admissible, would be wholly immaterial.

The remaining question is, whether before the attachment by the defendant there was a valid sale from Evans to the plaintiffs. It is objected in the first place, that the contract of sale was not completed, because the bricks had not been counted according to the stipulation between the parties to that effect. And if the counting was intended by the parties to precede the completion of the sale, then undoubtedly the objection must prevail. The evidence, however, does not support this objection, but rather shows that the sale was considered as complete and absolute at the time when the settlement between Evans and the plaintiffs was made; or at least the jury would be warranted by the testimony of Hunting, to find that such was the intention of the contracting parties. The whole bricks were estimated at 370 thousand. Evans sold his share in the whole and received pay in account, and a balance was due to the plaintiffs which was to be paid for in carting the bricks, so far as that might go. It is true the bricks were to be counted, but that was to be done to enable the parties to come to a settlement of their accounts, and not for the purpose of completing the sale. Taking the whole of Hunting's testimony together, this, we think, is the reasonable inference to be drawn from it. If the bricks had been actually delivered, there could have been no question that the sale would have been

complete, notwithstanding the bricks were to be afterwards counted. The general principle is, that where any operation of weight, measurement, counting or the like, remains to be performed, in order to ascertain the price, the quantity or the particular commodity to be delivered, and to put it in a deliverable state, the contract is incomplete until such operation is performed. *Brown on Sales*, 41. But where the goods or commodities are actually delivered, that shows the intent of the parties to complete the sale by the delivery, and the weighing or measuring or counting afterwards would not be considered as any part of the contract of sale, but would be taken to refer to the adjustment of the final settlement as to the price. The sale would be as complete as a sale upon credit before the actual payment of the price. Nothing can be found in any of the numerous cases on this point, which militates against this position.

We come, then, to the second objection to the sale, namely, that there was no delivery. In answer to this objection it was said, as Evans agreed to cart the bricks and did actually cart one load after the sale, this may be considered as a delivery of a part under an entire sale, and so according to the authorities would amount to a constructive delivery of the whole. Perhaps this may be so, but we do not think, under the circumstances of this case, that any actual delivery was necessary. The plaintiffs were in fact as much in pos-

session of the bricks as Evans was; he was their agent; the bricks were remaining in their yard, and under the circumstances proved, a delivery would be altogether an unmeaning ceremony. The plaintiffs accepted the bricks, gave orders to Evans to cart them, and in all respects treated them as their property. The sale, therefore, amounted to a transfer, and was so considered by the parties.

Then it was objected, that the sale was void by the statute of frauds; but as here was a delivery of a part, that alone would take the case out of the statute. But that which took place was equivalent to a delivery of the whole, and therefore the statute of frauds can have no application. Whether this sale was void as against creditors, is a question not now to be considered; nor have we considered the question, whether the plaintiffs, before the sale, had a lien on the brick as security for the balance due them from Evans, since our opinion as to the sale renders this question immaterial. These questions may be raised on another trial, but at present we confine ourselves to the two questions reserved by the report. As to one of these questions, namely, that touching the sale, evidence may be offered by the defendant which may have a material bearing; but as the evidence is reported, we are all of opinion that the plaintiffs have made out a *prima facie* case, and the nonsuit must be set aside and a new trial granted.

McCONNELL v. HUGHES.

(29 Wis. 537.)

Supreme Court of Wisconsin. January Term, 1873.

Appeal from circuit court, Green Lake county.

Ryan & Kimball, for appellant. A. B. Hamilton and Butler & Winkler, for respondent.

LYON, J. The bill of exceptions does not purport to contain all of the evidence.

We cannot, therefore, review the evidence, but must presume that it sustains the findings of fact by the circuit court. That court having found that the material allegations of the complaint were proved, it follows that if the complaint states a valid cause of action, the plaintiff was entitled to judgment.

We think that the complaint does state a valid cause of action. It avers that an executory contract for the sale and purchase of wheat was made by the parties, and that, in pursuance thereof, the plaintiff delivered to the defendants, and the defendants accepted and received the wheat. It must be true that by such delivery and acceptance the title to the wheat became vested in the defendants, and the right to have the price therefor, when the same should be determined as provided in the contract, in like manner became vested in the plaintiff.

But it is urged on behalf of the defendants that the transaction was invalid as a sale, because the contract did not limit the plaintiff to the selection of any particular day, or of a day within a specified time, on which the market price of wheat in Milwaukee should control the price of the wheat in question, but left him the option to select any day in the future for the purpose of fixing the price.

The contract furnishes a criterion for ascertaining the price of wheat; leaving

nothing in relation thereto for further negotiation between the parties. This is all that the law requires. Story on Sales, § 220. No case has been cited, and we are unable to find one, which holds that it is essential to the validity of a sale in such cases that the criterion agreed upon should, by the terms of the contract of sale, be applied, and the price thereby determined, on any specified day or within a specified time. Judge Story, in the section of his treatise above cited, evidently does not intend to lay down any such rule. It may be that, if the plaintiff had delayed unreasonably to make such selection after being requested to make the same, he might be compelled to do so. But we do not decide this point.

It is further argued that, after a valid sale and before payment of the price, there must be a debt owing by the vendee to the vendor, while in this case, until the price of the wheat was ascertained, there was no indebtedness. The latter part of this proposition is erroneous. As soon as the wheat was delivered, the defendants owed the plaintiff therefor. There was therefore a debt, but the amount thereof was not ascertained. It remained unliquidated until the price of the wheat was determined.

The objections that the assessor could not list the claim for the price of the wheat for taxation, and that the same could not be reached by garnishee process at the suit of a creditor of the plaintiff, while such price remained undetermined, present no practical difficulties. The assessor would fix the value of the demand according to his best judgment as in other cases of the valuation of property and credits; and the creditor in the garnishee proceeding would probably be subrogated to the rights of the plaintiff in respect to determining the contract price for the wheat.

BY THE COURT. The judgment of the circuit court is affirmed.

McCRORY v. HAMILTON.

(39 Ill. App. 490.)

Appellate Court of Illinois. Jan. 21, 1891.

Action by James Hamilton against William E. McCrory. From a judgment for plaintiff, defendant appealed. Reversed.

Fryer & Neal, for appellant. F. K. Dunn and James W. Craig, for appellee.

WALL, J. This was an action of debt on a replevin bond. The replevin suit was brought October 16, 1883, by F. F. Randolph against Robert Kane for a quantity of barrel staves and heading valued at \$100. The writ was executed by replevying the property and delivering it to the plaintiff.

The defendant died pending the suit and his administrator was made a party in his stead and at the September term, 1887, the suit was dismissed for want of prosecution. The property not having been returned the present action was brought, resulting in a judgment of \$589 75 in favor of the plaintiff therein, from which an appeal is prosecuted to this court by defendant McCrory, who was the surety on the bond. The first point made in behalf of the appellant is, that upon the death of Kane the replevin suit abated and could not be revived against his administrator.

By Sec. 123, Chap. 3, R. S., it is provided that in addition to the actions which survive at common law the action of replevin (and others named) shall survive. But counsel urges that means merely that it shall survive only in favor of the representatives of the plaintiff, the injured party. In *Wehr v. Brooks*, 21 Ill. App. 115, we held that the provision of the statute is not so limited and we see no occasion to depart from that ruling.

It is next urged that the judgment in the replevin suit is not sufficiently formal and that it is not in terms a judgment that the property be returned to the defendant, as alleged in the declaration, but merely that the defendant have a writ of *retorno habendo*.

The objection is, as we think, not substantial. While the judgment is somewhat informal, yet it is not so defective as to be regarded as a nullity. In effect it is an adjudication of cost against the plaintiff and that the property be returned to the defendant. We are not inclined to the very technical view suggested by appellant and must overrule the objection.

Certain objections to the action of the court in admitting and excluding evidence are also considered not well taken, and as we think they are not important in the view we take of the merits of the case, they need not be discussed. The main question presented arises upon the evidence and the conclusion to be drawn from the standpoint of the appellee. The proof shows that Kane was a cooper and that Randolph was a miller; that Randolph delivered a lot of the staves and heading, of which the property replevied was a part, to Kane, from which Kane made and was to make four barrels to be delivered to Randolph; that the material was mostly worked up in this way when Kan-

dolph gave notice to Kane that he would need no more barrels and demanded the staves and heading then on hand, which demand not being complied with the replevin suit was brought. The evidence is conflicting as to the terms of the arrangement, it being contended on the part of Randolph that the staves and heading were always his property and that Kane was to be paid for his work at eighteen cents per barrel; while, as Kane contends, the staves and heading were sold to him and became his absolute property at certain rates named, and that he was to pay for the same in barrels at certain prices named for barrels of ten and twelve hoops respectively.

It was evidently made a question before the jury upon which the case was supposed to hinge, whether the material was sold to Kane or whether it always continued the property of Randolph. If the latter, then it seems to be conceded that no more could be recovered in this suit than the amount of whatever was due to Kane for the work done by him when the demand was made; but if he purchased the property it is assumed that the value of what was replevied may be recovered without regard to the fact that it was not fully paid for.

It seems quite clear that though the form of the transaction may have been an agreement to sell the materials to Kane at certain rates and that he should sell the barrels to be made out of it back to Randolph at certain prices, yet it was not in any proper sense a sale of property on either side as that term is usually understood.

It was rather a delivery for the special purpose of making up into barrels which were to be delivered to Randolph. Had Kane refused to do this or had he sold or disposed of the property in any other way he would have broken his contract with Randolph. The mere fact that the witnesses may use the terms sell or sale or that the parties may have used them, will not make it a sale when, upon a consideration of the whole matter, it appears that there was no sale.

We can not believe that it was intended by the parties to change the general ownership of the property, and while Kane may have been and was invested with a special ownership or interest, it was for the purpose and upon the express trust that he would do certain work upon it and return it. He was to be charged with it at certain prices and was to be credited with certain prices upon what he was to return. It is a misuse of terms to call this a sale on either side.

Kane had a lien for any balance due him for the work done, and if Randolph improperly prevented him from manufacturing the rest of the material, he was also entitled to full compensation for damages thereby sustained and his lien would include that item also; but we are of the opinion that this is the full extent of his demand, in any event, even accepting the testimony offered by the appellee as the true version of the matter. The judgment must therefore be reversed and the cause remanded.

Reversed and remanded.

MALLORY v. WILLIS.

(4 N. Y. 76.)

Court of Appeals of New York. 1850.

Replevin for seventy-five barrels of flour. The plaintiffs had contracted with the defendant, Christopher Willis, to deliver at the Hlopeton Mills a quantity of good merchantable wheat to be manufactured into flour on the following terms: For every four bushels and fifteen pounds of wheat, Christopher Willis was to deliver one hundred and ninety-six pounds of superfine flour, packed in barrels to be furnished by the plaintiffs. Said Willis was to guarantee the inspection of the flour, and if scratched, to pay all losses sustained thereby. The plaintiffs were to have all the offals, or feed, etc.; the said Willis to store the same until sold. The plaintiffs were to pay sixteen cents for each barrel so manufactured, and if they made one shilling net profit on every barrel, they were to pay said Willis two cents per barrel extra.

The plaintiffs delivered thirty-two thousand five hundred and eighty-six bushels and four pounds of wheat at the Hlopeton Mills, and received seven thousand six hundred and sixty-seven barrels and one hundred and fifty-six pounds of flour, pursuant to the agreement. They brought this action of replevin against Christopher Willis and Charles P. Willis, to recover the surplus of seventy-five barrels still due under the contract. The defendant insisted that the title to the wheat passed to Willis by force of the delivery under the contract, and that, therefore, the plaintiffs could not recover the flour manufactured from the same wheat. Judgment was rendered in favor of the plaintiffs by Pratt, J., and affirmed by the general term. The defendants brought this appeal.

J. S. Glover, for appellants. S. B. Wells, for respondents.

HURLBUT, J. If the contract was one of bailment, and if by a proper construction of it the defendants were entitled to the surplus flour, I think the burden would have rested on them of showing that the article in question was such surplus, after the plaintiffs had established that it was the produce of their wheat; so that taking the most favorable view for the defendants, there was no error in point of law in this branch of the decision at the circuit, which would entitle them to except, and the only question for our decision is, whether the contract and the delivery under it amounted to a sale or a bailment of the wheat?

The defendants refer us to that part of the contract which binds them to deliver a barrel of superfine flour and to guarantee its inspection, for every four and one-fourth bushels of wheat, which it is alleged, if the plaintiffs' construction is to prevail, is not only an unreasonable and hard contract for the defendants, but is altogether inconsistent with the notion of a bailment; for it is asked, if it were not a sale, why should the defendants

guarantee that the flour should bear inspection, or why should they agree for a certain quantity of wheat to deliver a barrel of flour? It may be remarked in answer to this, that the defendants being experienced millers must be deemed to have contracted with a knowledge of the quantity of wheat required to yield a barrel of flour; and as the plaintiffs were obliged by the contract to deliver good merchantable wheat, it seems but reasonable that the defendants should have been required so to manufacture it, as that the flour would bear inspection; that these provisions must be viewed in the connection in which they stand, and receive a construction which shall make them harmonize with the whole expression of the contract between the parties; and that taking the whole agreement into view, they seem to have been inserted at the suggestion of the plaintiffs, for the purpose, in part, at least, of causing a skillful and prudent manufacture of the wheat into flour; and even if they were employed to define the quantity of flour to be returned, they would not overbear the other provisions of the agreement, which import very clearly an understanding between the parties that the identified wheat which was delivered by the plaintiffs should be manufactured into flour for their benefit; that they were to pay for the work a stipulated price in money, and to receive the manufactured article, together with the offals or feed, which should come from the wheat. The language of the agreement will hardly bear a different construction. The plaintiffs by its terms were to deliver wheat to be manufactured into flour, which Willis agreed to do—i. e., he agreed to manufacture the wheat so to be delivered into flour. But this provision would be entirely out of place in an exchange of wheat for flour. The plaintiffs were to furnish the barrels in which it was to be packed; thus providing every material for the completion of the work, and leaving nothing for Willis to do but to perform the proper labor of a manufacturer. The plaintiffs were moreover to have all the offals or feed, etc.; not such a quantity of offals as would proceed from like quantity of other wheat, but the offals or feed—i. e., such as should come of grinding the very wheat delivered to the miller, who was also to store the feed until the plaintiffs could sell it. And in case Willis performed on his part, i. e., in case he manufactured the wheat so delivered into flour, with the requisite skill and prudence, the plaintiffs were to pay him at the rate of sixteen cents, or in a certain contingency eighteen cents per barrel, as a compensation for the labor of manufacture. Proper effect cannot be given to these provisions of the agreement, without treating it as a contract by the defendants to manufacture the plaintiffs' wheat into flour, to deliver to them the specific proceeds, at least to the extent mentioned in the contract, and to receive in satisfaction for the work the stipulated price per barrel. Contracts of this sort, which have received a different construction, will be found to have

differed very materially from the present in their terms, as will be seen by a brief reference to the leading cases.

In *Buffum v. Merry* (3 Mason, 478), the plaintiff owned two thousand nine hundred pounds of cotton yarn, and agreed to let one Hutchinson take it at the price of sixty-five cents per pound, and he was to pay the plaintiff the amount in plaids, at fifteen cents per yard. H. was to use the plaintiff's yarn in making the warp of the plaids, and to use for filling other yarn of as good a quality. Under this contract the yarn was delivered to H., who failed without having manufactured it into plaids, and assigned it with other property for the benefit of his creditors. The question was whether the property in the yarn passed to H. by the delivery; and Story, J., said that it did; holding that it was not a contract whereby the specific yarn was to be manufactured into cloth, wholly for the plaintiff's account and at his expense, and nothing but his yarn was to be used for the purpose. That in such a case the property might not have changed; but here the cloth was to be made of other yarn as well as the plaintiff's. The whole cloth when made was not to be delivered to him, but so much only as at fifteen cents per yard would pay for the plaintiff's yarn at sixty-five cents per pound. That this was a sale of the yarn at a specified price, to be paid for in plaids at a specified price. (See, also, *Story on Bailments*, § 283; *Jones on Bailments*, p. 102).

In *Ewing v. French* (1 Blackf. [Ind.] 353), the plaintiff delivered a quantity of wheat to the defendants, at their mill, to be exchanged for flour. The wheat was thrown by the defendants into their common stock, and the mill was subsequently destroyed by fire. The court held this to be a contract of exchange, or a sale of the wheat to be paid for in flour; that from the moment the defendants received the wheat they became liable for the flour; that the wheat itself was not to be returned, nor the identical flour manufactured from it. And this was very well, for the contract was, by its express terms, one of exchange.

In *Smith v. Clark* (21 Wend. 83), one Hubbard owned a flouring-mill, and the plaintiffs agreed with him to deliver wheat at his mill, and he agreed that for four bushels and fifty-five pounds of wheat which should be received, he would deliver the plaintiffs one barrel of superfine flour, warranted to bear inspection. Here was nothing which imported a delivery of wheat for the purpose of being manu-

factured, nor any agreement to make it into flour and to receive a compensation for so doing, at a certain price per barrel; and it is obvious that Hubbard might have delivered any flour of the quality stipulated for, in satisfaction of the contract. Hence it was held that the delivery of the wheat under this agreement amounted to an exchange of the wheat for flour, and that Hubbard on receiving the wheat became indebted to the plaintiffs.

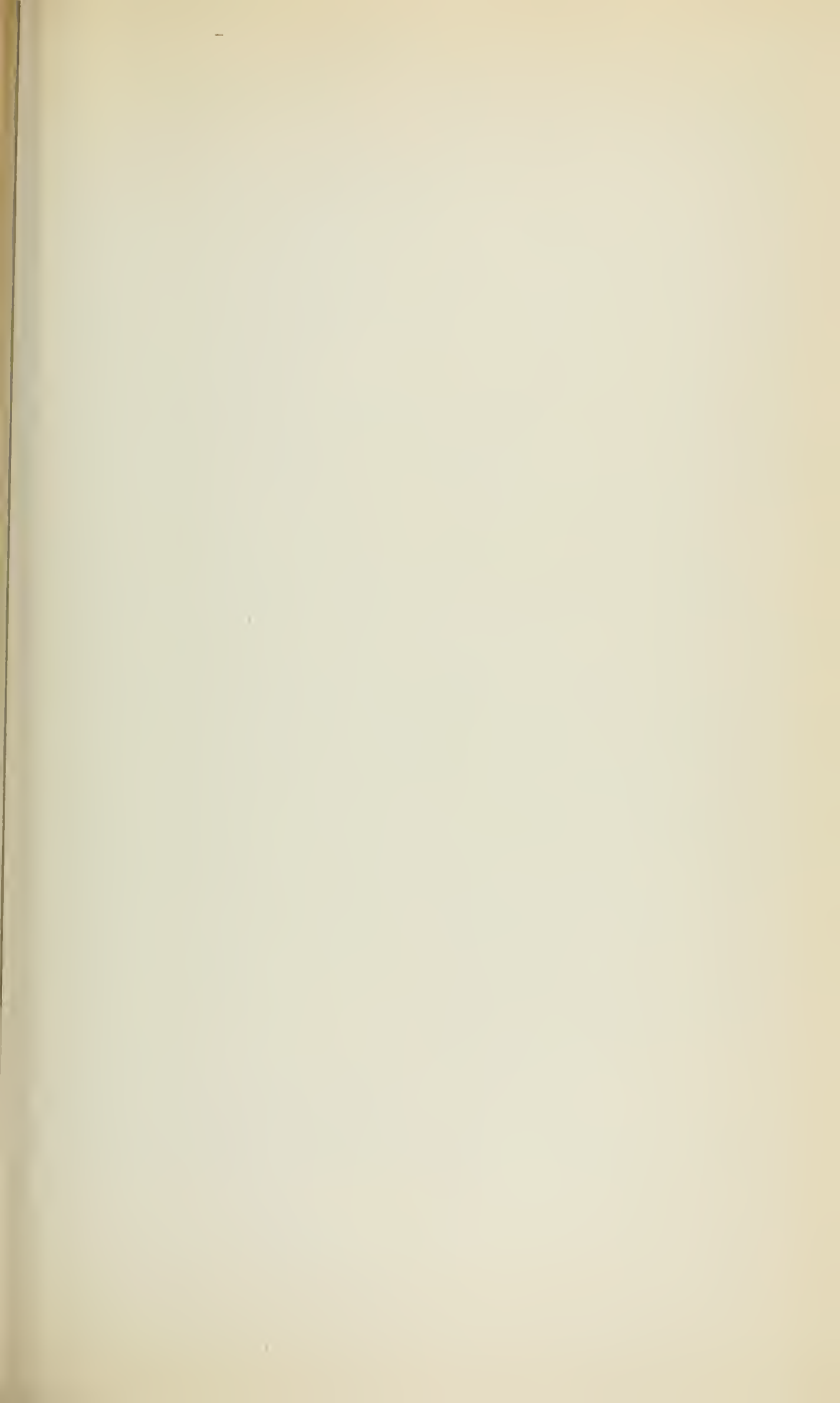
In *Norton v. Woodruff* (2 Comst. 153), the defendant agreed to "take" wheat and to "give" them one barrel of superfine flour for every four bushels and thirty-six pounds of wheat; but here also there was the absence of a delivery for the purpose of being manufactured, no compensation was agreed to be given to the miller for his work, there was nothing about offals, and nothing about the wheat-owner's furnishing barrels in which to pack the flour. On the contrary, the miller in this case was to furnish the barrels. This court gave proper effect to the language of this contract by holding, that the miller, by agreeing to take wheat and give flour in return, had bargained for an exchange of wheat for flour; that any flour of the quality described in the contract would have answered its requirements, and that the property of the wheat passed upon its delivery.

But in the case under review, Willis contracted to manufacture the wheat delivered, and to receive compensation for his labor. The flour, by which was intended the produce of the manufacture, was to be delivered to the plaintiffs in their own barrels, and the offals were to be kept in store as their property. These features give a character to this contract so materially different from that which is borne by the agreements which have received a judicial construction in the cases referred to, that with the fullest concurrence in the justice of those decisions, it may be held that the defendants were bailees and not purchasers of the plaintiffs' wheat, and bound to restore its proceeds to them. I am, therefore, of opinion that the judgment of the supreme court ought to be affirmed.

JEWETT, J., also delivered an opinion in favor of affirming the judgment.

RUGGLES, GARDINER, PRATT, and TAYLOR, JJ., concurred.

BRONSON, C. J., and HARRIS, J., dissented.



MARTINDALE v. SMITH.

(1 Q. B. 389.)

B. R. Easter Term, IV. Vict. April 15, 1841.

Trover for goods and chattels, to wit, six stacks of oats, etc., of which plaintiff was lawfully possessed as of his own property. Pleas: 1. Not guilty. 2. That plaintiff was not possessed of the goods and chattels as of his own property, in manner and form etc. Issues thereon.

On the trial, before Alderson B., at the Cumberland spring assizes, 1839, it appeared that defendant, being owner of six stacks of oats then standing on his ground, sold them to the plaintiff, under the following written contract.

"April 23d, 1838. Sold to Mr. John Martindale of Catterlen six oat stacks, for £85. John Smith gives John Martindale liberty to let the stacks stand, if he thinks fit, until the middle of August next; and John Martindale to pay John Smith for the stacks in twelve weeks from the date hereof." Signed by the parties.

In the beginning of July, the defendant told the plaintiff that, if he, plaintiff, did not pay on the 16th of that month, defendant would consider the contract at an end. The plaintiff did not pay on that day, but afterwards requested time, which the defendant refused to give, adding that plaintiff, as he had failed in payment at the time appointed by the contract, should not have the stacks. Two or three days afterwards, the plaintiff tendered the money; which the defendant refused to accept. On the 14th of August, the plaintiff served defendant with a written notice, in which he repeated the tender, and stated that he should attend to remove the stacks on the next day at ten in the morning, and demanded that he should be then admitted to the field in which the stacks were, requiring the defendant not to sell them. An actual tender was then again made, and refused; and defendant afterwards sold the stacks. The defendant's counsel contended that plaintiff, having made default in payment at the appointed day, was not entitled to the possession. The learned judge directed a verdict for the plaintiff, giving leave to move to enter a verdict for the defendant on the second issue. In Easter term, 1839, Dundas obtained a rule accordingly.

Alexander and Knowles shewed cause. Cresswell, Dundas, and Ramshay, contra.

Lord DENMAN, C. J. now delivered the judgment of the court. After stating the facts, his lordship proceeded as follows:

Having taken time to consider of our judgment, owing to the doubts excited by a most ingenious argument, whether the vendor had not a right to treat the sale as at an end and reinvest the property in

himself by reason of the vendee's failure to pay the price at the appointed time, we are clearly of opinion that he had no such right, and that the action is well brought against him. For the sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods, if they remain in his possession, till that price be paid. But that default of payment does not rescind the contract. Such is the doctrine cited by Holroyd J. from Com. Dig. Agreement, (B. 3.), in *Tarlton v. Baxter*¹; and it will be found consistent with all the numerous cases referred to in the course of the argument. In a sale of chattels, time is not of the essence of the contract, unless it is made so by express agreement, than which nothing can be more easy, by introducing conditional words into the bargain. The late case of *Stead v. Dawber*² does not apply, depending (as Parke B. truly observed in *Marshall v. Lynn*,)³ not on the materiality of the alteration in the contract, but on the fact of the alteration only.

Pothier, in his *Traité du contrat de vente*, part. V. ch. 2, s. 6,⁴ cites the Civil Code for the proposition, that a purchaser's delay in paying the price does not give the vendor a right to require a dissolution of the contract; he can only exact by legal procedure the payment of the price due to him. "*Non ex eo, quod emptor non satis conventioni fecit, contractus irritus constituitur.*"⁵ He adds, however, that, from the difficulty of enforcing payment from debtors, the French law had departed from the rigour of these principles, permitting a suit for the dissolution of the contract for default of payment. The judge then appointed a more distant day; which passed, and no payment made, the vendor was permitted to resume possession of the thing sold. But, even after sentence of dissolution, the purchaser may prevent that effect, and keep what he has bought, by appealing, and offering, on that appeal, the price which he owes, with interest and expenses.

The vendor's right, therefore, to detain the thing sold against the purchaser must be considered as a right of lien till the price is paid, not a right to rescind the bargain. And here the lien was gone by tender of the price. My brother Alderson directed the jury according to these principles; and the rule for setting aside the verdict must be discharged.

Rule discharged.

¹ 6 B. & C. 360, 362.

² 10 A. & E. 57.

³ 6 M. & W. 117.

⁴ Art. 475. (*Ouvrages*, tome 1 p. 610, 2d Ed.)

⁵ *Code*, lib. iv. tit. 44, § 14.

MARVIN SAFE CO. v. NORTON.

(7 Atl. Rep. 418, 48 N. J. Law, 410.)

Supreme Court of New Jersey. Nov. 29, 1886.

On certiorari to Mercer common pleas.

On May 1, 1884, one Samuel N. Schwartz, of Hightstown, Mercer county, New Jersey, went to Philadelphia, Pennsylvania, and there, in the office of the prosecutors, executed the following instrument: "May 1, 1884. Marvin Safe Company: Please send, as per mark given below, one second-hand safe, for which the undersigned agrees to pay the sum of eighty-four dollars, (\$84,) seven dollars cash, and balance seven dollars per month. Terms cash, delivered on board at Philadelphia or New York, unless otherwise stated in writing. It is agreed that Marvin Safe Company shall not relinquish its title to said safe, but shall remain the sole owners thereof until above sum is fully paid in money. In event of failure to pay any of said installments or notes, when same shall become due, then all of said installments or notes remaining unpaid shall immediately become due. The Marvin Safe Company may, at their option, remove said safe without legal process. It is expressly understood that there are no conditions whatever not stated in this memorandum, and the undersigned agrees to accept and pay for safe in accordance therewith. Samuel N. Schwartz. Mark: Samuel N. Schwartz, Hightstown, New Jersey. Route, New Jersey. Not accountable for damages after shipment." Schwartz paid the first installment of seven dollars, May 1, 1884, and the safe was shipped to him the same day. He afterwards paid two installments of seven dollars each, by remittance to Philadelphia by check. Nothing more was paid. On July 30, 1884, Schwartz sold and delivered the safe to Norton for \$55. Norton paid him the purchase money. He bought and paid for the safe without notice of Schwartz's agreement with the prosecutors. Norton took possession of the safe, and removed it to his office. Schwartz is insolvent and has absconded. The prosecutor brought trover against Norton, and in the court below the defendant recovered judgment on the ground that, the defendant having bought and paid for the safe bona fide, the title to the safe, by the law of Pennsylvania, was transferred to him.

Before Justices DEPUE, DIXON, and REED.

A. S. Appelget, for plaintiff in certiorari.
S. M. Schunck, contra.

DEPUE, J. The contract expressed in the written order of May 1, 1884, signed by Schwartz, is for the sale of the property to him conditionally; the vendor reserving the title, notwithstanding delivery, until the contract price should be paid. The courts of Pennsylvania make a distinction between the bailment of a chattel, with power in the bailee to become the owner on payment of the price agreed upon, and the sale of a chattel, with a stipulation that the title shall not

pass to the purchaser until the contract price shall be paid. On this distinction the courts of that state hold that a bailment of chattels, with an option in the bailee to become the owner on payment of the price agreed upon, is valid, and that the right of the bailor to resume possession on non-payment of the contract price is secure against creditors of the bailee and bona fide purchasers from him; but that, upon the delivery of personal property to a purchaser under a contract of sale, the reservation of title in the vendor until the contract price is paid is void as against creditors of the purchaser, or a bona fide purchaser from him. *Crow v. Woods*, 5 Serg. & R. 275; *Ealow v. Klein*, 79 Pa. St. 488; *Hank v. Linderman*, 61 Pa. St. 499; *Stadtfeld v. Huntsman*, 92 Pa. St. 53; *Brunswick, etc., Co. v. Hoover*, 95 Pa. St. 508; 1 Benj. Sales, (Corbin's Ed.) § 416; 21 Amer. Law Reg. (N. S.) 224, note to *Lewis v. McCabe*. In the most recent case in the supreme court of Pennsylvania, Mr. Justice Sterrett said: "A present sale and delivery of personal property to the vendee, coupled with an agreement that the title shall not vest in the latter unless he pays the price agreed upon at the time appointed therefor, and that, in default of such payment, the vendor may recover possession of the property, is quite different in its effect from a bailment for use, or, as it is sometimes called, a lease of the property, coupled with an agreement whereby the lessee may subsequently become owner of the property upon payment of a price agreed upon. As between the parties to such contracts, both are valid and binding; but, as to creditors, the latter is good, while the former is invalid." *Forrest v. Nelson*, 19 Reporter, 38, 108 Pa. St. 481. The cases cited show that the Pennsylvania courts hold the same doctrine with respect to bona fide purchasers as to creditors.

In this state, and in nearly all of our sister states, conditional sales—that is, sales of personal property on credit, with delivery of possession to the purchaser, and a stipulation that the title shall remain in the vendor until the contract price is paid—have been held valid, not only against the immediate purchaser, but also against his creditors and bona fide purchasers from him, unless the vendor has conferred upon his vendee indicia of title beyond mere possession, or has forfeited his right in the property by conduct which the law regards as fraudulent. The cases are cited in *Cole v. Berry*, 42 N. J. Law, 308; *Midland R. Co. v. Hitchcock*, 37 N. J. Eq. 559, 559; 1 Benj. Sales, (Corbin's Ed.) §§ 437-469; 1 Smith, L. C. (8th Ed.) 33-90; 21 Amer. Law Reg. (N. S.) 224, note to *Lewis v. McCabe*; 15 Amer. Law Rev. 380, "Conversion by Purchase." The doctrine of the courts of Pennsylvania is founded upon the doctrine of *Twyne's Case*, 3 Coke, 80, and *Edwards v. Harben*, 2 Term R. 587, that the possession of chattels under a contract of sale without title is an indelible badge of fraud,—a doctrine repudiated quite generally by the courts of this country, and especially in this state. *Runyon v. Groshon*, 12 N. J. Eq. 86;

Broadway Bank v. McElrath, 13 N. J. Eq. 24; Miller v. Pancoast, 29 N. J. Law, 256. The doctrine of the Pennsylvania courts is disapproved by the American editors of Smith's Leading Cases in the note to Twyne's Case, 1 Smith, Lead. Cas. (8th Ed.) 33, 34; and by Mr. Landreth in his note to Lewis v. McCabe, 21 Amer. Law Reg. (N. S.) 224; but, nevertheless, the supreme court of that state, in the latest case on the subject, — *Forrest v. Nelson*, decided February 16, 1885, — has adhered to the doctrine. It must therefore be regarded as the law of Pennsylvania that, upon a sale of personal property with delivery of possession to the purchaser, an agreement that title should not pass until the contract price should be paid is valid as between the original parties, but that creditors of the purchaser, or a purchaser from him bona fide by a levy under execution or a bona fide purchase, will acquire a better title than the original purchaser had, — a title superior to that reserved by his vendor. So far as the law of Pennsylvania is applicable to the transaction, it must determine the rights of these parties.

The contract of sale between the Marvin Safe Company and Schwartz was made at the company's office in Philadelphia. The contract contemplated performance by the delivery of the safe in Philadelphia to the carrier for transportation to Hightstown. When the terms of sale are agreed upon, and the vendor has done everything that he has to do with the goods, the contract of sale becomes absolute. *Leonard v. Davis*, 1 Black, 476; 1 Benj. Sales, § 308. Delivery of the safe to the carrier in pursuance of the contract was delivery to Schwartz, and was the execution of the contract of sale. His title, such as it was, under the terms of the contract, was thereupon complete.

The validity, construction, and legal effect of a contract may depend, either upon the law of the place where it is made, or of the place where it is to be performed, or, if it relate to movable property, upon the law of the situs of the property, according to circumstances; but, when the place where the contract is made is also the place of performance and of the situs of the property, the law of that place enters into and becomes part of the contract, and fraziers the rights of the parties to it. *Frazier v. Fredericks*, 24 N. J. Law, 162; *Dacosta v. Davis*, id. 319; *Bulkley v. Harold*, 19 How. 390; *Scudder v. Union Nat. Bank*, 91 U. S. 406; *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. Rep. 102; *Morgan v. New Orleans, M. & T. R. Co.*, 2 Wood, 244; *Simpson v. Fogo*, 9 Jur. (N. S.) 403; *Whart. Confl. Laws*, §§ 341, 345, 401, 403, 418; *Parr v. Brady*, 37 N. J. Law, 201. The contract between Schwartz and the company having been made and also executed in Pennsylvania by the delivery of the safe to him, as between him and the company Schwartz's title will be determined by the law of Pennsylvania. By the law of that state the condition expressed in the contract of sale, that the safe company should not relinquish title until the contract price was paid, and that on the failure

to pay any of the installments of the price the company might resume possession of the property, was valid, as between Schwartz and the company. By his contract, Schwartz obtained possession of the safe, and a right to acquire title on payment of the contract price; but until that condition was performed the title was in the company. In this situation of affairs, the safe was brought into this state, and the property became subject to our laws.

The contract of Norton, the defendant, with Schwartz for the purchase of the safe, was made at Hightstown, in this state. The property was then in this state, and the contract of purchase was executed by delivery of possession in this state. The contract of purchase, the domicile of the parties to it, and the situs of the subject-matter of purchase were all within this state. In every respect the transaction between Norton and Schwartz was a New Jersey transaction. Under these circumstances, by principles of law which are indisputable, the construction and legal effect of the contract of purchase, and the rights of the purchaser under it, are determined by the law of this state. By the law of this state, Norton, by his purchase, acquired only the title of his vendor, — only such title as the vendor had when the property was brought into this state and became subject to our laws.

It is insisted that inasmuch as Norton's purchase, if made in Pennsylvania, would have given him a title superior to that of the safe company, that, therefore, his purchase here should have that effect, on the theory that the law of Pennsylvania, which subjected the title of the safe company to the rights of a bona fide purchaser from Schwartz, was part of the contract between the company and Schwartz. There is no provision in the contract between the safe company and Schwartz that he should have power, under any circumstances, to sell and make title to a purchaser. Schwartz's disposition of the property was not in conformity with his contract, but in violation of it. His contract, as construed by the laws of Pennsylvania, gave him no title which he could lawfully convey. To maintain title against the safe company, Norton must build up in himself a better title than Schwartz had. He can accomplish that result only by virtue of the law of the jurisdiction in which he acquired his rights.

The doctrine of the Pennsylvania courts, that a reservation of title in the vendor upon a conditional sale is void as against creditors and bona fide purchasers, is not a rule affixing a certain construction and legal effect to a contract made in that state. The legal effect of such a contract is conceded to be to leave property in the vendor. The law acts upon the fact of possession by the purchaser under such an arrangement, and makes it an indelible badge of fraud, and a forfeiture of the vendor's reserved title as in favor of creditors and bona fide purchasers. The doctrine is founded upon consideration of public policy adopted in that state, and applies to the fact of possession and acts

of ownership under such a contract, without regard to the place where the contract was made, or its legal effect considered as a contract.

In *MacCabe v. Blymyre*, 9 Phila. 615, the controversy was with respect to the rights of a mortgagee under a chattel mortgage. The mortgage had been made and recorded in Maryland, where the chattel was when the mortgage was given, and by the law of Maryland was valid, though the mortgagor retained possession. The chattel was afterwards brought into Pennsylvania, and the Pennsylvania court held that the mortgage, though valid in the state where it was made, would not be enforced by the courts of Pennsylvania as against a creditor or purchaser who had acquired rights in the property after it had been brought to that state; that the mortgage, by allowing the mortgagor to retain possession of the property, and bring it into Pennsylvania, and exercise notorious acts of ownership, lost his right, under the mortgage, as against an intervening Pennsylvania creditor or purchaser, on the ground that the contract was in contravention of the law and policy of that state. Under substantially the same state of facts this court sustained the title of a mortgagee under a mortgage made in another state, as against a bona fide purchaser who had bought the property of the mortgagor in this state, for the reason that the possession of the chattel by the mortgagor was not in contravention of the public policy of this state. *Parr v. Brady*, 37 N. J. Law, 201.

The public policy which has given rise to the doctrine of the Pennsylvania courts is local, and the law which gives effect to it is also local, and has no extraterritorial effect. In the case in hand, the safe was removed to this state by Schwartz as soon as he became the purchaser. His possession, under the contract, has been exclusively in this state. That possession violated no public policy,—not the public policy of Pennsylvania, for the possession was not in that state; nor the public policy of this state, for in this state posses-

sion under a conditional sale is regarded as lawful, and does not invalidate the vendor's title unless impeached for actual fraud. If the right of a purchaser, under a purchase in this state, to avoid the reserved title in the original vendor on such grounds be conceded, the same right must be extended to creditors buying under a judgment and execution in this state; for by the law of Pennsylvania creditors and bona fide purchasers are put upon the same footing. Neither on principle, nor on considerations of convenience or public policy, can such a right be conceded. Under such a condition of the law, confusion and uncertainty in the title to property would be introduced, and the transmission of the title to movable property, the situs of which is in this state, would depend, not upon our laws, but upon the laws and public policy of sister states or foreign countries. A purchaser of chattels in this state which his vendor had obtained in New York, or in most of our sister states, under a contract of conditional sale, would take no title; if obtained under a conditional sale in Pennsylvania, his title would be good; and the same uncertainty would exist in the title of purchasers of property so circumstanced at a sale under judgment and execution.

The title was in the safe company when the property in dispute was removed from the state of Pennsylvania. Whatever might impair that title—the continued possession and exercise of acts of ownership over it by Schwartz, and the purchase by Norton—occurred in this state. The legal effect and consequences of those acts must be adjudged by the law of this state. By the law of this state it was not illegal nor contrary to public policy for the company to leave Schwartz in possession as ostensible owner, and no forfeiture of the company's title could result therefrom. By the law of this state, Norton, by his purchase, acquired only such title as Schwartz had under his contract with the company. Nothing has occurred which by our law will give him a better title.

The judgment should be reversed.

MELDRUM et al. v. SNOW.

(9 Pick. 441.)

Supreme Judicial Court of Massachusetts. Suffolk and Nantucket. March Term, 1830.

Replevin brought by the plaintiffs, who are brewers in the city of Boston, to recover of the defendant, a deputy of the sheriff of Suffolk, eighteen beer barrels, each containing about thirty gallons of beer, with their contents, being in the cellar recently occupied by one Klein, in Market street; which the plaintiffs aver to be their property, and that the defendant took and unlawfully detained the same on the first day of August 1828.

The defendant pleaded as to the beer, that it was the property of Klein, and that he, the defendant, had attached it as such at the suit of Klein's creditors; to which the plaintiffs replied property in themselves, traversing Klein's ownership, and issue was joined thereon.

At the trial before Wilde J. the plaintiffs proved that the beer was sent to Klein in the spring, he being a retailer of beer, and carrying on his business in the cellar where the beer was when it was attached by the defendant.

The plaintiffs also proved, that according to the universal usage of trade here, and in other places in this country, the following are the terms upon which retailers are supplied by the brewers. In the spring, the brewer sends to the retailer such quantity as the retailer expects to vend, and at a stipulated price, and in barrels belonging to the brewer, which are returned to him when emptied. The retailer pays for all that he vends in the course of the season, at the price at which it was originally furnished. If the beer becomes sour or stale, or is lost by the bursting of the casks, or by fire or other casualty, the loss falls on the brewer. If any beer remains unsold at the end of the season, the retailer has a right to return it to the brewer, but the brewer has no right to take it without his consent. Payment is never made by the retailer in advance, but usually in annual or semi-annual settlements, when what has been sold is paid for and the residue is returned or remains a subject for future adjustment. The profits of retailing belong exclusively to the retailer, and all losses by bad debts fall upon him. The brewer's price of beer never varies. Beer cannot be drawn off nor removed in warm weather without injury and great danger of destroying it.

Sowden, a brewer in Boston, who has carried on the business for twenty-two years, testified, that he never considered the sale absolute till the barrel was emptied.

It was testified that the custom was observed by the plaintiffs in their dealings, and that Klein was one of their customers.

The plaintiffs also produced an instrument made and delivered to them by Klein on the first day of August, previously to the service of the writ, as follows:—
"Whereas I have always holden the beer, now in the cellar recently occupied by me,

in the casks furnished by Meldrum & Co., as being of their property unless paid for, and the same being now attached by my creditors, ought of right, according to our contract, to be delivered up to them; therefore and for good and valuable considerations me thereto moving, I do hereby assign and transfer all my right, title and property therein, unto the said Meldrum & Co., they crediting me in account for what they thus receive."

Horton, the attesting witness to the assignment, testified that he went with the plaintiffs' clerk to the defendant, and that the clerk produced this instrument and demanded the beer and barrels, but the defendant refused to give them up.

As to the question, whether the property in the beer was in Klein, the jury were instructed, that if they believed that he took the beer of the plaintiffs on the terms of the custom above stated, the property became vested in him; that this was in fact a conditional sale, and the beer could be attached as belonging to him, and the only remedy of the plaintiffs would be to recover of him the price.

The jury found a verdict for the defendant.

The plaintiffs moved for a new trial, because the judge instructed the jury, that the delivery of the beer, upon the terms of the custom proved, constituted a conditional sale to Klein, and vested in him the property in the beer, subject to attachment for his debts; whereas the plaintiffs contended, that such delivery vested only a special property in Klein for certain purposes; and that the general property remained in the plaintiffs; so that the beer could not be attached as the property of Klein; and that by virtue of the assignment to them of his special property, they became entitled to the immediate possession, and acquired the whole title, so that the detention by the defendant after demand made, was unlawful.

C. G. Loring and E. G. Loring, for plaintiffs. S. D. Ward, for defendant.

PER CURIAM. The principal question in the case regards the ownership of the beer. Evidence was given at the trial, of a custom among brewers to supply retailers with beer in the manner stated in the report of the judge. It is argued that this mode of dealing is necessary, and it should seem to be so; for in general the retailer would not be able to purchase a large quantity of beer at once, and it appears that beer must be supplied to him in cold weather, as it cannot be removed in warm weather without injury. The question is, whether the beer is liable to attachment as the property of the retailer. The contract is very similar to that of sale or return in England; and in the case of some kinds of manufactures such a contract is required, owing to particular circumstances which take them out of the rules of ordinary sales. It is on this ground that contracts of sale or return are held valid; and it is uniformly considered that in such contracts the property continues in the original owner; except in

cases under the statute of James, of bankruptcy, which is not in force in this commonwealth.

It is objected, that in the contract of sale or return, the article is to be returned, unless sold, but that by the custom under consideration, it may or may not be returned, at the election of the retailer. We are not clear that there is any such distinction; nor is there good reason for it. It is consistent with the English law, that the beer shall remain the property of the brewer until the election of the retailer shall be made.

We place this contract on the same ground as that of sale or return in England, and we are glad to find authorities which sustain us; but without authorities we should deem it proper to uphold such a contract. Retailers who take beer to sell are often persons of very small property, and the custom appears to be so general and well known, that the retailer would not be supposed to be the owner of

the beer; no injury therefore can arise to creditors of the retailer. And it being beneficial to the community to introduce the use of beer, public policy would justify us in favouring the custom.

It is asked, how shall the beer be attached; whether as the property of the brewer, or of the retailer. It is not necessary for us to answer this question. There are many cases where chattels cannot be attached as the property either of the general or of the special owner.

An objection is raised in regard to the possession of the plaintiffs in replevin, the possession and the right of possession being here in the retailer. It is sufficient to remark, that when the sale of beer is stopped by the acts of the retailer, his right to retain ceases; and further, in the case before us, the general property being in the brewer, and the retailer having assigned all his right in the beer to him, the action may well lie.

New trial granted.



MEWS v. CARR.

(1 Hurl. & N. 481.)

Exchequer. Nov. 20, 1856.

The declaration stated that the plaintiff put up for sale by public auction in lots a large quantity of timber of a certain description, &c., under and subject to the following conditions of sale. (The declaration set out the conditions, of which the following only are material): first, that the highest bidder should be deemed the purchaser, &c.; fourthly, that the goods should be paid for and cleared away within twenty-eight days from the day of sale; sixthly, that in default of compliance with the above conditions the deposit money received shall be forfeited, and the purchasers shall be liable for all loss, charges, interest of money, or any expenses whatever attendant on a re-sale either by private contract or public auction. Averments: that on the said exposure to sale of the said timber the defendant became the highest bidder for and the purchaser of (to wit) two lots of the same on the conditions aforesaid, at and for a certain sum (to wit) of £183 6s., and he agreed with the plaintiff to become the purchaser thereof on the said conditions and at and for the said price, and to comply with the said conditions, and the plaintiff accepted him as such purchaser; and although the plaintiff has at all times been ready and willing to do and perform and has done and performed all things and all things have happened to entitle him to a performance by the defendant of the said conditions of sale and his said agreement, and although the defendant according to the said conditions of sale and his said agreement ought to have paid for and cleared away the said lots within twenty-eight days from the day of sale, yet the defendant did not nor would at any time within the said space of twenty-eight days from the day of sale pay for or clear away the said lots or any part thereof; and thereupon, in accordance with the said conditions of sale and after the expiration of the said period of twenty-eight days from the day of sale, and in a reasonable time in that behalf, the plaintiff did re-sell the said lots by public auction at and for a less sum than the amount so to have been paid for the same by the defendant as aforesaid, to wit, at a loss of £20; and the plaintiff was put to and incurred great expense, to wit, a further sum of £20, for and in respect of divers charges and expenses attendant on such re-sale, &c.; of all which premises the defendant afterwards and before the commencement of this suit had notice, and was then requested by the plaintiff to pay him the said several sums; but the defendant has hitherto wholly neglected and refused so to do.

Plea. That the defendant did not become the highest bidder for and the purchaser of the said two lots on the said conditions, nor did he agree to become the purchaser thereof on the said conditions at and for the said price and to comply with the said conditions; nor did the plaintiff accept him as such purchaser as alleged.

Replication, taking issue on the plea.

At the trial before Pollock, C. B., at the last Surrey assizes, it appeared that on the 26th of October, 1856, one Churchill on behalf of the plaintiff put up for sale by auction several lots of timber under the conditions of sale mentioned in the declaration. All the lots were not sold; and on the following day the defendant called at the office of Churchill and inquired what lots remained unsold. Churchill thereupon shewed him a catalogue, and he selected two lots, which he agreed to purchase. Churchill then wrote the defendant's name in the catalogue opposite these lots. Two or three days after the defendant again called and requested to know what further lots remained on hand. The catalogue was shewn to him, and he selected two other lots; and on being informed the terms he said he should consider whether he would become the purchaser of them. About the 9th November he again called, and on this occasion he agreed to purchase these two lots. Churchill then wrote in the defendant's presence his name in the catalogue opposite these lots, and also the agreed price, £10 10s. per standard. The defendant then stated that as the prompt day fixed by the conditions of sale at twenty-eight days after the day of sale, viz., on the 23d November, was so near, he could not pay for the lots then; and it was agreed that the twenty-eight days should be calculated from the 9th November. Evidence was adduced to shew that by the custom of the trade persons who purchased lots from those remaining unsold at an auction were always considered as bound by the conditions of sale, the same as if they had purchased at the auction.

It was objected on behalf of the defendant, first, that Churchill was not the agent of the defendant so as to bind him by his signature, and consequently that there was no contract in writing as required by the 17th section of the statute of frauds; secondly, that this, being a sale by private contract, was not subject to the conditions mentioned in the declaration. The learned judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him.

Hawkins in the present term obtained a rule nisi accordingly, against which Montagu Chambers and Mathew now shewed cause. Hawkins appeared to support the rule, but was not called upon.

POLLOCK, C. B. The rule must be absolute. The sale in question took place some days after the auction was over; and therefore, as regards the statute of frauds, the case must be determined as any other ordinary sale. The parties cannot set up a custom of trade to repeal the statute of frauds. No doubt an auctioneer at the sale is agent for both seller and buyer, so as to bind them by his signature; but the moment the sale is over, the same principle does not apply, and the auctioneer is no longer the agent of both parties, but of the seller only; and the signature of the seller or his agent cannot bind the buyer. The question is,

whether there is any evidence to take the case out of the statute of frauds; and I think that there is none.

ALDERSON, B. I am of the same opinion.

BRAMWELL, B. The only reason why I make any remark is, that the observations of the court in *Graham v. Musson*¹ may not be misunderstood. There the court said that, if the traveler had signed

the defendant's name, and he had not expressed any dissent, that would have been a recognition of agency. Here the auctioneer signed the defendant's name, not purporting to act for him, but as the person who sold the goods. It is now established that an auctioneer at the time of the sale is agent for both buyer and seller; but as soon as the sale is over the reason for the rule fails, and he is certainly not the agent of the buyer unless he has some authority to act on his part.

¹ 5 Bing. N. C. 603.

WATSON, B., concurred. Rule absolute.

MITCHELL v. GILE.

(12 N. H. 390.)

Superior Court of Judicature of New Hampshire.
Hillsborough. Dec. Term, 1841.

Assumpsit by one Mitchell against one Gile, one of the charges being for ten cords of wood sold and delivered. It appeared on the trial that plaintiff had on his land a lot of seasoned wood, of which defendant wished to borrow a portion in order to complete a boat load. Plaintiff gave him permission to take what he wanted for the purpose, and, as defendant proposed to cut some wood from his land near plaintiff's, it was agreed that the latter should have of it as much as defendant might take of plaintiff's wood. Defendant accordingly took ten cords of plaintiff's wood, and plaintiff afterwards demanded a like quantity of defendant, which, however, the latter neglected to deliver. Defendant objected that this evidence did not support the declaration, and that plaintiff should have declared on the original contract.

Bowman & Porter, for plaintiff. S. D. Bell, for defendant.

GILCHRIST, J. There is a class of cases where it is unnecessary to declare upon the special contract which the parties may have made. Where one party agrees to do a certain thing, and the other party agrees to pay a sum of money, and the thing or duty is performed, but the other party refuses to pay the money, an action lies for the money, because a debt has accrued, and nothing remains to be done but to pay it. There seems to be no reason in such a case why a general count should not be sufficient for the recovery of the money due. The plaintiff's claim does not then sound in damages, but is for a definite sum. Such is the principle recognized in the *Bank of Columbia vs. Patterson's Adm'r*, 7 Cranch 303; *Williams vs. Sherman*, 7 Wend. 109; *Jewell vs. Schroeppel*, 4 Cowen 564; *Felton vs. Dickinson*, 10 Mass. 287; *Sheldon vs. Cox*, 3 B. & C. 420, and in the cases generally, whenever the point is adverted to.

There is another class of cases, where the only remedy for the plaintiff is by an action on the special agreement, because it still remains open and unrescinded. In general, where goods are sold to be paid for wholly or in part by other goods, or by the defendant's labor, or otherwise than in money, the action must be on the agreement, and for a breach of it, and not for goods sold and delivered. And this is especially the case unless there be a sum of money due the plaintiff on the contract, and that part of it which is for something else than money has been performed by the defendant, so that there is nothing to be done which can be the subject of future litigation. In such case perhaps the plaintiff may declare that the defendant was indebted to him in a sum of money for goods sold and delivered to him in exchange. But in a case tried before Mr. Justice Buller, where the declaration was for goods sold and delivered, and the con-

tract proved was, that the goods should be paid for partly in money and partly in buttons, the plaintiff was consulted, for not declaring on the special agreement. *Harris vs. Fowle*, cited in the case of *Barbe vs. Parker*, 1 H. Bl. 287. There is also an old case on this point in *Palmer's Reports* 364, *Brigs' Case*, where one in possession of land promised to make a lease of it, and took a fine for the lease, after which, and before the lease was made, he was ejected from the land. It was held that debt did not lie to recover the money paid for the fine; and the principle of the decision seems to have been, that the contract to make the lease being still subsisting, the plaintiff should have sued upon that contract. And the authorities are nearly uniform, that where goods are delivered on a special agreement, a mere failure to perform, by the defendant, does not rescind the agreement; but it is still executory and subsisting, and the remedy is by an action upon it. *Raymond vs. Beardon*, 12 Johns. 274; *Jennings vs. Camp*, 13 Johns. 91; *Clark vs. Smith*, 14 Johns. 326; *Robertson vs. Lynch*, 18 Johns. 451; *DuBois vs. Del. & Hudson Canal Co.*, 4 Wend. 289; *Talver vs. West*, Holt 178. And in *Weston vs. Downes*, 1 Dougl. 23, the court expressly held, that if a contract be rescinded, an action for money had and received will lie for money paid under it; but if the contract be broken, this action will not lie, but an action for a breach of the contract must be brought. This principle is fully recognized in *Towers vs. Barrett*, 1 T. R. 133, and in *Davis vs. Street*, 1 C. & P. 18. Opposed to the general current both of the English and American authorities on this point, are the intimations and the reasoning of Mr. Justice Cowen, in the case of *Clark vs. Fairfield*, 22 Wend. 522. He expresses the opinion that the cases will justify the position, that though the compensation for the goods, or other thing advanced, is to be rendered in services, or some other specific thing, if the party promising to render be in default, indebitatus assumpsit will lie for the price of the thing advanced. He admits that this position goes beyond any direct adjudication in England, although he thinks it may be maintained by the principle of many cases there, and that it is just that in such a case a general count should be maintained. He cites, with approbation, the case of *Way vs. Wakefield*, 7 Vermont R. 223, 228, where Mr. Justice Collamer says, that "whenever there are goods sold, work done, or money passed, whatever stipulations may have been made about the price, or mode, or time of payment, if the terms have transpired so that money has become due, the general count may be maintained." The action was for harness sold, to be paid for in lumber at a specified time. There being a default in payment, the court allowed the general count for harness sold. Mr. Justice Cowen admits that "the learned judge certainly did not cite any direct authority for thus applying the rule," and we are not aware that any authority exists for such an application of it. To the rule, as above stated, there may, perhaps, be no objection. The question in cases of such a char-

acter always is, whether the money has become due; and if no more be meant than that a general count will lie, where a contract has been performed, and has resulted in an obligation to pay money, then we assent to the correctness of the position. Of the propriety of the application of the rule to the facts in the case of *Way vs. Wakefield*, we may be permitted, respectfully, to express a doubt. It is true that a general count may sometimes be maintained, where the goods were to be paid for by other goods. Of this character is the case of *Forsyth vs. Jervis*, 1 *Starkie's Reports* 437. The plaintiff sold the defendant a gun for forty-five guineas, and agreed to take of the defendant a gun, in part payment, at the price of thirty guineas. Lord Ellenborough held that as here was a sale of goods, to be paid for in part by other goods at a stipulated price, upon the refusal of the purchaser to pay for them in that mode, a contract resulted to pay for them in money, and that the forty-five guineas might be recovered under a count for goods sold. This case has every characteristic of a sale. The plaintiff sold the gun for a specified price; the defendant agreed to give, in part payment, another gun for a stipulated price, and was bound either to deliver the gun or pay its price. As he refused to deliver the gun, a decision that he was indebted to the plaintiff for its price accords with the general tone of the authorities. In relation to the case of *Clark vs. Fairchild*, it is also to be remarked, that in the subsequent case of *Ladue vs. Seymour*, 24 *Wend.* 62, Mr. Justice Bronson says, that where there is a subsisting special contract between the parties in relation to the thing done, all the cases agree that the contract must control, and that the remedy is, in general, upon that, and not upon the common counts in assumpsit.

But apart from authority, and from technical reasoning depending upon authority for much of its force, it is proper that the form of the remedy should be adapted to the actual state of facts. In no other mode of declaring can the proper rule of damages be applied, where there has been a breach of a special contract. If goods are sold and delivered, the price, or value, at the time of the transaction, is the measure of damages, unless there be something showing a different intention by the parties. The plaintiff is entitled to the value of the goods he has parted with, at the time, and to nothing more; nor can the defendant be compelled to pay more than the value at the time he received them. Both parties act with reference to the value at the time of the transaction. But where a party agrees, but neglects to deliver goods at a specified time, the damages for the non-fulfilment of such an agreement are to be calculated according to their value at the time they should have been delivered. If the articles have fallen in price, the defendant will be entitled to the benefit of such a change in the market; if they had risen, the increase in value will belong to the plaintiff. There is, therefore, a substantial reason why the

rights of both parties can be better secured, by declaring specially upon a breach for the non-fulfilment of a contract to deliver goods, than by declaring upon the general count; and this reason probably has had its effect in causing the forms of the remedy to be kept distinct. *Leigh vs. Paterson*, 8 *Taunt.* 540; *Gainsford vs. Carroll*, 2 *B. & C.* 624; *Shaw vs. Nudd*, 8 *Pick.* 9.

If, where goods are sold to be paid for otherwise than in money, and the vendee neglects to perform, an action must be brought on the special agreement, there is a still stronger reason for adopting the same form of the remedy where the goods are not sold, but exchanged. In the former case, the goods are at least sold; and so far the evidence supports the declaration. But the latter case has no feature in common with a contract, necessary to support a count for goods sold and delivered. Now the transaction between those parties was, properly speaking, an agreement for an exchange of goods, and not for a sale. Blackstone says, 2 *Comm.* 446, "if it be a commutation of goods for goods, it is more properly an exchange; if it be a transferring of goods for money, it is called a sale." Here the defendant agreed to deliver to the plaintiff as much wood as he received of him. This agreement the defendant failed to perform. There is, then, a breach of the special agreement, and there is nothing else. The injury sustained by the plaintiff is to be compensated by a recovery of damages for the breach. There is nothing in the case that shows a sale of the wood by either party to the other; nor can the transaction be considered a sale, without a disregard of all the authorities which distinguish actions sounding in damages for a breach of contracts, from actions to recover a definite sum as the purchase money for goods sold.

Nor is the case altered by the fact that no suit could be maintained without a demand. The wood was to be delivered to the plaintiff at such time as he should desire it. The plaintiff would have a right to the performance of the agreement whenever he should notify the defendant that he desired the wood. There could be no breach of the agreement by the defendant until after this notice; and a refusal to deliver was a breach, for which an action is maintainable. That a demand, in a given case, is necessary before a suit can be maintained on a special contract, by no means proves that the demand alters the form of the remedy to which the plaintiff is entitled. It might as well be said, that because an action on a special contract could not be maintained until a given period had elapsed, therefore the lapse of time altered the form of the remedy. Undoubtedly, a demand and refusal may, in some cases, have this effect, but the result does not necessarily follow because the demand must be made.

The opinion of the court is, that the plaintiff has misconceived his remedy, and that this action cannot be maintained.

Plaintiff nonsuit.

MOODY v. BROWN.

(34 Me. 107.)

Supreme Judicial Court of Maine. 1852.

On exceptions from the district court; Hathaw: v. J.

Assumpsit, on account for materials and labor furnished, and one on an account for articles sold and delivered. The account was for stereotype plates, \$18; alteration of same, \$4; and some interest and expressage, making in all \$25.01.

A witness for the plaintiff testified that in behalf of the plaintiff he presented the bill and requested payment, to which the defendant replied that he had ordered the plates, but did not feel able to take them; that there was a mistake in them, which the plaintiff was to correct at his own expense; that he afterwards carried the plates to the store of the defendant, who refused to take them; that he left them there, against the remonstrance of the defendant; that the defendant afterwards offered to pay \$20 for the whole bill; that at a still subsequent period, the witness asked the defendant when he would pay the \$20, who replied that he would do it in a few days; and that the defendant afterwards repeatedly said he would pay the twenty dollars.

The judge instructed the jury, that, if defendant contracted for the plates to be made for him, and refused to accept them when made, although he might be liable to plaintiff in an action for damages for not fulfilling his contract, yet he would not be liable in this action for their value, as for goods sold and delivered; that if they were left at defendant's store against his consent and remonstrance, such a proceeding on the part of plaintiff could have no effect to vary the liabilities of defendant.

But if afterwards defendant offered to pay the twenty dollars in full for the bill, and if that offer was accepted, the plaintiff would be entitled to recover the twenty dollars and interest thereon from the time such offer was accepted, but that defendant would not be bound by that offer, unless it was accepted.

Before SHEPLEY, C. J., and WELLS, RICE, and APPLETON, JJ.

J. E. Godfrey, for plaintiff. Simpson, for the defendant,

SHEPLEY, C. J. There is not a perfect agreement of the decided cases upon the question presented by the exceptions.

The law appears to be entirely settled in England in accordance with the instructions. Atkinson v. Bell, 8 B. & C. 277;

Elliott v. Pybus, 10 Bing. 512; Clarke v. Spence, 4 Ad. & El. 448.

The case of Bement v. Smith, 15 Wend 493, decides the law to be otherwise in the state of New York. The case of Towers v. Osborne, Stra. 506, was referred to as an authority for it. The plaintiff in that case does appear to have recovered for the value of a chariot, which the defendant had refused to take. No question appears to have been made respecting his right to do so, if he was entitled to maintain an action. The only question decided was, whether the case was within the statute of frauds.

In the case of Bement v. Smith, C. J. Savage appears to have considered the plaintiff entitled upon principle to recover for the value of an article manufactured according to order and tendered to a customer refusing to receive it.

This can only be correct upon the ground that by a tender the property passes from the manufacturer to the customer against his will. This is not the ordinary effect of a tender. If the property does not pass, and the manufacturer may commence an action and recover for its value, while his action is pending it may be seized and sold by one of his creditors, and his legal rights be thereby varied, or he may receive benefit of its value twice, while the customer loses the value. The correct principle appears to have been stated by Tindal, C. J., in the case of Elliott v. Pybus, that the manufacturer's right to recover for the value depends upon the question, whether the property has passed from him to the customer. The value should not be recovered of the customer, unless he has become the owner of the property, and can protect it against any assignee or creditor of the manufacturer.

To effect a change in the property there must be an assent of both parties. It is admitted that the mere order given for the manufacture of the article does not affect the title. It will continue to be the property of the manufacturer until completed and tendered. There is no assent of the other party to a change of the title exhibited by a tender and refusal. There must be proof of an acceptance or of acts or words respecting it, from which an acceptance may be inferred, to pass the property.

This appears to be the result of the best-considered cases.

There is a particular class of cases to which this rule does not apply, where the customer employs a superintendent and pays for the property manufactured by installments as the work is performed.

Exceptions overruled.

MOORE v. McKINLAY et al.

(5 Cal. 471.)

Supreme Court of California. Oct. Term, 1855.

Appeal from the district court of the twelfth judicial district, San Francisco county.

Hoge & Wilson, and Cook & Olds, for appellants. Charles H. S. Williams, for respondent.

MURRAY, C. J. This was an action in the court below, to recover the amount paid by the plaintiff to the defendants for the purchase of an invoice of garden seeds.

It is in evidence, that after the arrival of the vessel, the plaintiffs were requested to open and inspect the seeds, but declined to do so, and paid for them. They were afterwards tested, and found to be almost wholly worthless. In order to maintain this action, the plaintiffs must show either an express or implied warranty. The sale note is as follows: "We have this day sold you two shipments of seeds for arrival," &c.

The plaintiff maintains, that the word "seeds" thus used, amounts to an express warranty; that it has an express signification, importing an article which will germinate or grow, and that it would be error to apply this term to any seeds not possessing these properties. And second, that if not an express warranty, the law will imply a warranty; or, in other words, raise the presumption, that the article sold is merchantable, and fit for the use for which it was sold.

At common law, the rule *caveat emptor* applied to all sales of personal property, except where the vendor gave an express warranty, which is said to be such recommendations or affirmations, at the time of the sale, as are supposed to have induced the purchase. To constitute a warranty, no precise words are necessary; it will be sufficient if the intention clearly appear.

During the time of Lord Holt, the doctrine was established, that to warrant, no formal words were necessary, and therefore a warranty might be implied, from the nature and circumstances of the case, and the maxim was thus introduced, that a sound price imports a sound bargain or warranty.

This doctrine was afterward exploded by Lord Mansfield, since which time it has undergone some modifications in the Eng-

lish and American courts, tending in the former somewhat and in some of the states of the Union, to the rule of civil law, which implies that the goods sold are merchantable, and fit for the purpose for which they were bought.

The better opinion, however, I think, as deduced from English and American decisions, is that a warranty will not be implied, except in cases where goods are sold at sea, where the party has no opportunity to examine them, or in case of a sale by sample, or of provisions for domestic use.

In *Hart v. Wright*, 17 Wend., 267, Judge Cowen reviews the former decisions of that state as well as the English cases, and arrives at the conclusion which I have stated. This case was afterwards brought before the court of errors of New York, and the doctrine approved.

In *Moses v. Mead*, 1 Denio, 385, the question again came before the supreme court of New York. In commenting on the decisions on this subject, Judge Bronson says, "Some English judges have lately shown a strong tendency towards the doctrines of the civil law, in relation to sales, and have been disposed to imply warranties where none exist. . . . I do not regret to find, that there are men in Great Britain who can look beyond the shores of that island; but I feel no disposition to follow them in their new zeal for the civil law, for the reason, that it is not our law in relation to sales in the best."

The same doctrine is maintained in *Friley v. Bispham*, 10 Barr., 320, and many other American decisions. There have been no departures from this rule in the decisions of this court. In the case of *Flinn v. Lyon*, 4 Cal., 17, the flour was described as "Haxall," and we held, that this amounted to a warranty, that the article sold was "Haxall," and not a different brand or quality of flour. In *Rulz et al. v. Norton*, 4 Cal., 359, the sale note described the rice as "sound rice," which it was held amounted to a warranty.

Testing the present case by the rule which we have deduced from the better authority of courts, the plaintiff cannot recover. The language used in the sale note cannot be tortured into a warranty, and the fact that the plaintiff had an opportunity and declined to inspect the seeds before accepting them, takes the case from the operation of the rule of implied warranty.

Judgment reversed, with costs.

HEYDENFELDT, J., concurred.

MORSE et al. v. SHAW.

(124 Mass. 59.)

Supreme Judicial Court of Massachusetts.
Hampden. Feb. 8, 1878.

Replevin of wool. At the trial in the superior court, before Rockwell, J., the jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

G. M. Stearns and N. A. Leonard, for plaintiffs. G. F. Hour, for defendant.

MORTON, J. The plaintiffs seek to avoid a sale, upon the ground that they were induced to make it by false and fraudulent representations of the defendant. The burden is upon them to show that the defendant knowingly made false representations of matters of fact which are susceptible of knowledge. Representations which are mere expressions of opinion, judgment or estimate, or intended as expressions of belief only, are not sufficient to support the action. They must be statements of facts susceptible of knowledge, as distinguished from matters of mere belief or opinion. *Safford v. Grout*, 129 Mass. 20. *Litchfield v. Hutchinson*, 117 Mass. 195.

At the trial of this case, the presiding justice stated these principles of law with substantial correctness, and the defendant does not complain of the rulings in this respect. But he contends that the only representations proved in the case were expressions of opinion or belief as to the defendant's ability to pay his debts, and that, therefore, under rules of law adopted by the presiding judge, he should have instructed the jury, as requested, that the evidence would not warrant a verdict for the plaintiffs.

The evidence tended to show that, in January, 1876, the defendant went to the plaintiffs to buy wool, and, after some conversation as to his business condition and credit, agreed to go home and prepare a statement of his affairs; that, in the February following, he again called upon the plaintiffs, took out a memoran-

dam book, apparently read it, and said: "I want to tell you how I stand. I could pay every dollar of indebtedness of mine, including the mortgages on my real estate, and not owe on that real estate more than \$15,000 to \$20,000." It appeared that he had a large and valuable real estate. The statement is equivalent to a representation that he had, independently of his real estate, property enough to pay all his debts except \$20,000.

Such a representation may be susceptible of either of two interpretations. It may be intended as a wilfully false statement of a fact, and may be understood as a statement of a fact. Or it may be intended as the expression of the opinion or estimates which the owner has of the value of his property, and may be so understood. Suppose, for instance, that a man who owns property worth \$1000, for the purpose of procuring credit, represents that he is worth or that he has property worth \$100,000. It would be self-evident that he intended to misrepresent facts, and such misrepresentation would be a fraud. But, if the same man should represent that he had property worth \$1500, it might well be regarded as an expression of his judgment or estimate of value, and therefore not an actionable fraud. In such cases, it is for the jury to determine whether the representations were intended and understood as statements of facts, or mere expressions of opinion or judgment. In the case at bar, the court could not say, as matter of law, that the statements made by the defendant as to his property and debts were mere expressions of his opinion or belief, and not statements of facts. All the evidence was before the jury, disclosing the circumstances and condition of the defendant and his property, and it was properly left to them to decide whether the statements proved were false and fraudulent representations of material facts.

Exceptions overruled.

ENDICOTT and LORD, JJ., absent.

MORSE et al. v. SHERMAN.

(106 Mass. 430.)

Supreme Judicial Court of Massachusetts. Suffolk. March, 1871.

Contract. The declaration contained two counts,—the first on an account annexed, the second for goods sold, and referring to the account as a bill of particulars. John S. Manny, one of the plaintiffs, testified that plaintiffs, as assignees of the Inventors' Manufacturers' Company, in July, 1869, took possession of their goods in a store in Boston. The stock included "a lot of cutlery, plated ware, ladies' travelling bags, pocket-books, pencils, and fancy goods." The defendant proposed "to buy for cash all the goods in the store of the description named, at a certain discount from the manufacturers' list of prices," and the plaintiffs accepted the offer. All the goods of that description were then taken from the places where they had been kept, and put by themselves, for delivery, and a schedule was made, showing the amount of \$4,103.78 as their price under the contract of sale. The defendant then said that he could not pay for the whole of them, but would like a part of them for his customers, and was allowed to take about \$1,200 worth, paying \$1,000 "on account." The defendant at the time promised to pay the balance and take away the rest of the goods in a few days. The rest of the goods were kept at the store for the defendant for some time, until the plaintiffs were to vacate the store, when plaintiffs asked the defendant to pay the balance due and take the goods away. Plaintiffs refused to take defendant's note for the balance, and notified him that, if he did not pay the balance and take the goods away before they vacated the store, they should store them at his risk and expense, and refused to let him have them until he paid for them. When they vacated the store they packed and removed them to the warehouse of one of the plaintiffs. The defendant was present at the time, and made no objection, promising to pay for them in a few days and take them away. The defendant then offered the plaintiff at whose warehouse they were stored an assignment of certain lenses as security for the balance due, which plaintiffs refused. The plaintiffs then brought this action. The judge, being of opinion that the declaration was insufficient for the goods not taken away by the defendant, reported that question before verdict, for the determination of the court.

A. A. Ranney, (N. Morse, with him,) for plaintiffs. J. B. Richardson, for defendant.

COLT, J. A count on an account annexed may be used under our statute, "where the action is for one or more items, which would be correctly described by any one of the common counts." This includes an action for the price of goods bargained and sold, as well as one for goods sold and delivered, because formerly the price in such case could be recovered

under an *indebitatus assumpsit*. *Stearns v. Washburn*, 7 Gray, 187. Do the facts here reported justify the jury in finding for the plaintiffs under a general count for goods bargained and sold, or such a count for goods sold and delivered? If, so, then the declaration on the account annexed is sufficient, and the case should have been submitted to them.

The evidence reported tends to show a completed contract of sale. Nothing remained to be done by either party, in the way of designating, or appropriating, or accepting, the goods sold. They were all that were in the store of the description named, and were taken from the shelves, scheduled, and put by themselves. After they were thus set apart, the defendant took a portion of them, paying a part of the price, and saying that he had not money to pay for the whole, but promising to pay the balance in a few days. The goods have since been kept by the plaintiffs ready to be surrendered to the defendant upon payment of the balance of the purchase money. The purchase was for cash; and the plaintiffs had a right to retain possession, by virtue of their lien for the price. The contract of sale was executed.

It is a familiar rule of pleading that, when the terms of a special contract have been so far performed that nothing remains but a mere duty to pay money, then the amount due may be recovered under a general count. It is only necessary to declare specially, when the agreement remains executory. Thus when the contract of sale is complete, and the vendee does not take away the goods, the vendor may recover the price in *indebitatus assumpsit*. The law does not require that complete delivery, that actual receipt of the goods, which would be necessary to defeat the vendor's lien for the price, or his right of stoppage in transitu, or which would be required to take the case out of the statute of frauds. The term "delivery" is used in the law of sales in very different senses. It is used in turn to denote transfer of title and transfer of possession; and where the parties have agreed, and the specific articles are appropriated and accepted, then, independently of the statute of frauds, it is often said, there is sufficient delivery to pass the title, although there be no transfer of possession. And this must be so, in order to be consistent with the lien which remains to the vendor for the price. 2 Kent Com. (6th ed.) 492. *Simmons v. Swift*, 5 B. & C. 857. In *Dixon v. Yates*, 5 B. & Ad. 313, Parke, J., said that when, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take the specific chattel and pay the stipulated price, the parties are then in the same situation as they would be in after a delivery of goods in pursuance of a general contract. The appropriation of the chattel is equivalent to delivery by the vendor; and the assent of the vendee, to take the specific articles and pay the price, is equivalent to his accepting possession. And it is now well settled that "by the law of England, by a contract for the sale of specific ascer-

tained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties." *Gilmour v. Supple*, 11 Moore P. C. 551, 566. *Blackburn, J.*, in *Calcutta & Burmah Steam Navigation Co. v. De Mattos*, 32 L. J. (N. S.) Q. B. 322, 328. See also *Damon v. Osborn*, 1 Pick. 476; *Middlesex Co. v. Osgood*, 4 Gray, 447; *Riddle v. Varnum*, 20 Pick. 280.

In *Atwood v. Lucas*, 53 Maine, 508, cited for the defendant, the action indeed was upon an account annexed, which would, as we have seen, have been maintained by proof of goods bargained and sold merely, as well as by proof of goods sold and delivered. But the facts of the case are not fully stated in the report; the question passed upon, as appears both in the opinion of the court and the head note of the reporter, was whether general indebtedness *assumpsit* could be supported, without proof of actual delivery and acceptance of the goods; and it was erroneously assumed that goods bargained and sold required a special count, and could not be recovered for under the common counts. That case therefore is of no weight upon the question what evidence is necessary to maintain an action for goods bargained and sold.

In *Turley v. Bates*, 2 H. & C. 200, the declaration contained a special count, with

counts for goods bargained and sold, goods sold and delivered, and on an account stated; the plaintiff sold the defendant a quantity of clay at a certain price per ton, to be carted away by the defendant and weighed at his own expense; it appeared that it was the intention of the parties that the property should pass to the buyer; and it was held that the plaintiff might recover the balance of the price under a count for goods bargained and sold, although the clay had never been all carted away and weighed.

It is competent, of course, for the parties expressly to agree, in the contract of sale, that the title to the property shall not pass except on the performance of a precedent or concurrent condition, such as the payment of the price. It is then a conditional sale strictly; and it is familiar law that the title will remain in the seller. It will not be a complete sale; it is then an executory contract; and it may be that the vendor's remedy is only upon a special count. The case shows no such express condition here; and there was evidence enough, in the opinion of a majority of the court, to warrant the jury in finding that it was the intention of the parties to make the sale complete and absolute, subject only to the vendor's lien for the price. Upon such a state of facts, as we have seen, the declaration is sufficient.

Case to stand for trial.

MORTON v. TIBBETT.

(15 Q. B. 428.)

Queen's Bench. May 31, 1850.

Debt for goods sold and delivered, and goods bargained and sold. Plea, *nunquam ladebitatus*. Issue thereon.

On the trial before Pollock, C. B., at the Cambridgeshire spring assizes, 1849, it appeared that the action was brought to recover the price of fifty quarters of wheat. On 25th August, 1848, the plaintiff and defendant being at March market, sold the wheat to the defendant by sample. The defendant said that he would send one Edgley, a general carrier and lighterman, on the following morning to receive the residue of the wheat in a lighter for the purpose of conveying it by water from March, where it then was, to Wisbeach; and the defendant himself took the sample away with him. On 26th August Edgley received the wheat accordingly. On the same day the defendant sold the wheat at a profit, by the same sample, to one Hampson at Wisbeach market. The wheat arrived at Wisbeach in due course on the evening of Monday the 28th August, and was tendered by Edgley to Hampson on the following morning, when he refused to take it, on the ground that it did not correspond with the sample. Up to this time the defendant had not seen the wheat; nor had any one examined it on his behalf. Notice of Hampson's repudiation of his contract was given to the defendant; and the defendant on Wednesday the 30th August sent a letter to the plaintiff repudiating his contract with the plaintiff on the same ground. There was no memorandum in writing of the bargain within § 17 of the statute of frauds, 29 Car. 2, c. 3; and it was objected for the defendant that there was no evidence of acceptance and receipt to satisfy the requirements of the same section. The lord chief baron overruled the objection; and the counsel for the defendant addressed the jury exclusively on the question of such acceptance and receipt. A verdict was found for the plaintiff, and leave given to move to enter a nonsuit, if the court should think either that there was no evidence of acceptance and receipt or no such evidence as justified the verdict.

Before CAMPBELL, C. J., PATTESON, COLERIDGE, and ERLE, JJ.

Worledge in Easter term, 1849, obtained a rule nisi accordingly. In this term (May 22d) Andrews and O'Malley shewed cause. Worledge and Couch, contra.

CAMPBELL, C. J. In this case the question submitted to us is, whether there was any evidence on which the jury could be justified in finding that the buyer accepted the goods and actually received the same, so as to render him liable as buyer, although he did not give any thing in earnest to bind the bargain or in part payment, and there was no note or memorandum in writing of the bargain.

It would be very difficult to reconcile the cases on this subject; and the difference between them may be accounted for

by the exact words of the 17th section of the statute of frauds not having been always had in recollection. Judges as well as counsel have supposed that, to dispense with a written memorandum of the bargain, there must first have been a receipt of the goods by the buyer, and after that an actual acceptance of the same. Hence perhaps has arisen the notion that there must have been such an acceptance as would preclude the buyer from questioning the quantity or quality of the goods, or in any way disputing that the contract has been fully performed by the vendor. But the words of the act of parliament are: "No contract for the sale of any goods, wares and merchandizes, for the price of £10 sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." It is remarkable that, notwithstanding the importance of having a written memorandum of the bargain, the legislature appears to have been willing that this might be dispensed with where by mutual consent there has been part performance. Hence the payment of any sum in earnest to bind the bargain or in part payment is sufficient. This act on the part of the buyer, if acceded to on the part of the vendor, is sufficient. The same effect is given to the corresponding act by the vendor of delivering part of the goods sold to the buyer, if the buyer shall accept such part and actually receive the same. As part payment however minute the sum may be is sufficient, so part delivery however minute the portion may be is sufficient. This shews conclusively that the condition imposed was not the complete fulfilment of the contract to the satisfaction of the buyer. In truth the effect of fulfilling the condition is merely to waive written evidence of the contract and to allow the contract to be established by parol as before the statute of frauds passed. The question may then arise, whether it has been performed either on the one side or the other. The acceptance is to be something which is to precede or at any rate to be contemporaneous with the actual receipt of the goods, and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined. As the act of parliament expressly makes the acceptance and actual receipt of any part of the goods sold sufficient, it must be open to the buyer to object at all events to the quantity and quality of the residue, and even where there is a sale by sample that the residue offered does not correspond with the sample. We are therefore of opinion that, whether or not a delivery of the goods sold to a carrier or any agent of the buyer is sufficient, still there may be an acceptance and receipt within the meaning of the act without the buyer having examined the goods or done any thing to preclude him from contending that they

do not correspond with the contract. The acceptance to let in parol evidence of the contract appears to us to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled.

We are therefore of opinion in this case that, although the defendant had done nothing which would have precluded him from objecting that the wheat delivered to Edgley was not according to the contract, there was evidence to justify the jury in finding that the defendant accepted and received it.

We will now examine the cases which are supposed to prove the doctrine that there can be no acceptance within the meaning of the statute of frauds unless the buyer is precluded from objecting that the vendor has not fully performed the contract on his part. The first of these was *Howe v. Palmer*,¹ which we clearly think was well decided, although we cannot concur in all the reasons given for the decision. There the only evidence of acceptance and receipt was that the agent of the vendor who had verbally sold to the defendant twelve bushels of tares, part of a larger quantity in the vendor's possession, had measured off twelve bushels of the tares, and set them apart for the purchaser. According to the contract they were to remain in the possession of the vendor till called for. The purchaser therefore neither had accepted nor received the goods. Abbott, C. J., does say: "If he had once accepted he could not afterwards make any objection, even if it turned out that the tares did not correspond with the sample." But this observation was quite unnecessary for the determination of the case; and, with the most sincere respect to the great judge from whom it fell, we do not think that it is applicable. The proper ratio decidendi seems to us to be given by Holroyd, J., where he says: "In this case there has been no actual receipt of any part of the goods sold within the usual meaning of the term, and I think that what has been done ought not to be considered in point of law as an acceptance. For supposing that it was made part of the contract in this case that the seller should set apart and measure the thing sold, that would not make the act of measuring amount to a virtual acceptance or receipt of the goods by the buyer." The next case relied upon is *Tempest v. Fitzgerald*,² where in an action for the price of a horse that had died after the time when he was sold by parol and before he was delivered or paid for, the question arose upon whom the loss should fall. The only evidence of acceptance and receipt was that, while the horse remained in the possession of the vendor, the purchaser made his servant gallop the horse and gave some directions about his treatment, requesting that he might be kept by the vendor a week longer. The court held that there had been no acceptance and receipt of the horse by the purchaser. But the case has little connection with the doctrine contended

for, that there must be an opportunity for the vendor to inspect the quality of the thing sold; and Abbott, C. J., founds his judgment upon this consideration, that the defendant had no right of property in the horse till the price was paid, and could not till then exercise any act of ownership over him. Holroyd, J., says: "There is no evidence to shew that" the vendor "had ever parted with the possession" of the horse. Next comes *Hanson v. Armistage*.³ There the vendor, who resided in London, having been in the habit of selling goods to a customer in the country and of delivering them to a wharfinger to be forwarded by the first ship, in pursuance of a verbal order from the customer delivered a parcel of goods to the wharfinger to be forwarded in the usual manner. The customer had done nothing beyond giving the verbal order for the goods. Abbott, C. J., in a very few words delivered the judgment of the court that an action could not be maintained for the price of the goods, on the ground that the acceptance in this case not being by the party himself was not sufficient, referring to *Howe v. Palmer*,⁴ where he says: "It was held that there could no actual acceptance so long as the buyer continued to have a right to object either to the quantum or quality of the goods." But the decision may well stand on other grounds; and we may observe that it is an actual receipt of the goods which the statute requires, and not an actual acceptance. *Carter v. Toussaint*⁵ was likewise relied upon, but it was merely (like *Tempest v. Fitzgerald*)⁶ a case of a sale by parol of a horse that remained always in the possession and under the control of the vendor, so that he could not have been accepted and received by the purchaser. Abbott, C. J., says: "The plaintiff's character of owner remained unchanged from first to last." The next case is *Smith v. Surman*,⁷ and there after a sale of timber by parol the purchaser had offered to sell the butts, and had given some directions about crosscutting the timber; but the evidence clearly proved that the whole continued to remain in the possession of the vendor. The court, as might have been expected, held that there could be no receipt by the purchaser while the possession of the goods remained with the vendor. A very learned judge, my Brother Parke, does unnecessarily add: "That the later cases have established that, unless there has been such a dealing on the part of the purchaser as to deprive him of any right to object to the quantity or quality of the goods, or to deprive the seller of his right of lien, there cannot be any part acceptance." That there can be no acceptance and receipt by the purchaser while the lien of the vendor remains is clear enough, for the vendor's lien necessarily supposes that he retains the possession of

¹ 5 B. & Ald. 537.

² 3 B. & Ald. 321.

³ 5 B. & Ald. 855.

⁴ 3 B. & Ald. 680.

⁵ 9 B. & C. 361.

⁶ 9 B. & C. 577.

⁷ 3 B. & Ald. 321.

⁸ 3 B. & Ald. 680.

the goods; but I must be permitted to doubt whether the cases referred to have established the residue of the rule. The last case cited on behalf of the defendant was *Norman v. Phillips*.⁹ This case very much resembled *Hanson v. Armitage*,¹⁰ and presented no stronger evidence of acceptance and receipt. The defendant living at Wallingford gave the plaintiff, a timber merchant in London, a verbal order for timber, directing it to be sent to the Paddington station of the Great Western Railway so that it might be forwarded to him at Wallingford. The timber was accordingly forwarded to the Wallingford station; but the defendant being informed of its arrival refused to have anything to do with it. The court held that although there might be a scintilla of evidence for the jury of an acceptance of the timber within the statute of frauds, yet there was not sufficient to warrant them in finding that there was such an acceptance; and the court set aside a verdict for the plaintiff not warranted by the evidence. Alderson, B., says: "The true rule appears to me to be that acceptance and delivery under the statute of frauds means such an acceptance as precludes the purchaser from objecting to the quality of the goods." He adds what, with great deference, is a better reason: "The carrier is only an agent for the purpose of carrying, and here the purchaser himself immediately refused to take the goods." It was upon this reason that the rest of the court appears to have proceeded.

If there were such a rule as is contended for it would be decisive against the plaintiff in this case, for the defendant never had an opportunity of examining the goods sold: there is no evidence that Edgley was his agent for that purpose; and he had done nothing to preclude him from objecting to the quality of the wheat. But if there be no such rule, then surely there was evidence to submit to the jury and to justify them in finding an acceptance and receipt. He specially sent Edgley to receive the wheat after the delivery of the wheat to his agent and when it was no longer in the possession of the vendor, instead of rejecting it as in other cases, he exercised an act of ownership over it by re-selling it at a profit, and altering its destination by sending it to another wharf, there to be delivered to his vendee. The wheat was then constructively in his own possession; and could such a re-sale and order take place without his having accepted and received the commodity? Does it lie in his mouth to say that he has not accepted that which he has re-sold and sent on to be delivered to another? At any rate is not this evidence from which such an acceptance and receipt may be inferred by the jury? Upon similar evidence the finding of an acceptance and receipt has been sanctioned by very eminent judges. In *Hart v. Sattley*,¹¹ where goods had been verbally ordered to be sent from London to Dartmouth, and were sent by a carrier employed by the

defendant, and were not proved to have been rejected by him, although there was no proof that they had come to his hands, Chambre, J., is reported to have said: "I think under the circumstances of this case the defendant must be considered as having constituted the master of the ship his agent to accept and receive the goods." The plaintiff recovered a verdict which was not disturbed. In *Chaplin v. Rogers*,¹² where a stack of hay being sold by parcel to the defendant he, without paying for it or removing it, re-sold a part of it to another person who took it away, and the jury found that the defendant had accepted and received the stack of hay, Lord Kenyon said: "The question was specifically left to the jury whether or not there were an acceptance of the hay by the defendant, and they have found that there was, which puts an end to any question of law." "Here the defendant dealt with this commodity afterwards as if it were in his actual possession; for he sold part of it to another person." "The other judges agreed that there was sufficient evidence of a delivery to and acceptance by the defendant to leave to the jury." And the verdict for the plaintiff was confirmed. So in *Blenkinsop v. Clayton*,¹³ Gibbs, C. J., and the whole court of common pleas, agreed that if a person who has contracted for the purchase of goods offers to re-sell them as his own, whether this be proof of an acceptance and receipt of the goods by himself is a question for the jury. I will only further mention the well-considered case of *Bushel v. Wheeler*,¹⁴ decided in this court. The defendant residing in Herefordshire had verbally ordered goods from a manufacturer at Bristol; according to his orders they were sent to Hereford and deposited in a warehouse there. After they had been a considerable time there the defendant repudiated them. In an action for the price before a most learned and cautious judge, Mr. Justice Erskine, it was left to the jury whether upon the evidence the buyer had accepted and received the goods; and the verdict was for the defendant, with liberty to enter a verdict for the plaintiff if the court should be of opinion that there was an acceptance. A rule to shew cause was granted; and cause being shewn the court unanimously approved of the direction, but declined to take upon themselves to enter a verdict for the plaintiff, and made a rule absolute for a new trial. I particularly rely upon the pointed language in that case of my Brother Coleridge, who, after observing that the acceptance required by the statute must be very clear and unequivocal, says that it may be constructive; and adds that "It is a question for the jury, whether under all the circumstances" "the acts which the buyer does or forbears to do are an acceptance or otherwise."

These are express decisions through a long course of years that there may be an acceptance and receipt of goods by a purchaser within the statute of frauds.

⁹ 14 M. & W. 277.

¹⁰ 5 B. & Ald. 557.

¹¹ 3 Campb. 528.

¹² 1 East, 192.

¹³ 7 Taunt. 597.

¹⁴ 8 Jurist, 532. 15 Q. B. 412, note.

although he has had no opportunity of examining them, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract. We approve of these decisions thinking that they do not in-

fringe upon the statute of frauds and that they conduce to fair dealing in trade.

We are therefore of opinion that in this case the rule for entering a nonsuit should be discharged.

Rule discharged.

NATIONAL BANK v. DAYTON.

(102 U. S. 59.)

Supreme Court of the United States. Oct. Term, 1880.

Error to the supreme court of Wyoming Territory.

Samuel Shellabarger and Jeremiah S. Wilson, for plaintiff in error. Mr. William A. Maury, for defendant in error.

Mr. Justice HARLAN delivered the opinion of the court.

This was replevin by the Wyoming National Bank against Thomas J. Dayton. The latter, as sheriff of Albany county, Wyoming territory, had, by virtue of several attachments against the property of one W. S. Bramel, levied upon a number of cords of wood. The bank, claiming to be the owner of the wood at and before the time when the writs were issued and levied, brought this action to recover it, and damages for the detention thereof.

In the court of original jurisdiction a verdict was returned in favor of the defendant, and judgment thereon entered. From the judgment of affirmance by the supreme court of the territory the present writ of error is prosecuted.

Upon the question of the ownership of the wood, at the date of the respective levies, the evidence was conflicting, and presented a case peculiarly within the province of the jury to determine, under proper guidance as to the law governing it. Without attempting to set forth the whole case, it is sufficient to remark that there was evidence to establish the following facts:—

Bramel was engaged in the business of bringing wood down the Big Laramie river to Laramie city. He had a contract with the Union Pacific Railroad Company for the delivery to it, at its yard in that city, by a specified date, of five hundred cords of wood at \$5 per cord. In the necessary preparations for that engagement, he had, prior to Oct. 30, 1873, received from the bank about \$2,100, which its president testified had been advanced to him at different times on this same wood. For these advances the bank held his notes. On the day last named he applied to the president of the bank for a further advance of money. His application was denied. He then proposed that the bank should buy all the wood he had, some of which was then in the yard of the company, but not received by it, some on the bank of the river, and some in the river. This proposition was at first declined; but, after further conversation between him and the president of the bank, it was agreed that the bank should take the five hundred cords at \$5 per cord, to be paid for in the debt of \$2,100, then held by the bank, and \$400 in cash, upon the condition that the company would receive the wood from the bank upon like terms. It was a part of the arrangement that Bramel should, in that event, put the wood into the yard of the company, and use the \$400 for that purpose. In order

to ascertain whether the company would assent to this arrangement, the bank cashier and Bramel, by direction of the president of the bank, visited Mr. Shankland, who had the control of all such business for the company. They returned together and reported that Shankland approved the arrangement, and would make out the vouchers for the wood to the bank. The cashier then paid \$400 to Bramel, taking his note therefor, bearing interest at three per cent per month; and the latter went on putting the wood into the yard of the company. He had delivered at that place about three hundred and seventy-five cords, and had a few cords on the river-bank, when it was all seized by the defendant in error, under the attachments against Bramel's property. None of the wood had then been actually received by the company. Bramel's notes, to which we have referred, were held by the bank at the commencement of this action. They were taken, as the bank claimed and proved by its president, more as memoranda than anything else, and had not been surrendered to Bramel because he had not called at the bank for them.

Such was, substantially, the case of the bank. We do not say that the jury should have found that it was made out, even by a decided preponderance of the evidence, but only that there was evidence tending to show that the contract and acts of the parties were such as the foregoing statement sets forth.

Looking at the case in the light of these facts, it seems that the transaction between the bank and Bramel was something more than a mere agreement as to the disposition of the money to be obtained from the company. It constituted a sale to the bank of all the wood which he delivered at the yard of the company. The absolute title to it passed to the bank upon his depositing it there, with the intention or for the purpose of completing the sale. Nothing more remained to be done by him. His contract bound him to deliver the wood, not to the company, but at its yard only. In legal contemplation, it then came into the possession and control of the bank, and was not thereafter subject to be reached by his creditors, upon the mere ground that the title had not passed, or that a complete delivery had not been made. The delivery in execution of the contract, at a specified place not belonging to him, was such as accorded with the nature of the property. When placed in the yard of the company, in pursuance of the agreement, the acts of the parties united with the previous verbal contract, resulting in a consummated obligatory agreement, depriving the seller of all further control of the property, and putting it under the exclusive dominion of the buyer, with a perfected title thereto.

From that moment, the indebtedness of the seller to the bank to the extent of the contract price of the wood actually delivered at the designated place was discharged, and the property was thenceforward at the risk of the buyer. Actual manual possession of the bank by its agents was, under the circumstances and regarding the nature of the property, both imprac-

ticable and unnecessary to a complete delivery. These conclusions are abundantly sustained by authority. Benjamin, Sales, bk. 1, pt. 2, p. 134; Hilliard, Sales, c. 7, pp. 124-130; Browne, Statute of Frauds, c. 15, p. 323.

The instructions were not in accordance with these views. The court failed to state distinctly and clearly the principles of law by which the jury were to be governed. Taking all the instructions together, it is evident that the deposit of the wood at the yard of the company, in pursuance of the previous agreement between the bank and Bramel that it should be put there for ultimate delivery to the company, was not regarded by the court as such a change of possession as would, in law, pass the title to the bank as against the creditors, whose attachments were subsequently issued and levied.

That we do not misinterpret the instructions is quite clear, from the opinion of the supreme court, which declared that "the record shows that the full and absolute control and possession of the same was publicly and privately retained by Bramel, after the alleged unconditional sale." In view of the pleadings and evidence this could not be the case, unless the court below not only disregarded the evidence in behalf of the bank, but was, further, of opinion that the delivery of the wood at the yard was insufficient to pass the title, and change the control and possession of the property from the seller to the buyer. But that position, as we have seen, is unsound both upon principle and authority. We repeat that, if Bramel agreed to sell and the bank agreed to buy the wood at a fixed price per cord, the seller to remove

the wood from the river and put it in the yard of the company, for sale or delivery to the latter by the bank, which was to receive the vouchers, and if the wood was so deposited in pursuance of that sale and agreement, then, in legal contemplation, the title and possession of the property passed to the bank from the moment it reached the yard. If after being placed there and before its receipt by the company the wood had been destroyed or stolen, the loss would have been that of the bank. It is immaterial, under the circumstances, that the company had not, when the attachments were levied, expressly or formally recognized the bank's ownership of the wood.

Some stress was laid upon the fact that the bank took the note of Bramel for the \$400 advanced to him. That act, it is claimed, was inconsistent with the theory of an absolute purchase by the bank. There was, however, evidence conducing to show that the bank took the note by way only of precaution, and to meet the possible contingency of the non-delivery of the wood at the yard of the company. But it was for the jury to say what weight should be given to that fact in determining, upon the whole case, whether there was an actual sale of the wood, or only an agreement as to the disposition of the proceeds after it should be received by the company.

The judgment will be reversed, with directions to require the judgment of the court of original jurisdiction to be set aside and a new trial granted, and for such further proceedings as may be in conformity with this opinion; and it is
So ordered.



NEWHALL et al. v. CENTRAL PAC. R. CO.

(51 Cal. 345.)

Supreme Court of California. July, 1876.

Appeal from district court, fifteenth judicial district, city and county of San Francisco.

Campbell, Fox & Campbell, for appellant. W. H. Rhodes, S. M. Wilson, and W. W. Cope, for respondents.

CROCKETT, J. This case comes up on the findings, and there is, therefore, no controversy as to the facts; the only question being, whether the plaintiffs are entitled to judgment on the facts found. The facts necessary to a correct understanding of the only question of law in the case are, that a mercantile firm in New York sold certain merchandise on credit to a similar firm in San Francisco, and shipped the same in the usual course of business, by railway, to the vendees as consignees, under bills of lading in the usual form. The bills of lading were received at San Francisco by the consignees before the goods arrived; and while the merchandise was in transit, in the custody of the defendant as a common carrier, the consignees failed, and became insolvent, and thereupon the vendors notified the defendant in writing that they stopped the goods in transit; that the vendees had become insolvent, and the goods were not paid for, and that they must not be delivered to the consignees, but to the vendors. The plaintiffs then were, and for many years had been, auctioneers and commission merchants, doing business in San Francisco, and had been in the habit of receiving from the consignees bills of lading, and goods under them, for sale on commission. About two hours after the notice of stoppage in transitu was served upon the defendant, the consignees indorsed and delivered the bills of lading to the plaintiffs, who, on the faith thereof and of the goods named therein, "advanced a sum of money to the consignees in the usual course of business;" and the sum so advanced was to be reimbursed out of the proceeds of the goods, which were to be sold at auction by the plaintiffs. At the time of the indorsement and transfer of the bills of lading to the plaintiffs, they had no notice that the consignees were in failing circumstances, or had failed, or that any notice of stoppage in transitu had been served upon the defendant. While the goods were still in the possession of the defendant as a common carrier, the plaintiffs, as holders, exhibited to the defendant the bills of lading, tendered the charges, and demanded a delivery of the goods, which was refused, and the action is to recover their value.

The question involved being one of great practical importance, it has been discussed by counsel both orally and in printed arguments, with learning and ability. But after the most careful research, they have failed to call to our attention a single adjudicated case in which the precise question under review has been decided or discussed. There are numer-

ous decisions, both in England and America, to the effect that where goods are consigned by the vendor to the vendee, under bills of lading in the usual form, as in this case, an attempt by the vendor to stop the goods in transitu will be unavailing as against an assignee of the bill of lading, who took it in good faith, for a valuable consideration, in the usual course of business, before the attempted stoppage. The leading case on this point is *Lickbarrow v. Mason* (2 Term R. 63), the authority of which has been almost universally acquiesced in by the courts and text-writers, in this country and in England. There being little or no conflict in the authorities on the point adjudicated in that case, it would be useless to recapitulate them here. But it is important to ascertain the principles which underlie these decisions, that we may determine to what extent, if at all, they are applicable to the case at bar. The first, and, as I think, the controlling, point determined in these cases, is, that by the bill of lading the legal title to the goods passes to the vendee, subject only to the lien of the vendor for the unpaid price; which lien continues only so long as the goods are in transit, and can be enforced only on condition that the vendee is or becomes insolvent while the goods are in transit.

On the failure of each of these conditions, the right of stoppage is gone, and the lien ceases, even as against the vendee. But it is further settled by these adjudications, that if the bill of lading is assigned, and the legal title passes to a bona fide purchaser for a valuable consideration before the right of stoppage is exercised, the lien of the vendor ceases as against the assignee, on the well-known principle that a secret trust will not be enforced as against a bona fide holder for value of the legal title. In such a case, if the equities of the vendor and assignee be considered equal (and this is certainly the light most favorable to the vendor in which the transaction can be regarded), the rule applies that where the equities are equal the legal title will prevail. But in such a case it would be difficult to maintain that the equities are equal. The vendor has voluntarily placed in the hands of the vendee a muniment of title, clothing him with the apparent ownership of the goods; and a person dealing with him in the usual course of business, who takes an assignment for a valuable consideration, without notice of such circumstances as render the bill of lading not fairly and honestly assignable, "has a superior equity to that of the vendor asserting a recent lien, known, perhaps, only to himself and the vendee." (*Brewster v. Sims*, 42 Cal. 139.)

These being the conditions which determine and control the relative rights of the vendor and assignee, where the assignment is made before the notice of stoppage is given, precisely the same principles, in my opinion, are applicable when the assignment is made after the carrier is notified by the vendor. Notwithstanding the notice to the carrier, the vendor's lien continues to be only a secret trust as to a person, who, in the language of Mr. Benjamin, in his work on Sales, section eight

hundred and sixty-six, takes an assignment of a bill of lading "without notice of such circumstance as renders the bill of lading not fairly and honestly assignable." The law provides no method by which third persons are to be affected with constructive notice of acts transpiring between the vendor and the carrier; and in dealing with the vendee, whom the vendor has invested with the legal title and apparent ownership of the goods, a stranger, advancing his money on the faith of this apparently good title, is not bound, at his peril, to ascertain whether, possibly, the vendor may not have notified a carrier—it may be on some remote portion of the route—that the

goods are stopped in transitu. If a person, taking an assignment of a bill of lading, is to encounter these risks, and can take the assignment with safety only after he has inquired of the vendor, and of every carrier through whose hands the goods are to come, whether a notice of stoppage in transition has been given, it is quite certain that prudent persons will cease to advance money on such securities, and a very important class of commercial transactions will be practically abrogated. In my opinion the judgment should be affirmed, and it is so ordered.

Mr. Chief Justice WALLACE did not express an opinion.



NEWHALL v. LANGDON.

(39 Ohio St. 87.)

Supreme Court of Ohio. January Term, 1883.

Error to district court, Hamilton county.

Action by Newhall, Gale & Co. against Langdon & Son to recover balance due on 50 barrels of flour, at \$5.15 per barrel. The answer admitted the purchase of 17 barrels, and alleged payment therefor, but denied the purchase and delivery of the balance. The following were the special findings of fact in the common pleas: "First. On August 28, 1876, during the forenoon, the plaintiffs, who were at that date commission merchants, in Cincinnati, Ohio, contracted to sell the defendants fifty barrels of flour of a particular quality and brand. The price fixed by the contract was \$5.15 per barrel. On the afternoon of the same day the defendants received from the plaintiffs an order upon the Dayton Short-Line Railroad Company for the delivery to the defendants of fifty barrels of flour, of the brand and character called for by the terms of the contract. Second. The plaintiffs were the owners, at the time of giving the order, of one hundred barrels of the brand and character called for by the contract. Said one hundred barrels of flour had arrived at the depot of said railroad company in Cincinnati, and was stored in the depot in a particular location or compartment. On said 28th day of August plaintiffs sold twenty-five barrels of said one hundred barrels to one Smith, and gave him an order upon the railroad company therefor. On the 29th of August they sold to one Sweeney twenty-five barrels, and gave him an order therefor. On the 29th, between four and five o'clock P. M., the defendants sent their drayman to the depot, with the order for the fifty barrels for the purpose of obtaining some of the flour. He delivered the order to the railroad clerk, took seventeen barrels of the flour, left the order with the railroad clerk, who noted the delivery of the seventeen barrels on the back of it, and hauled the seventeen barrels to defendants' store, pursuant to his instructions. Later in the afternoon of the 29th, Smith and Sweeney received and hauled away the remainder of flour, due them upon their respective orders, thus leaving thirty-three barrels of the one hundred before referred to. During the next succeeding night, to wit, at 12 o'clock A. M., August the 30th, the depot was burned, and the thirty-three barrels of flour left of the one hundred, as above stated, were totally destroyed. Subsequently the defendants paid plaintiffs for the seventeen barrels which had been hauled, such payment being without prejudice to the rights of either party touching the remaining thirty-three barrels. Third. Neither the plaintiffs nor the railroad company set apart at any time any specific barrels to the defendants, and there was no such setting off, unless the fact that Sweeney and Smith hauled away all of the flour save the thirty-three barrels which were left, and the hauling

of the seventeen barrels hauled by defendants, amounted to such separation and appropriation. Neither defendants nor any of their agents saw any of the flour which remained after the drayman took away the seventeen barrels, nor had they seen any part of the one hundred at any time prior to the hauling of the seventeen barrels, nor did they know of the sales to Smith and Sweeney, or the removal of any flour by them until after the fire. Fourth. The usage of business in Cincinnati, between buyers and sellers of flour, at and before the dates named, was this: Flour arrives at the depots consigned to commission merchants. The railroad company notifies the merchant of its arrival, who pays the freight, and signs a full receipt, acknowledging the delivery of the flour to him. The railroad company then stores the flour in a particular location or compartment in its depot, of which the merchant is advised. He then makes sales, and, upon the conclusion of an agreement of sale, he hands to the buyers an order upon the railroad company for the number of barrels called for by the contract. The purchaser sends his dray or wagon with the order. The driver delivers the order to the railroad clerk, who points out the location or compartment in which the flour against which the order is drawn is contained, and the driver proceeds to load his vehicle. If the order calls for a certain number of barrels, and the compartment contains a larger number, the driver makes the selection and removal of the number to which he is entitled, and receipts for them. The order is left with the railroad company when the first load is hauled, and separate receipt given by the hauler for the amount of each load. The parties to this suit understood and pursued this, the usual mode of transacting this business. The order from the seller to the buyer upon the railroad company specifies the number of barrels, the number of the car upon which the flour was transported to the depot, and the number of the location or compartment in which it is stored; also the brand and quality of the flour. Fifth. The one hundred barrels of flour before referred to was all that was in the location in which it was stored on the 28th, 29th, and 30th of August, and it was all alike, and answered the terms of the contract between the plaintiffs and defendants in all respects." The conclusions of law were: "First. That upon the facts, as found by the court, the title to the thirty-three barrels of flour destroyed in the depot remained in the plaintiffs until the destruction thereof by fire, and did not pass to the defendants. Second. That the plaintiffs are not entitled upon said facts to maintain an action against the defendants as to said thirty-three barrels as for goods bargained and sold, or goods sold and delivered. Third. It is therefore adjudged that defendants go hence without day, and recover their costs in this behalf expended, and taxed at \$— —. To all of which said plaintiffs, by their counsel, except. Judgment and findings of court for defendants. Plaintiffs except. Motion for new trial over-

ruled, to which plaintiffs except." This judgment was affirmed by the district court.

Ramsay & Matthews and C. B. Matthews, for plaintiffs in error. P. H. Kummer, Drassin Wulsin, and James H. Perkins, for defendants in error.

JOHNSON, C. J. Since the decision of *Whitehouse v. Frost*, 12 East, 614, the cases bearing on the question here involved have been numerous, but by no means uniform. The tendency of the more recent cases has been to follow that case, though its correctness has been ably challenged. This tendency has arisen out of the apparent necessity of adapting the principles of the common law to the changes in the new methods adopted for the transaction of business.

The accepted principles of right and justice form the groundwork of the law of contracts. In all questions involving contract relations, the convenience and wants of business give rise to usages which become part of the contract, where it is made with reference to such usages. This is often called the expansive property of the common law, but it is rather the application of accepted principles of right and justice, as evidenced by common law, to new phases and methods in the transaction of business.

In view of the nature of this particular business, in case at bar, and the known usage governing buyer and seller, we think it clear that, as between them, by the delivery of the order from the seller, by the purchaser to the warehouseman, and his acceptance of the same, the right to the fifty barrels of flour was perfected in the purchaser, and that thereafter it became his property. It is true, there were one hundred barrels out of which the order was to be filled, but it was all of the same quality, and by the known usage, the only delivery to be made by the seller, was by an order on the warehouseman, which, when presented, entitled the purchaser to separate and remove the property.

No selection, properly speaking, had to be made, as all the barrels were alike, but only a counting off and separation, and in this respect it differs from those cases where it is the intention of the parties that there is to be a selection or designation out of the larger quantity. The effect of a known usage on such a transaction is settled in *Steel Works v. Dewey*, 37 Ohio St. 242. In that case, Dewey, Vance & Company had a contract for a large quantity of ore, belonging to the Iron Mountain Company, to be taken from a larger quantity lying on the bank of the river. They sold to the steel works part of the ore so situated, and gave the purchaser an order on the Iron Mountain Company for the same, which was presented and accepted. By the terms of the contract, and by the usage of the business, purchasers were to take away their ore by boats during the year, or the order would be canceled. Owing to ice and other causes, the ore was not taken away by the steel works during the year, though

it was there for them in mass with the larger lot. It was held, that as between Dewey, Vance & Company and the steel works, and in view of the usage, the sale was completed, and the right to the ore vested in the steel works, without any separation from the larger mass. We think this case is decisive of the case at bar.

Woods v. McGee, 7 Ohio, pt. 2, p. 128 (413), is relied on to sustain the court below, and but for the effect of the known usage, the language of Judge Grinke sustains this claim. An examination of the facts of that case will show, that while the judgment is right, yet it did not necessarily depend upon the principles discussed and declared by the learned judge. That was *trover* by Woods against McGee, a warehouseman, for the wrongful conversion of three hundred barrels of flour, which he claimed to own. The facts were these: Swearinger owned fifteen hundred barrels of flour, varying in value from twenty-five to fifty cents per barrel, which was stored with McGee, a warehouseman. Out of this lot, Swearinger sold to Hutton six hundred barrels, and on the 23d of April, gave him an order on McGee for the same. On the same day, Hutton assigned the order to Gordon and Sidwell. Seven days thereafter, Gordon assigned to plaintiff, Woods, all his interest in the order and purchase. This was on May 1. The order was not presented to the warehouseman until May 21, when Woods, as assignee of Gordon's interest, received from McGee three hundred barrels, and Sidwell received three hundred barrels, and in each case McGee took a receipt for the amount, from the respective parties. Wood sued for the three hundred barrels delivered to Sidwell, on the ground that he had purchased the same of Sidwell, prior to said delivery, through his agent, Gordon. Of this sale McGee had no notice, and it appears that Sidwell, at the time he received the flour, presented the original order with the assignment thereon by Hutton to himself and Gordon, and with the assignment of Gordon, only of his interest to Woods. Looking, therefore, to the order, one-half this flour belonged to Sidwell, when delivered to him, and the warehouseman who delivered the same to him in good faith, could not, on any principle of justice, be charged in *trover* in favor of an unknown purchaser, when he had strictly complied with the terms of the order showing the right in Sidwell.

The distinction between that case and the one at bar, is so manifest, that even conceding the correctness of the principles stated by the learned judge, independent of any usage on the subject, and it is unnecessary to question them, they do not control in this case.

1st. There the question was considered, unaffected by any usage, in the light of which the parties acted.

2d. In that case, the order was never presented by the holders and accepted by the warehouseman, as in this, nor does it appear that he knew of its existence, or of the assignments indorsed thereon, until the day when all the flour was delivered,

one half to each assignee, as directed by the order. So far, therefore, as the acceptance of the order by the warehouseman affects the question of ownership, as between seller and buyer, the cases are unlike.

3d. The flour varied in price, and therefore in marketable quality, and in all such cases, there is to be a selection before the title passes.

This opinion might be extended and perhaps made more interesting by an analysis of the numerous cases on the subject both ancient and modern, but we content ourselves with a reference to some few of them, without attempting more. We hold that upon the facts found by the court, showing the well known usage of

the business, it is manifest that upon the presentation and acceptance of this order, the sale was completed, and the subsequent loss of flour, while stored at the depot must fall on the purchaser. *Steel Works v. Dewey*, 37 Ohio St. 242; *Young v. Miles*, 23 Wis. 613; *Cloud v. Moorman*, 18 Ind. 40; *Horr v. Barker*, 6 Cal. 489; *Cushing v. Breed*, 14 Allen, 376; *Kimberly v. Patchin*, 19 N. Y. 330; *Waldron v. Chase*, 37 Maine, 414; *Chapman v. Shepard*, 39 Conn. 413; *Whitehouse v. Frost*, 12 East, 614; also notes to *Hires v. Hurff*, 17 & 18 Am. Law Reg. 17, 161, in which the whole subject is exhaustively discussed and the cases reviewed.

Judgment reversed, and cause remanded.

NICHOLSON *et al.* *v.* TAYLOR *et al.*

(31 Pa. St. 125.)

Supreme Court of Pennsylvania. 1858.

Action on the case by Richard L. Nicholson and another, trading as R. L. & C. L. Nicholson, against David B. Taylor and others, trading as D. B. Taylor & Co., for breach of contract to deliver certain lumber. From a judgment for defendants, plaintiffs appealed. Affirmed.

J. Cook Longstreth, for plaintiffs in error. Parsons, for defendants in error.

TOMPSON, J.—“When the lawful form of contracting is pursued,” said Mr. Justice Lowrie in *Winslow, Lanier & Co. v. Leonard*, 12 Harris, 14, “the vesting of the title always depends upon the intention of the parties, to be drawn from the contract and its circumstances,” and “it is perfectly legitimate to point to the want of measuring and setting apart as evidence, in the very nature of the transaction, that it was not intended as a perfect sale.” Id. Going further in this direction than mere evidence, C. J. Gibson, in *Hazard v. Hamlin*, 5 Watts, 201, declared that “where nothing is paid or delivered, it is agreed on all hands that the contract is merely executory.” This is true of such a contract standing alone; whether taken as an axiom or as evidence merely, the difference is in terms only. No intention is to be drawn from a contract but what it expresses, when there is nothing else to manifest it; so that the difference of terms in stating the proposition leaves the rule the same, namely, that so long as anything remains to be done as between the vendor and vendee, for the purpose of ascertaining the amount and price of the article, the property and risk remains in the vendor; it is not changed: Addison on Contracts 222, 223; *Hanson v. Meyer*, 6 East 614; *Ward v. Shaw*, 7 Wend. 404; *Lester, Sennett & Co. v. McDowell*, 6 Harris 92; *Hutchinson v. Hunter*, 7 Barr 140; *Smyth v. Craig*, 3 W. & S. 20; *Winslow, Lanier & Co. v. Leonard*, 12 Harris 14; *Nesbit v. Burry*, 1 Casey 208. This rule is predicable of cases where no actual delivery of the property has taken place, and it is sought to give the contract the effect of changing the possession. If parties choose to deliver property without the price being fixed, the property will pass, because it is the contract and intention to pass it. But we have to do with a case not of this last kind. The contract is as follows:—

“Sold Messrs. R. L. & C. L. Nicholson,

load of Pine creek lumber, within the neighborhood of 5000 feet of plank, at \$15.50 and expenses, take a note at 6 months, with interest. D. B. Taylor & Co. 8th Mo. 11th.”

A Pine creek load of lumber, it would appear contains about 50,000 feet board measure, a portion of which in this case was plank. The oral testimony left the case just as it found it, giving nothing in regard to the intention of the parties but what was contained in it. The defendants below refused to deliver the lumber, alleging that they were mistaken in the amount of the plank contained in it—that in place of 5000 there were 10,000 feet, and which they charged that plaintiffs knew; but they offered to deliver the load, or the amount of it, with 5000 feet of plank in it. The plaintiffs refused to take it. This being the situation of things between the parties, and the plaintiffs claiming that the property passed to them, brought a special action on the case against the defendants in which they had a count in trover. On the trial in the district court, the point was reserved as to whether the property passed by the contract; and a verdict was rendered in favor of plaintiffs for \$1050.50, its entire value. Afterwards the court entered judgment for the defendants non obstante veredicto, on the point reserved.

The case stands now simply upon the rights of the parties as created by the written contract. Applying the rule already laid down, “that when something remains to be done between the vendor and vendee for the purpose of ascertaining the amount and price of the article, the property and risk remains in the vendor,” to this case; we will have but little difficulty in coming to a conclusion. The lumber was to be measured before the price could be ascertained, so as to give the six months’ note for the payment. This was, in point of labor, as well as in other particulars, an important item of the transaction. No time was set for the measurement, or for giving the note, the latter being consequent only on the former; all showing that the contract was but executory in fact and intention. The property therefore remained in the vendor, and the plaintiffs had no legal right to recover its value in trover; property in the plaintiffs being necessary to enable them to do so. They were at no time debarred from suing for damages for a breach of the contract, if any such had occurred. We think the court below were right in their decision, and this judgment must be affirmed.

Judgment affirmed

NIGHTINGALE et al. v. EISEMAN et al.

(24 N. E. Rep. 475, 121 N. Y. 28.)

Court of Appeals of New York. April 29, 1890.

Appeal from supreme court, general term, first department.

Action by John Nightingale and others against Moses L. Eisman and another. A judgment entered at circuit in favor of defendants, and dismissing the complaint, was affirmed at general term, and plaintiffs again appeal.

Albidge C. Smith, for appellants. *Theodore Connolly*, for respondents.

EARL, J. On the 4th day of January, 1886, the plaintiffs were manufacturers of silk at Patterson, N. J., and the defendants were dealers in silk doing business in the city of New York. On that day an agent of the plaintiffs, who was engaged in selling silk for them on a salary, called upon the defendants at their place of business, and took from them the following order:

Order No. 1L	January 1th, 1886.
Ship by Ex.	Eiseman & Co.,
Bill March.	Grand St., City.
Duplicate No.	
Term, 6-10 1 per cent. special.	
Delivery.	25 pes., Feb. 20.
	50 pes., Mch. 1st.
	Balance before Mch. 15, or
	earlier, if possible.
No. 756. 100 pes., 19-In. Sarah. at 60c.	

Then follows a statement of the colors of the different pieces to be furnished. It was proved that the figures "6-10 1," following the word "Term," meant 6 per cent. off from the bill for the silk, 1 per cent. extra discount, and the silk to be paid for 10 days after delivery. The order having been sent to the plaintiffs by their agent, on the next day they wrote to the defendants that they had received their order, and would endeavor to forward the goods "as near as possible to the time specified." About the 13th of March they shipped from Patterson to the defendants at New York 17 pieces of the silk, and never thereafter shipped any more; and they commenced this action on the 13th of April thereafter to recover the contract price of the silk delivered. The defendants refused payment before the action was commenced, and defended the action on the ground that the plaintiffs had not performed their contract.

If we assume that the contract as made by the plaintiffs' agent is to be considered modified by their letter to the defendants, so that they were bound to deliver the silk only, as near as possible to the time specified in the contract, yet, in any event, the contract bound them to deliver at some time. If the circumstances were such as to excuse the plaintiffs from delivery at the time specified in the contract, yet they were bound to deliver, and they could perform their contract only by delivering the silk at some time. We are inclined to the opinion that the contract should be treated as an entire contract to deliver the 100 pieces, and that none of the silk was to be paid for until 10 days after the delivery of the whole. But if such be not its proper construction, and the defendants were bound to pay for each of the installments

of silk specified in the contract within 10 days after the delivery thereof, the plaintiffs were bound to make at least one complete delivery before they could call upon the defendants for any payment. The defendants in no way, so far as the evidence discloses, waived complete performance. The 17 pieces of silk were shipped to them from Patterson. They had no reason to suppose that the plaintiffs intended that shipment as a compliance with their contract to ship 25 pieces; and so when they received the 17 pieces they had the right to suppose that they would be followed by a further shipment, and that the plaintiffs would continue to perform their contract. They could, therefore, receive the 17 pieces without waiving their right to demand further performance before they could be compelled to pay. At the very first time when they were called upon to speak, that is, when they were asked to pay for the 17 pieces, they refused payment on the express ground that the plaintiffs had not performed their contract, and promised that they would pay when the balance of the silk was received, and not before. Therefore whether we regard this as a single contract, by which the plaintiffs were bound to deliver 100 pieces of silk before they could demand any payment, or whether we consider the defendants bound to pay for each delivery specified in the contract, we think the plaintiffs are not entitled to recover; and for this conclusion the authorities in this state are so abundant that they need not be cited.

At the trial the counsel for the plaintiffs asked one of their witnesses—the agent who took the order from the defendants—the following questions: "After you took this order, did you have any conversation with the defendants, or either of them, with respect to the delivery of any of the goods under this contract?" "After the taking of that order, what conversation did you have with the defendants in regard to the delivery of the first installment of pieces referred to in the contract?" These questions were objected to on the part of the defendants as immaterial, and were excluded by the court. The counsel did not disclose what he expected to prove by these questions, and it is impossible to discover what competent evidence could have been elicited by them. No claim was made at the trial that the contract had in any way been changed, and the court, therefore, committed no error in excluding the questions.

One of the plaintiffs, as a witness, was asked the following questions by his counsel: "State whether or not, but for the strike of the laborers employed in your mill, you would have been able to deliver the goods ordered by the defendants at the time stated in the order, or within a reasonable time thereafter." "State whether or not the strike of the laborers interfered with the delivery of a portion of the goods ordered by the defendants at the time named in the order given by them." These questions were objected to by defendants' counsel as incompetent and immaterial, and were excluded. No complaint was made at the trial that the plaintiffs did not deliver the 17 pieces of silk in time.

The sole complaint was that they did not deliver even the 25 pieces required for the first installment, and any evidence which could have been elicited by these questions could show no justification for a failure to make such delivery at some time before the action was commenced, and therefore the questions were properly excluded. The judgment is clearly right, and should be affirmed. All concur.

NOBLE v. SMITH et al.

(2 Johns. 51.)

Supreme Court of New York. Nov. Term, 1806.

This was an action of trespass, for breaking and entering the close of the plaintiff, cutting down, taking and carrying away the wheat in the straw, which was there standing, and converting the same to his own use.

The cause was tried at the Rensselaer circuit, in May, 1806, before Mr. Chief Justice Kent. The plaintiff proved, that he was put into possession of the locus in quo in March, 1805, by the sheriff of Rensselaer county, by virtue of a writ of habere facias possessionem, issued on a judgment in ejectment against one Hallett, and that he continued in possession to the time of the trespass. At the time the sheriff put the plaintiff in possession, he did not remove the goods out of the house of Hallett. It was also proved, that the defendants and their servants, in July, 1805, broke and entered the same close, and there cut down and carried away, though forbidden by the plaintiff's overseer, near two hundred bushels of wheat in the straw. A witness for the defendants, proved that Hallett had lived on the farm as a tenant to John Hill, the principal of the plaintiff, above two years before the plaintiff was put into possession. That two of the defendants were step-sons of Hallett, and lived in his family. That after Hallett was dispossessed, he was sued, and taken on execution for rent due to Hill. The witness applied to the plaintiff, to let Mrs. Hallett have some of the wheat then growing on the premises, for seed; and the plaintiff told the witness, that "he would give the wheat growing, to the defendants, the Smiths, for the support of themselves and Mrs. Hallett, and would procure a written surrender to be drawn up for Hallett to execute." The Smiths, afterwards, requested the plaintiff to give them a writing for the wheat, which the plaintiff refused to do, saying, "that he would reserve it for them, if he should demise the premises to any other person." The Smiths were relations of Hill, who requested them to repair the fence in the autumn, round the field in which the wheat was growing. Another witness stated, that the plaintiff, in October, 1805, told him, that he had given the wheat to the Smiths, but that he had revoked the gift, on account of some offence they had given him. Something was said of a condition annexed to the gift, but what it was, did not clearly appear.

The judge charged the jury, that there was sufficient evidence of a valid gift of the wheat, and which was not revocable by the plaintiff. The plaintiff, therefore, submitted to a nonsuit.

A motion was now made to set aside the nonsuit, and for a new trial for the misdirection of the judge.

Henry and Van Vechten, for plaintiff, Woodworth, Atty. Gen., for defendants.

KENT, C. J. This case presents the following questions. 1. Can property in

corn growing, be transferred, by gift? 2. Is there here the requisite evidence of such a gift?

After a consideration of this case, I am satisfied, that the opinion which I gave at the circuit, upon the trial of this cause, was incorrect.

Lord Coke is reported to have said, in *Wortes v. Clifton*, (1 *Rep.* 61,) that by the civil law, a gift of goods, was not valid, without delivery, but that it was otherwise, by our law. This is a very inaccurate dictum, and the difference between the two systems, is directly the reverse. By the civil law, a gift, *inter vivos*, was valid and binding, without delivery; (*Inst.* lib. 2, tit. 7, § 2. *Code* lib. 8, tit. 51, l. 3, l. 35, § 5) but at common law, it is very clear, from the general current of authorities, that delivery is essential to give effect to a gift. (*Bracton*, de acq. rerum dom. lib. 2, fo. 15, b. 16, a. *Flower's Case*, *Noy*, 67. *Smith v. Smith*, 2 *Str.* 955. *Case No. 9*, *Jenkins*, 109. 2 *Black*, *Comm.* 411.) In the analogous case, also, of gifts, *causa mortis*, it was held, by Lord Hardwicke, in the case of *Ward v. Turner*, (2 *Vesey*, *Str.* 431,) where the subject underwent a very full discussion, that a delivery was necessary to make the gift valid; and, accordingly, that a delivery of receipts, for south sea annuities, was not a sufficient delivery to pass these annuities by that species of gift.

Delivery, in both kinds of gift, is equally requisite, on grounds of public policy and convenience, and to prevent mistake and imposition.

If delivery be requisite, there was none in the present case. The land, at the time of the alleged gift, was in possession of one Hallett, and not of any of the defendants, to whom the gift is said to have been made; and before the wheat was ripe, the plaintiff recovered the possession of the land, by due course of law. There was not even an attempt at a symbolical delivery, and giving the testimony the strongest possible construction, in favour of the defendants, it amounted to nothing more than saying, I give, without any act to enforce it. A mere symbolical delivery, would not, I apprehend, have been sufficient. The cases in which the delivery of a symbol has been held sufficient to perfect the gift were those in which it was considered as equivalent to actual delivery, as the delivery of a key of a trunk, of a room or warehouse, which was the true and effectual way of obtaining the use and command of the subject. (*Ward v. Turner*, 2 *Vesey*, 442, 443. *Tate v. Hobert*, 4 *Brown*, Ch. 286. *Toller's law of Exc.* 181, 2.) I do not know, that corn, growing, is susceptible of delivery, in any other way, than by putting the donee into possession of the soil, but it is not necessary to give any opinion, at present, to that extent; nor do the court mean to do so. It is sufficient to say, that there was no evidence of delivery, in the present case, and, that to presume one, we must go the whole length of the example, given in the Roman law, where the buyer is supposed to take possession of a large immovable column, by his eyes and his affections, *oculis et affectu*. (*Dig.* 41, 2, l. 21.) The

courts of equity seem to have adopted the true rule in their decisions, on the *donatio causa mortis*, in which they hold, that the delivery must be actual and real, or, by some act, clearly equivalent.

The opinion of the court, therefore, is, that the nonsuit be set aside, and a new trial awarded, with costs, to abide the event of the suit.

New trial granted.

NORRINGTON *v.* WRIGHT *et al.*

(6 Sup. Ct. Rep. 12, 115 U. S. 188.)

Supreme Court of the United States. Oct. 26, 1885.

In error to the circuit court of the United States for the eastern district of Pennsylvania.

The facts fully appear in the following statement by Mr. Justice GRAY:

This was an action of assumpsit, brought by Arthur Norrington, a citizen of Great Britain, trading under the name of A. Norrington & Co., against James A. Wright and others, citizens of Pennsylvania, trading under the name of Peter Wright & Sons, upon the following contract: "Philadelphia, January 19, 1880. Sold to Messrs. Peter Wright & Sons, for account of A. Norrington & Co., London: Five thousand (5,000) tons old T iron rails, for shipment from a European port or ports, at the rate of about one thousand (1,000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880, at forty-five dollars (\$45.00) per ton of 2,240 lbs. custom-house weight, ex ship Philadelphia. Settlement, cash, on presentation of bills accompanied by custom-house certificate of weight. Sellers to notify buyers of shipments with vessels' names as soon as known by them. Sellers not to be compelled to replace any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia. Edward J. Etting, Metal Broker."

The declaration contained three counts. The first count alleged the contract to have been for the sale of about 5,000 tons of T iron rails, to be shipped at the rate of about 1,000 tons a month, beginning in February, and ending in July, 1880. The second count set forth the contract verbatim. Each of these two counts alleged that the plaintiffs in February, March, April, May, June, and July shipped the goods at the rate of about 1,000 tons a month, and notified the shipments to the defendants; and further alleged the due arrival of the goods at Philadelphia, the plaintiff's readiness to deliver the goods and bills thereof, with custom-house certificates of weight, according to the contract, and the defendants' refusal to accept them. The third count differed from the second only in averring that 400 tons were shipped by the plaintiff in February and accepted by the defendants, and that the rest was shipped by the plaintiffs, at the rate of about 1,000 tons a month, in March, April, May, June, and July. The defendants pleaded non assumpsit. The material facts proved at the trial were as follows:

The plaintiff shipped from various European ports 400 tons by one vessel in the last part of February, 885 tons by two vessels in March, 1,571 tons by five vessels in April, 850 tons by three vessels in May, 1,000 tons by two vessels in June, and 300 tons by one vessel in July, and notified to the defendants each shipment. The defendants received and paid for the February shipment upon its arrival in March,

and in April gave directions at what wharves the March shipments should be discharged on their arrival, but on May 14th, about the time of the arrival of the March shipments, and having been then for the first time informed of the amounts shipped in February, March, and April, gave Etting written notice that they should decline to accept the shipments made in March and April, because none of them were in accordance with the contract; and in answer to a letter from him of May 16th, wrote him on May 17th, as follows: "We are advised that what has occurred does not amount to an acceptance of the iron under the circumstances, and the terms of the contract. You had a right to deliver in parcels, and we had a right to expect the stipulated quantity would be delivered until the time was up in which that was possible. Both delivering and receiving were thus far conditional on there being thereafter complete delivery in due time and of the stipulated article. On the assumption that this time had arrived, and that you had ascertained that you did not intend to, or could not, make any further deliveries for the February and March shipments, we gave you the notice that we declined accepting those deliveries. As to April, it is too plain, we suppose, to require any remark. If we are mistaken as to our obligation for the February and March shipments, of course we must abide the consequences; but if we are right, you have not performed your contract, as you certainly have not for the April shipments. There is then the very serious and much debated question, as we are advised, whether the failure to make the stipulated shipments in February or March has absolved us from the contract. If it does, we of course will avail ourselves of this advantage."

On May 18th Etting wrote to the defendants, insisting on their liability for both past and future shipments, and saying, among other things: "In respect to the objection that there had not been a complete delivery in due time of the stipulated article, I beg to call your attention to the fact that while the contract is for five thousand tons, it expressly stipulates that deliveries may be made during six months, and that they are only to be at the rate of about one thousand tons per month." "As to April, while it seems to me 'too plain to require any remark,' I do not see how it can seem so to you, unless you intend to accept the rails. If you object to taking all three shipments made in that month, I shall feel authorized to deliver only two of the cargoes, or for that matter, to make the delivery of precisely one thousand tons. But I think I am entitled to know definitely from you whether you intend to reject the April shipments, and, if so, upon what ground, and also whether you are decided to reject the remaining shipments under the contract. You say in your last paragraph that you shall avail yourselves of the advantage, if you are absolved from the contract; but, as you seem to be in doubt whether you can set up that claim or not, I should like to know definitely what is your intention."

On May 19th the defendants replied: "We do not read the contract as you do. We read it as stipulating for monthly shipments of about one thousand tons, beginning in February, and that these six months' clause is to secure the completion of whatever had fallen short in the five months. As to the meaning of 'about,' it is settled as well as such a thing can be; and certainly neither the February, March, nor April shipments are within the limits. As to the proposal to vary the notices for April shipments, we do not think you can do this. The notice of the shipments, as soon as known, you were bound to give, and cannot afterwards vary it if they do not conform to the contract. Our right to be notified immediately that the shipments were known is as material a provision as any other, nor can it be changed now in order to make that a performance which was no performance within the time required." "You ask us to determine whether we will or will not object to receive further shipments because of past defaults. We tell you we will if we are entitled to do so, and will not if we are not entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself. You know quite as well as we do what is the rule and its uncertainty of application." On June 10th Etting offered to the defendants the alternative of delivering to them one thousand tons strict measure on account of the shipments in April. This offer they immediately declined. On June 15th Etting wrote to the defendants that two cargoes, amounting to 221 tons, of the April shipments, and two cargoes, amounting to 650 tons, of the May shipments, (designated by the names of the vessels,) had been erroneously notified to them, and that about 900 tons had been shipped by a certain other vessel on account of the May shipments. On the same day the defendants replied that the notification as to April shipments could not be corrected at this late date, and after the terms of the contract had long since been broken. From the date of the contract to the time of its rescission by the defendants, the market price of such iron was lower than that stipulated in the contract, and was constantly falling. After the arrival of the cargoes, and their tender and refusal, they were sold by Etting, with the consent of the defendants, for the benefit of whom it might concern.

At the trial the plaintiff contended (1) that under the contract he had six months in which to ship the 5,000 tons, and any deficiency in the earlier months could be made up subsequently, provided that the defendants could not be required to take more than 1,000 tons in any one month; (2) that, if this was not so, the contract was a divisible contract, and the remedy of the defendants for a default in any month was not by rescission of the whole contract, but only by deduction of the damages caused by the delays in the shipments on the part of the plaintiff. But the court instructed the jury that if the defendants, at the time of accepting the delivery of the cargo paid for, had no no-

tice of the failure of the plaintiff to ship about 1,000 tons in the month of February, and immediately upon learning that fact gave notice of their intention to rescind, the verdict should be for them. The plaintiff excepted to this instruction, and, after verdict and judgment for the defendants, sued out this writ of error.

Samuel Dickson and J. C. Bullitt, for plaintiff in error. Richard C. McMurtrie, for defendants in error.

Mr. Justice GRAY, after stating the facts as above, delivered the opinion of the court.

In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of infilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. *Behn v. Burness*, 3 Best & S. 751; *Bowes v. Shand*, 2 App. Cas. 455; *Lowber v. Bangs*, 2 Wall. 728; *Davison v. Von Lingen*, 113 U. S. 40, 5 Sup. Ct. Rep. 316.

The contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments, or deliveries of so many distinct quantities of iron. *Mersey S. & I. Co. v. Naylor*, 9 App. Cas. 434, 439. The further provision that the sellers shall not be compelled to replace any parcel lost after shipment, simply reduces, in the event of such a loss, the quantity to be delivered and paid for. The times of shipment, as designated in the contract, are "at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880." These words are not satisfied by shipping one-sixth part of the 5,000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1,000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in the month of July. The contract is not one for the sale of a specific lot of goods, identified by independent circumstances,—such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer, in a certain mill,—in which case the mention of the quantity, accompanied by the qualification of "about," or "more or less," is regarded as a mere estimate of the probable amount, as to which good

faith is all that is required of the party making it. But the contract before us comes within the general rule: "When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight." *Brawley v. United States*, 96 U. S. 168, 171, 172. The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.

The plaintiff, instead of shipping about 1,000 tons in February and about 1,600 tons in March, as stipulated in the contract, shipped only 400 tons in February, and 855 tons in March. His failure to fulfill the contract on his part in respect to these first two installments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission. The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice or means of knowledge that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties.

The case wholly differs from that of *Lyon v. Bertram*, 20 How. 149, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract. The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

For these reasons we are of opinion that the judgment below should be affirmed. But as much of the argument at the bar was devoted to a discussion of the recent English cases, and as a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpreta-

tion and effect of commercial contracts of this kind, is greatly to be deprecated, it is proper to add that upon a careful examination of the cases referred to they do not appear to us to establish any rule inconsistent with our conclusion.

In the leading case of *Hoare v. Renne*, 5 Hurl. & N. 19, which was an action upon a contract of sale of 667 tons of bar iron, to be shipped from Sweden in June, July, August, and September, and in about equal portions each month, at a certain price payable on delivery, the declaration alleged that the plaintiffs performed all things necessary to entitle them to have the contract performed by the defendants, and were ready and willing to perform the contract on their part, and in June shipped a certain portion of the iron, and within a reasonable time afterwards offered to deliver to the defendants the portion so shipped, but the defendants refused to receive it, and gave notice to the plaintiffs that they would not accept the rest. The defendants pleaded that the shipment in June was of about 20 tons only, and that the plaintiffs failed to complete the shipment for that month according to the contract. Upon demurrer to the pleas, it was argued for the plaintiffs that the shipment of about one-fourth of the iron in each month was not a condition precedent, and that the defendants' only remedy for a failure to ship that quantity was by a cross-action. But judgment was given for the defendants, Chief Baron Pollock saying: "The defendants refused to accept the first shipment, because, as they say, it was not a performance, but a breach of the contract. Where parties have made an agreement for themselves, the courts ought not to make another for them. Here they say that, in the events that have happened, one-fourth shall be shipped in each month, and we cannot say that they meant to accept any other quantity. At the outset the plaintiffs failed to tender the quantity according to the contract,—they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for. Therefore the pleas are an answer to the action." 5 Hurl. & N. 28. So in *Coddington v. Paleologo*, L. R. 2 Exch. 193, while there was a division of opinion upon the question whether a contract to supply goods, "delivering on April 17th, complete 8th May," bound the seller to begin delivering on April 17th, all the judges agreed that if it did, and the seller made no delivery on that day, the buyer might rescind the contract.

On the other hand, in *Simpson v. Crispin*, L. R. 8 Q. B. 14, under a contract to supply from 6,000 to 8,000 tons of coal, to be taken by the buyer's wagons from the seller's colliery in equal monthly quantities for 12 months, the buyer sent wagons for only 150 tons during the first month; and it was held that this did not entitle the seller to annul the contract and decline to deliver any more coal, but that his only remedy was by an action for damages. And in *Brandt v. Lawrence*, 1 Q. B. Div. 344,

in which the contract was for the purchase of 4,500 quarters, 10 per cent. more or less, of Russian oats, "shipment by steamer or steamers during February," or, in case of ice preventing shipment, then immediately upon the opening of navigation, and 1,139 quarters were shipped by one steamer in time, and 3,361 quarters were shipped too late, it was held that the buyer was bound to accept the 1,139 quarters, and was liable to an action by the seller for refusing to accept them. Such being the condition of the law of England as declared in the lower courts, the case of *Bowes v. Shand*, after conflicting decisions in the queen's bench division and the court of appeal, was finally determined by the house of lords. 1 Q. B. Div. 470; 2 Q. B. Div. 112; 2 App. Cas. 455. In that case, two contracts were made in London, each for the sale of 300 tons of "Madras rice, to be shipped at Madras or coast for this port during the months of March and April, 1874, per *Rajah of Cochin*." The 600 tons filled 8,200 bags, of which 7,120 bags were put on board, and bills of lading signed in February; and for the rest, consisting of 1,080 bags put on board in February, and 50 in March, the bill of lading was signed in March. At the trial of an action by the seller against the buyer for refusing to accept the cargo, evidence was given that rice shipped in February would be the spring crop, and quite as good as rice shipped in March or April. Yet the house of lords held that the action could not be maintained, because the meaning of the contract, as apparent upon its face, was that all the rice must be put on board in March and April, or in one of those months. In the opinions there delivered the general principles underlying this class of cases are most clearly and satisfactorily stated. It will be sufficient to quote a few passages from two of those opinions.

Lord Chancellor Cairns said: "It does not appear to me to be a question for your lordships, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance." 2 App. Cas. 463. "If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning,—it is no observation which can dispose of, or get rid of, or displace, that literal meaning,—to say that it puts an additional burden on the seller without a corresponding benefit to the purchaser; that is a matter of which the seller and purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfilment of any term in any contract is a means by which

a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled." Pages 465, 466. "It was suggested that even if the construction of the contract be as I have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross-action by them if they could show that any particular damage resulted to them from the rice not having been put on board in the months in question. My lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said, that it bears that the rice is to be put on board in the months in question, that is part of the description of the subject-matter of what is sold. What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months." "The plaintiff, who sues upon that contract, has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the non-fulfilment of the contract." Pages 467, 468.

Lord Blackburn said: "If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the *Rajah of Cochin*. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship; and before the defendants can be compelled to take anything in fulfilment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for, otherwise they are not bound to take it." 2 App. Cas. 480, 481.

Soon after that decision of the house of lords, two cases were determined in the court of appeal. In *Reuter v. Sala*, 4 C. P. Div. 239, under a contract for the sale of "about 25 tons (more or less) black pepper, October or November shipment, from Penang to London, the name of the vessel or vessels, marks, and full particulars to be declared to the buyer in writing within 60 days from date of bill of lading," the seller, within the 60 days, declared 25 tons by a particular vessel, of which only 20 tons were shipped in November, and five

tons in December; and it was held that the buyer had the right to refuse to receive any part of the pepper. In *Honek v. Muller*, 7 Q. B. Div. 92, under a contract for the sale of 2,000 tons of pig-iron, to be delivered to the buyer free on board at the maker's wharf "in November, or equally over November, December, and January next," the buyer failed to take any iron in November, but demanded delivery of one-third in December and one-third in January; and it was held that the seller was justified in refusing to deliver, and in giving notice to the buyer that he considered the contract as canceled by the buyer's not taking any iron in November.

The plaintiff in the case at bar greatly relied on the very recent decision of the house of lords in *Mersey Co. v. Naylor*, 9 App. Cas. 434, affirming the judgment of the court of appeal in 9 Q. B. Div. 648, and following the decision of the court of common pleas in *Freeth v. Burr*, L. R. 9 C. P. 208. But the point there decided was that the failure of the buyer to pay for the first installment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract, and to decline to make further deliveries under it. And the grounds of the decision, as stated by Lord Chancellor Selborne in moving judgment in the house of lords, are applicable only to the case of a failure of the buyer to pay for, and not to that of a failure of the seller to deliver, the first installment. The Lord Chancellor said: "The contract is for the purchase of 5,000 tons of steel blooms of the company's manufacture; therefore, it is one contract for the purchase of that quantity of steel blooms. No doubt, there are subsidiary terms in the contract, as to the time of delivery,—'delivery 1,000 tons monthly, commencing January next,'—and as to the time of payment,—'payment net cash within three days after receipt of shipping documents,'—but that does not split up the contract into as many contracts as there shall be deliveries for the purpose of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract that it is to be one contract for the purchase of that quantity of iron to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfillment of the unfulfilled part of the contract by the delivery of the undelivered steel." 9 App. Cas. 439.

Moreover, although in the court of appeal dicta were uttered tending to approve the decision in *Simpson v. Crippin*, and to disparage the decisions in *Hoare v. Rennie* and *Honek v. Muller*, above cited, yet in the house of lords *Simpson v. Crippin* was not even referred to, and Lord

Blackburn, who had given the leading opinion in that case, as well as Lord Bramwell, who had delivered the leading opinion in *Honek v. Muller*, distinguished *Hoare v. Rennie* and *Honek v. Muller* from the case in judgment. 9 App. Cas. 444, 446.

Upon a review of the English decisions, the rule laid down in the earlier cases of *Hoare v. Rennie* and *Coddington v. Paleologo*, as well as in the later cases of *Reuter v. Sala* and *Honek v. Muller*, appears to us to be supported by a greater weight of authority than the rule stated in the intermediate cases of *Simpson v. Crippin* and *Brandt v. Lawrence*, and to accord better with the general principles affirmed by the house of lords in *Bowes v. Shand*, while it in no wise contravenes the decision of that tribunal in *Mersey Co. v. Naylor*. In this country there is less judicial authority upon the question. The two cases most nearly in point that have come to our notice are *Hill v. Blake*, 97 N. Y. 216, which accords with *Bowes v. Shand*, and *King Philip Mills v. Slater*, 12 R. I. 82, which approves and follows *Hoare v. Rennie*. The recent cases in the supreme court of Pennsylvania, cited at the bar, support no other conclusion. In *Shinn v. Bodine*, 60 Pa. St. 182, the point decided was that a contract for the purchase of 800 tons of coal at a certain price per ton, "coal to be delivered on board vessels as sent for during the months of August and September," was an entire contract, under which nothing was payable until delivery of the whole, and therefore the seller had no right to rescind the contract upon a refusal to pay for one cargo before that time. In *Morgan v. McKee*, 77 Pa. St. 228, and in *Scott v. Kittanning Coal Co.*, 89 Pa. St. 231, the buyer's right to rescind the whole contract upon the failure of the seller to deliver one installment was denied, only because that right had been waived, in the one case by unreasonable delay in asserting it, and in the other by having accepted, paid for, and used a previous installment of the goods. The decision of the supreme judicial court of Massachusetts in *Winchester v. Newton*, 2 Allen, 492, resembles that of the house of lords in *Mersey Co. v. Naylor*.

Being of opinion that the plaintiff's failure to make such shipments in February and March as the contract required prevents his maintaining this action, it is needless to dwell upon the further objection that the shipments in April did not comply with the contract, because the defendants could not be compelled to take about 1,000 tons out of the larger quantity shipped in that month, and the plaintiff, after once designating the names of vessels, as the contract bound him to do, could not substitute other vessels. See *Busk v. Spence*, 4 Camp. 329; *Graves v. Legg*, 9 Exch. 709; *Reuter v. Sala*, above cited.

Judgment affirmed.

The CHIEF JUSTICE was not present at the argument, and took no part in the decision of this case.

OLIVER v. HUNTING.

(44 Ch. Div. 205.)

Chancery Division. Feb. 2, 3, 1890.

In August, 1888, Emma Oliver, a married woman, possessed of considerable separate estate, negotiated with a Mr. Hunting for the purchase of a freehold property known as the Fletton Manor House estate. Eventually she agreed to purchase it for £2375, and on the 7th of September, 1888, he signed the following document:—

"Memorandum of terms of agreement between Mr. Hunting and Mrs. Oliver: Price £2375. Vendor to make good title. Purchaser to pay for her own conveyance. Fixtures included in purchase. Purchase to be settled as soon as possible. Possession on 25th September. Deposit to be paid on the 10th."

On the 12th of September, 1888, Mr. Hunting wrote and sent a letter to Mrs. Oliver in the following words:

"I beg to acknowledge receipt of cheque value £375 on account of the purchase-money for the Fletton Manor House estate."

Mr. Hunting having refused to complete, Mrs. Oliver commenced this action against him, claiming specific performance of the contract of the 7th of September, 1888, and alleging in her statement of claim that in pursuance of the said contract she, on the 10th of September, 1888, paid to Mr. Hunting the sum of £375 as a deposit and in part payment of the said purchase-money, and submitting that the memorandum of the 7th and the letter of the 12th of September, 1888, formed a valid contract and a sufficient memorandum within the statute of frauds.

Mr. Hunting, by his statement of defence, did not admit any of the allegations in the statement of claim, and relied on the statute of frauds. Issue was joined. This was the trial of the action.

Mrs. Oliver in her evidence deposed that she sent the cheque of £375, mentioned in the letter of the 12th of September, on account of the purchase-money of the Fletton Manor House estate. It was part of the £2375. No other money was payable by her to the defendant. The £375 was the balance that Mr. Hunting was to receive, because the £2000 was to be paid over to a mortgagee of the property. Her solicitor, Mr. Law, was going to find the £2000 for her.

Neville, Q. C., and Dunning, for plaintiff. Warrington, Q. C., and Swinfen Esq., for defendant.

KEKEWICH, J.: The elementary proposition about which there is no doubt is this—the memorandum to be signed by the party sought to be charged, so as to bring a particular case within the statute of frauds, need not be on one piece of paper, nor need it be a complete document, signed by the party at one and the same time. It may be contained in two or more pieces of paper, but they must be so connected that you can read them together, so as to form one memorandum of the contract between the parties. Di-

rectly you get beyond that, you get into difficulty. One can illustrate that in a simple manner. An intending purchaser accepts an offer made by a proposing vendor thus: "In reply to your letter of the 14th instant." Can one annex to that reply the letter of the 14th instant? Surely one cannot, without inquiring what letter it is; unless the purchaser has, with unusual prudence, completed the reference by saying, "In reply to your letter of the 14th instant, a copy of which is on the other side." In the absence of any such complete evidence as that, one must inquire what the letter of the 14th instant was, because non constat, it may have been a reference to any one of half a dozen different letters; and so, from that very simple illustration, one can go through a large variety of more complex ones. It is not for me to say that the old rule was better or worse than the present rule; but that it was a different rule, notwithstanding the criticisms in the cases which Mr. Neville has given me, I have no doubt. I take the old rule from the original edition of Lord Blackburn, on the contract of sale, which is cited—I have not the original work before me—by Williams, J., in *Railway Co. v. Peck*,¹ where, after referring to *Hinde v. Whitehouse*,² and *Kenworthy v. Schofield*,³ he says: "The principle of these cases seems to me to be well stated in the same work by my Brother Blackburn, as follows: 'If the contents of the signed paper themselves make reference to the others so as to shew by internal evidence that the papers refer to each other, they may be all taken together as one memorandum in writing' " (as in the case which I have mentioned of a letter referring to a previous letter, of which the copy is annexed); "but if it is necessary, in order to connect them, to give evidence of the intention of the parties that they should be connected, shewn by circumstances not apparent on the face of the writings, the memorandum is not all in writing, for it consists partly of the contents of the writings and partly of the expression of an intention to unite them, and that expression is not in writing." The old case of *Boydell v. Drummond*,⁴ and some other cases, might be consistent with that rule; but certainly of late a different rule has been introduced, and it is a rule, to say the least, consistent with the convenience of mankind, because if you were to exclude parol evidence to explain such a doubtful reference as "the letter of the 14th instant," or it might be simply "your letter," the result might in a large number of cases be gross injustice. Now I take it to be quite settled that in a case of that kind you may give parol evidence to shew what the document referred to was. I take it that you may go further than that, and that if you find a reference to something, which may be a conversation, or may be a written document, you may give evidence to shew

¹ E. B. & E. 1001.² 7 East, 358.³ 2 B. & C. 915.⁴ 11 East, 112.

whether it was a conversation or a written document; and, having proved that it was a written document, you may put that written document in evidence, and so connect it with the one already admitted or proved. So far there is no difficulty. That was applied in the case of *Ridgway v. Wharton*,⁵ where the question was on the meaning of instructions which did not by any means necessarily point to a written document; but later the cases have gone further than that, and it seems to me that *Long v. Millar*,⁶ followed by *Field, J.*, in *Cave v. Hastings*,⁷ does establish a very much larger series of exceptions. In *Long v. Millar* I profess myself rather embarrassed by the judgment of *Thesiger, L. J.*—that is to say, I am unable quite to understand what he means by the passages on p. 456, which seem to me rather inconsistent; but seeing that I have the judgments of *Bramwell* and *Baggallay, L. J.*, without the slightest doubt or embarrassment, and that *Thesiger, L. J.*, concurred in their judgment, I think I may put any difficulty of that kind aside. *Bramwell, L. J.*, gave a judgment which, beyond its reference to the particular case, is exceedingly useful as illustrating this branch of law; because he gives an illustration which seems to me to go to the root of the matter. The illustration he gives is this⁸: "Suppose that A. writes to B., saying that he will give £1000 for B.'s estate, and at the same time states the terms in detail, and suppose that B. simply writes back in return, 'I accept your offer.' In that case there may be an identification of the documents by parol evidence, and it may be shewn that the offer alluded to by B. is that made by A., without infringing the statute of frauds, sect. 4, which requires a note or memorandum in writing." If that is sound, which I take it to be, according to other cases, and according to the convictions of judges in older cases which are introduced into the old law, it is difficult, perhaps, to say where parol evidence is to stop; but substantially it never stops short of this, that wherever parol evidence is required to connect two written documents together, then that parol evidence is admissible. You are entitled to rely upon a written document, which requires explanation. Perhaps the real principle upon which that is based is, that you are always entitled in regarding the construction and meaning of a written document to inquire into the circumstances under which it was written, not in order to find an interpretation by the writer of the language, but to ascertain

from the surrounding facts and circumstances with reference to what, and with what intent, it must have been written. I think myself that must be the principle on which parol evidence of this kind is admitted. Turning to the case before me, I find a letter of the 12th of September, 1888, written by the defendant to Mrs. Oliver; and in that he says: "I beg to acknowledge receipt of cheque, value £375, on account of the purchase-money for the Fletton Manor House estate, for which I thank you." I have two things here perfectly clear, that there is a property called Fletton Manor House estate, which constitutes the subject of a purchase, and, therefore, the subject of a sale. I have also that £375 is part of the purchase-money for that house; but, beyond that, I have no terms of a contract. I am entitled to consider the circumstances under which the letter was written, in order to give any meaning that I properly can to it—not to add terms to it, but to find out what the meaning necessarily must be, having regard to the facts and circumstances—and, having got the evidence which I have in this case, the conclusion is inevitable that it refers to a previous memorandum of terms of agreement under which Mrs. Oliver becomes the purchaser of this particular property for the price of £2375, on account of which the cheque for £375 was sent. Having got that evidence in, having got the connection between the two documents, I have then enough to enable me to read the two documents together, and, reading them together, I have a distinct memorandum of contract, specifying all the terms, the second one supplying what the first one omitted to give, namely, singularly enough, the property which was intended to be purchased and sold. That being so, the objection that there is no memorandum within the statute of frauds fails.

I have not referred to the late case of *Studds v. Watson*,⁹ before Mr. Justice North, because I am not quite sure how far that learned judge intended to go. If I am right in my view of his judgment, that he only allowed the parol agreement to be proved to see whether it connected the two written documents, and then, having got it in evidence, found that it did, and so was able to connect the two documents—if that is the right view, which I believe it to be, of what he intended—then it really follows *Long v. Millar*,¹⁰ and *Cave v. Hastings*,¹¹ to both of which he referred in his judgment.

Under these circumstances, I think the plaintiff is entitled to judgment for specific performance, and, of course, to the costs of the action.

⁵ 6 H. L. C. 238.

⁶ 4 C. P. D. 450.

⁷ Q. B. D. 125.

⁸ *Long v. Millar*, 4 C. P. D. 454.

⁹ 28 Ch. D. 305.

¹⁰ 4 C. P. D. 450.

¹¹ Q. B. D. 125.

ORMROD v. HUTH et al.

(14 Mees. & W. 651.)

Courts of Exchequer Chamber, June 15 & 19, 1845.

In error on a bill of exceptions from the court of exchequer.

Case for a false representation. The declaration stated, that the plaintiff, to wit, on, &c., at the request of the defendants, bargained with the defendants to buy of them divers, to wit, 142 bales of cotton of them the defendants, and for a certain price, to wit, the price or sum of £1646 15s.; and the defendants then, during such bargaining, falsely, fraudulently, and deceitfully exhibited to the plaintiff divers, to wit, 142 parcels of cotton, and falsely, fraudulently, and deceitfully represented and held out to the plaintiff, and induced the plaintiff to believe, that the same parcels were samples of the said cotton so bargained for, and were fair samples thereof, and that the said cotton was equal to and of the same description with, and of equal and like quality with the said parcels so exhibited as aforesaid; and thereupon the plaintiff, heretofore, to wit, on the same day and year, confiding in and relying upon the said parcels so exhibited, and the said representations and inducements of the defendants so made as aforesaid, at the request of the defendants, was induced to buy and did buy the said cotton of the defendants, at and for the said large price or sum of, to wit, £1646 15s., and afterwards, to wit, on the same day and year, paid to the defendants the same sum of money for the same; whereas, in truth and in fact, at the times of the said bargaining and sale by the defendants, the said parcels of cotton were not fair samples, nor were they samples of the said cotton so bargained for, nor was the said cotton equal to and of the same description with, and of equal and like quality with the said parcels, but of inferior and much worse description and quality, and of much less value. And the plaintiff in fact says, that the defendants, by means of the premises, on the day and year aforesaid, falsely and fraudulently deceived the plaintiff in the sale of the said cotton as aforesaid, by means whereof, &c.

Pleas, first, not guilty; secondly, that the plaintiff was not induced to buy, nor did he buy the said cotton or any part thereof, modo et forma.

The replication took issue upon both pleas.

At the trial, before Coltman, J., at the Liverpool spring assizes, 1843, it appeared that the plaintiff, a cotton-spinner, had, through a broker, bought several bales of cotton from the defendants, who were merchants at Liverpool. The usual method of purchasing cotton is by brokers. The selling broker always has samples by which he sells. Inspection from the bulk is quite unusual in purchases of cotton. The samples are drawn from a slit in the bale; and if any part of the bale proves to be of an inferior quality to that found in the slit, it is said to be falsely packed, and is unmerchantable on that

account. It is usual for the buying broker to have samples drawn by his own people from the bale, which redrawn samples he compares with those by which he has bought. In the present case, forty-five of the bales which were purchased by the plaintiff were found to be falsely packed. Cotton is packed in layers, so that the edges are visible only at the top and bottom, and along the narrow side. From the way in which the cotton is packed, you can only take the sample from the long narrow side. In this case there were two, three, or more layers of good cotton like the sample; but in the inner part the cotton was bad; in some instances there was not more than one layer of good, and the rest bad. A witness stated that this must have been done by design, and that the bales must have been falsely packed when purchased; but there was no evidence to show that the defendants were cognizant of the fraud. It was proved that the cotton had come straight from the ship to the defendants' warehouse, and they were the consignees; but whether they were the consignees on their own account or for others did not appear. Upon this evidence, the defendants' counsel insisted that there was no case to go to the jury on which they could find for the plaintiff on the first issue, inasmuch as neither the defendants nor their brokers were proved to have had any knowledge of the alleged misrepresentation being false, or of the false packing, or to have acted in any respect against good faith or with any fraudulent purpose. The plaintiff's counsel, on the other hand, maintained, that the delivery of samples not corresponding with the bulk, was a false representation of the quality of the cotton, which must be considered in point of law as fraudulent, as being the statement of a fact which the party making it did not know to be true, and which in fact was not true, and which induced the buyer to make the purchase. The learned judge directed the jury, that, unless they could see grounds for inferring that the defendants or their brokers were acquainted with the fraud that had been practised in the packing, or had acted in the transaction against good faith or with some fraudulent purpose, the defendants were entitled to the verdict on the first issue; whereupon the plaintiff's counsel excepted to the direction of the learned judge, and insisted that proof of the defendants or their brokers being acquainted with the fraud that had been practised in the packing, or of their having acted against good faith, or with some fraudulent purpose, was not necessary to be given by him on that issue, and tendered a bill of exceptions accordingly. The jury found a verdict for the defendants on the first issue, and were discharged by consent as to the other issues.

A writ of error having been brought, the case was now argued by

Cowling, for plaintiff in error. Crompton, for defendant in error.

TINDAL, C. J. We think the direction of the learned judge was perfectly correct.

The action is brought for a false and fraudulent representation, alleged to have been made by the defendants, on the sale of certain cotton to the plaintiffs, that the cotton was of the same description, and of equal and like quality with the sample by them exhibited, whereas in fact it was not: the action not being brought upon an express warranty, nor any express allegation being laid in the declaration, that the defendants knew at the time that the bulk of the cotton did not equal in description or quality the sample which had been so exhibited.

Upon the trial, the learned judge directed the jury, that, unless they could infer that the defendants or their brokers were acquainted with the fraud that had been practised in the packing, or had acted in the transaction against good faith, or with some fraudulent purpose, the defendants were entitled to the verdict; and we think this the proper direction.

The rule which is to be derived from all the cases appears to us to be, that where, upon the sale of goods, the purchaser is satisfied without requiring a warranty, (which is a matter for his own consideration,) he cannot recover upon a mere representation of the quality by the seller,

unless he can show that the representation was bottomed in fraud. If, indeed, the representation was false to the knowledge of the party making it, this would in general be conclusive evidence of fraud; but if the representation was honestly made, and believed at the time to be true by the party making it, though not true in point of fact, we think this does not amount to fraud in law, but that the rule of caveat emptor applies, and the representation itself does not furnish a ground of action. And although the cases may, in appearance, raise some difference as to the effect of a false assertion or representation of title in the seller, it will be found, on examination, that in each of those cases there was either an assertion of a title embodied in the contract, or a representation of title which was false to the knowledge of the seller.

The rule we have drawn from the cases appears to us to be supported so clearly by the early, as well as the more recent decisions, that we think it unnecessary to bring them forward in review; but satisfy ourselves with saying, that the exception must be disallowed, and the judgment of the court of exchequer affirmed.

Judgment affirmed.



PAGE v. MORGAN.

(15 Q. B. Div. 228.)

Court of Appeal. June 10, 1885.

Appeal from the judgment of the queen's bench division refusing an application for a new trial, or to enter judgment for the defendant.

The action was for the price of wheat, or in the alternative for damages for non-acceptance of the wheat.

The statement of defence denied the contract of purchase, alleged that the wheat was sold by sample, and the bulk was not equal to the sample, and set up non-compliance with the statute of frauds.

The case was tried before Bulwer, Q. C., sitting as commissioner at the Chelmsford summer assizes, 1884, when the facts were as follows:—

The defendant, a miller, bought of the plaintiff by oral contract through the plaintiff's agent eighty-eight quarters of wheat. The sale was by sample. The wheat was shipped by the plaintiff's agent on a barge for carriage to the defendant's mill, which was upon a navigable canal. The barge arrived at the mill on the evening of Tuesday the 25th of March, and at 8 o'clock on the morning of the 26th some of the sacks containing the wheat were, by direction of the defendant's foreman, hoisted up out of the barge on to the mill and examined by him. After twenty-four sacks had been hoisted up and examined the foreman sent for the defendant, who came to the mill and inspected the contents of the sacks already delivered, and ordered some more to be sent up for examination, and after having examined thirty-eight sacks in all, he at 9 o'clock told the bargeman to send up no more, as the wheat, he said, was not equal to sample. The defendant then on the same day went off to see the plaintiff's agent at a neighbouring market town, and told him that the wheat was not equal to sample, and that he should not take it. Some days afterwards, the exact interval, however, was not stated, the wheat taken in to the mill was returned by defendant's order to the barge, which remained at the defendant's mill with the wheat in it, the plaintiff refusing to take the wheat away, for seven weeks and until after action was brought, when the wheat was sold by the order of a judge at chambers, and the proceeds paid into court to abide the event of the action.

The learned commissioner directed the jury, on the authority of *Morton v. Tibbett*¹ and *Kibble v. Gough*,² that there was evidence of an acceptance by the defendant sufficient to constitute a contract within the 17th section of the statute of frauds, although the defendant was not precluded from rejecting the wheat if not equal to sample. The jury found that the wheat was equal to sample, and that the defendant had accepted it within the meaning of the 17th section of the statute of frauds, and accordingly gave a verdict for the plaintiff.

A rule for a new trial, or to enter judgment for the defendant, was moved for on the ground that there was no evidence for the jury of an acceptance of the wheat by the defendant to satisfy the statute, but the queen's bench division (Lord Coleridge, C. J., and Cave, J.) refused the application.

Morton, (Murphy, Q. C., with him,) for defendant. Philbrick, Q. C., and R. Vaughan Williams, for plaintiff, were not called upon to argue.

BRETT, M. R. It seems to me that the case of *Kibble v. Gough*³ lays down the governing principle with regard to the question whether there is evidence of an acceptance to satisfy the 17th section of the statute of frauds. It was there pointed out that there must be under the statute both an acceptance and actual receipt, but such acceptance need not be an absolute acceptance; all that is necessary is an acceptance which could not have been made except upon admission that there was a contract, and that the goods were sent to fulfil that contract. Cotton, L. J., in giving judgment in that case, said: "All that is wanted is a receipt and such an acceptance of the goods as shows that it has regard to the contract, but the contract may yet be left open to objection so that it would not preclude a man from exercising such a power of rejection. I think that in this case enough had been done to satisfy the statute." Now what had been done in that case? The goods had been taken into the defendant's warehouse and kept for some time, though not so long as to make it unreasonable that the defendant should exercise his right of rejection if the goods had not been according to contract, and the defendant had inspected the goods. They therefore had been delivered, and actual possession of them had been taken, and they had been dealt with by the defendant for the purposes of the contract. It was held that under those circumstances what had been done in respect to the goods by the defendant must be considered as having been done with regard to a contract for the purchase of the goods, and as amounting to a recognition of the existence of such contract, and that therefore, though the defendant might still have a right to reject the goods if not equal to sample, there was evidence on which the jury might find that the defendant had accepted the goods within the meaning of the statute. That being the law as laid down by that decision, what was the evidence on the question of acceptance in the present case? The wheat was sent to the defendant's mill in a barge, which was brought under the mill in the evening. The next morning a considerable quantity of wheat was taken up by the defendant's servants into the defendant's mill and remained there some time more or less until the defendant had opened the sacks and examined their contents to see if they corresponded with the sample. How could the defendant have these sacks

¹ 15 Q. B. 428.² 38 L. T. (N. S.) 204.³ 38 L. T. (N. S.) 204.

taken into his mill and there opened and examined without a recognition of the existence of a contract entitling him so to deal with them? How could any reasonable man come to any other conclusion from his dealing with them than that he had made a contract of purchase with regard to them, and that the goods were delivered to and received by him under such contract, and examined by him to see if they were according to the contract? It seems to me clear that under these circumstances there was evidence for the jury of an acceptance within the meaning of the statute. I can conceive of many cases in which what is done with regard to the delivery and receipt of the goods may not afford evidence of an acceptance. Suppose that goods being taken into the defendant's warehouse by the defendant's servants, directly he sees them, instead of examining them, he orders them to be turned out or refuses to have anything to do with them. There would there be an actual delivery, but there would be no acceptance of the goods, for it would be quite consistent with what was done that he entirely repudiated any contract for the purchase of the same. I rely for the purposes of my judgment in the present case on the fact that the defendant examined the goods to see if they agreed with the sample. I do not see how it is possible to come to any other conclusion with regard to that fact than that it was a dealing with the goods involving an admission that there was a contract. It appears to me that, having regard to the case of *Kibble v. Gough*, which is an authority binding on us, there was clearly evidence in this case for the jury of an acceptance, and that upon such evidence there was only one conclusion to which they reasonably could come. The counsel for the defendant placed reliance on the case of *Rickard v. Moore*.⁴ It is alleged that in that case Lord Bramwell doubted the correctness of what he had said in the previous case of *Kibble v. Gough*. However that may be, it is quite clear that that case cannot overrule *Kibble v. Gough*. For these reasons I am of opinion that this appeal must be dismissed.

BAGGALLAY, L. J. I am of the same opinion. It has been decided in the cases of *Morton v. Tibbett*⁵ and *Kibble v. Gough* that there may be an acceptance within the statute though it is not such an accept-

ance as to preclude the defendant from objecting subsequently that the goods are not according to the contract, and rejecting them on that ground. Different opinions have been expressed as to the true grounds on which *Morton v. Tibbett* was based, but it seems to me that the case of *Kibble v. Gough* has made the effect of the former decision clear. Reliance was placed by the defendant's counsel on the case of *Rickard v. Moore*. But when that case comes to be examined there are various points of difference which are adverted to in the judgments, and there is also the most important distinction adopted by Thesiger, L. J., in giving judgment, viz., that, whereas in *Kibble v. Gough* the jury found that the goods were equal to sample, in *Rickard v. Moore* the jury found that they were not equal to sample. The only question we have to consider is whether there is evidence of an acceptance in this case within the principle laid down in the cases of *Morton v. Tibbett* and *Kibble v. Gough*. It seems to me clear that there was such evidence.

BOWEN, L. J. This case appears to me to be governed by the decision in *Kibble v. Gough*. That decision would be binding upon me whether I agreed with it or not, but it seems to me that it is based on the soundest sense. The statute says that the contract shall not be good unless, among other alternative requisites, there has been an acceptance and actual receipt of some part of the goods. Having regard to the mischiefs at which the statute was aimed, it would appear a natural conclusion that the acceptance contemplated by the statute was such a dealing with the goods as amounts to a recognition of the contract. That, accordingly, was the view taken by this court in the case of *Kibble v. Gough*. In *Rickard v. Moore* there was the distinction that has been pointed out by my Brother Baggallay. In *Kibble v. Gough* the goods were found to be equal to sample, and it therefore became necessary to decide in that case whether there was an acceptance within the 17th section; in *Rickard v. Moore* the goods were found not to be equal to sample, so it was only necessary to decide whether they were rightly rejected. I do not think that Lord Bramwell, by his remarks on what had thus become a by point, can have intended to overrule the previous decision of this court. In any case we are bound by the decision in *Kibble v. Gough*.

Appeal dismissed.

⁴ 38 L. T. (N. S.) 841.

⁵ 15 Q. B. 428.

PALMER v. HAND.

(13 Johns. 434.)

Supreme Court of New York. Oct. Term, 1816.

This was an action of trover, tried before Mr. Justice Spencer, at the Albany circuit, in April, 1816.

The plaintiff was the owner of a raft, consisting of plank, joist, and boards; and whilst coming down the North river, in the autumn of the year 1815, with the raft, one Potter came upon the raft, and offered to buy it: the price was agreed upon: it was also agreed, that the plaintiff should deliver it at one of the docks in Albany, and be at the expense of taking it out of the water. Potter then applied to the defendant, who kept a lumber-yard, in Albany, to purchase the lumber which the plaintiff had agreed to sell him; but Potter and the defendant not being able to settle the bargain, it was agreed that the defendant should take and sell the lumber. The plaintiff arrived with his raft, the next day, and brought it to the defendant's dock, and there inquired of one of the witnesses in the cause for Potter, and asked if Potter was not to have more hands to take out and pile the lumber, and said that he had sold it to Potter. He then left the raft, and went into the city, and at 4 o'clock in the afternoon, at which time all the raft was taken out of the water, and nearly all piled, a few culling pieces excepted, the plaintiff returned and forbade any more to be piled, saying that Potter had gone off. The defendant, on the same day, advanced to Potter, on account of the deposit of lumber, 100 dollars; and also gave him an order on Wilder & Hastings, for 150 dollars, in goods, which were, in the evening of the same day, delivered to him. There was no formal delivery of the lumber to Potter, who, it was conceded, was a cheat, and had absconded. The plaintiff proved a demand on the defendant to restore the lumber, or pay for it, and a refusal. The jury found a verdict for the plaintiff, subject to the opinion of the court, on a case containing the above facts.

Van Vechten, for plaintiff. Henry, contra.

PLATT, J., delivered the opinion of the court. This is an action of trover, for a quantity of plank and scantling. It appears that the plaintiff was owner of a raft of lumber, and while descending the river opposite to Lansingburgh, he contracted with one Potter for the sale of the lumber, to be delivered to Potter, by the plaintiff, on one of the docks, in Albany, at a price agreed on, to be paid on delivery. Potter then went to the defendant, who keeps a lumber-yard and dock, at Albany, and agreed to deliver to him the lumber of that raft, to be sold by the defendant, on commission, for Potter.

Next morning, about sunrise, the plaintiff arrived with the raft, and fastened it to the defendant's dock. The plaintiff

then told the workmen employed there, that he had sold the lumber to Potter. One or two men began immediately to pile the plank, &c., on the defendant's dock, and the plaintiff "asked if Potter was not to have more hands to take out and pile the lumber." The plaintiff then went into the city, and did not return again till 4 o'clock P. M., at which time the lumber was almost all piled on the defendant's dock. The plaintiff then forbade the piling of any more, saying that Potter had absconded.

While the men were piling up the lumber, about 10 or 11 o'clock A. M. of that day, the defendant advanced to Potter 100 dollars, and, also, gave an order for 150 dollars' worth of goods, in favor of Potter, on account of the deposit of lumber. The plaintiff, afterwards, demanded the lumber, which the defendant refused to deliver.

There is no doubt that, upon a contract to sell goods, where no credit is stipulated for, the vendor has a lien; so that if the goods be actually delivered to the vendee, and, upon demand then made, he refuses to pay, the property is not changed, and the vendor may lawfully take the goods as his own, because the delivery was conditional.

As between the vendor and vendee, in this case, I incline to the opinion that the property in the lumber was not so vested in the vendee as that the vendor could not legally have resumed it when he came, in the afternoon, and forbade the piling of any more of it.

The contract with Potter was for the whole raft, to be delivered on the dock. The vendor, therefore, had no right to demand payment for any part until the whole was delivered; and it appears that he came to the place of delivery, at 4 o'clock in the afternoon of the day on which the raft arrived at the dock, whilst the lumber was still in the course of delivery, and signified his determination not to consider the sale as absolute. He said that Potter had absconded, and ordered the men not to pile any more of the plank, &c. As between Palmer and Potter there was no such delay or acquiescence on the part of the vendor, as would be evidence of a credit given for the money. If the vendor was there, and demanded payment, as soon as the whole lumber was piled on the dock, that was enough to preserve his lien; and such, I think, is the fair construction of the evidence.

The plaintiff, in this case, seeks to enforce his lien against a person who has bona fide received the property as a pledge for money and goods advanced to Potter, to nearly the amount of its value. Those advances were made by the defendant while the lumber was in a course of delivery on the dock, and before the plaintiff asserted his claim to it. But there is no evidence that the plaintiff had any knowledge of the negotiations between Potter and the defendant, in regard to the lumber, until after the plaintiff had made his election to rescind his contract with Potter. This is a contest, then, between two honest men, who shall be the dupe of

a swindler. The strict rule of law must, therefore, be applied; and the defendant cannot be allowed to stand in a more favorable situation than Potter would have been in if he himself had withheld the possession of the lumber, without paying the price when demanded. We are, therefore, of opinion, that the plaintiff is entitled to judgment. Judgment for the plaintiff.



PARKER v. PATRICK.

(5 Term R. 175.)

Court of King's Bench. April 22, 1793.

On the trial of this action of trover for goods at the last Sittings, it appeared that the goods in question had been obtained from the defendant by false pretences, and afterwards pawned to the plaintiff for a valuable consideration, without notice of the fraud; that the person obtaining them had been convicted by the defendant, on which the latter got possession of the goods again; and now this action was brought by the plaintiff, the pawnbroker, to recover them from the defendant. The defendant's counsel pressed for a non-suit, contending that the question must be considered to be the same as if the goods had been feloniously stolen from the defendant; and that the plaintiff, who derived title through a fraud, though he himself were innocent of the fraud, was not entitled to recover against the defendant, who was the true owner: but Lord Kenyon thought that it was not like the case of felony, and the plaintiff obtained a verdict.

Conste and Bayley now renewed the same objection in a motion to enter a non-suit; urging that in this respect there was no difference between the obtaining of goods by fraud or felony, for that the rea-

sons given in the latter case were equally applicable to the former. In a case in 13 Ed. 4. 9. recognized in Kel. 81, 82, where one bargained with another to carry some packs of goods to Southampton, and delivered the goods to the carrier, who carried them to another place, and there opened the packs, and took the goods, and disposed of them to his own use, it was held to be felony "because his subsequent act of carrying the goods to another place, and there opening them, and disposing of them to his own use, declared that his intent originally was not to take the goods upon the agreement and contract of the party, but only with a design of stealing them." According to which doctrine the subsequent act of the person who obtained these goods upon false pretences shewed that he did not take them upon the contract with the defendant, but by fraud; and consequently he could not make a title of them to the plaintiff. But

PER CURIAM. This is distinguishable from the case of felony; for there by a positive statute¹ the owner, in case he prosecutes the offender to conviction, is entitled to restitution: but that does not extend to this case, where the goods were obtained from the defendant by a fraud.

Rule refused.

¹ 21 Hen. 8. c. XI. Vid *Horwood v. Smith*, 2 Term R. 750.

PAUL v. REED et al.

(52 N. H. 136.)

Supreme Judicial Court of New Hampshire. Sullivan. June, 1872.

Action by Azor Paul against Dexter G. Reed, defendant, and Danna R. Moody, trustee. The trustee was held liable on the disclosure, and defendant took exceptions. Exceptions sustained.

The disclosure of Moody, the trustee, showed that he succeeded defendant, Reed, as tenant of a boarding house, and when he was taking possession, and Reed was moving out, he agreed to purchase from Reed a hog, some sugar, and other articles. The agreed price of the articles was as follows: One hog, \$10.50; flour, \$7; butter, \$10; bedstead, \$1; sugar and salt, \$1.50. Reed made a memorandum of the articles with the price carried out, and, as he was adding it up, the sheriff served the trustee summons on Moody. The hog had already been removed by Moody to another pen, and the sugar had been placed with Moody's other sugar. When the summons was served, Moody held the money in his hand, ready to pay for the articles as soon as the amount was ascertained. After service of process, Reed asked Moody to give the articles up, saying, "We can call it no sale, and I can take my stuff," giving as a reason that they were not yet paid for. Moody replied that he would take counsel, and, if it was safe for him to go so, he would give them up. He was advised to let the matter stand, as there would be a question as to his liability to be tried. Defendant, Reed, claimed the property, but the court held Moody to be chargeable with the \$30.30, and defendant excepted, and the question was reserved.

Bowers, for plaintiff. S. H. Edes, for defendant and trustee.

BELLOWS, C. J. Unless the principal defendant had another hog and other provisions or fuel, so that the value of his provisions and fuel exceeded twenty dollars, all the articles sold to the trustee were exempt from attachment. As there is no proof that he had another hog, or more provisions, or fuel, the court cannot find that he had such; and, therefore, unless the title in these goods had vested in the trustee so that he became indebted for them, the trustee must be discharged.

The question then is, whether the goods were delivered so as to vest the title in the trustee.

The proof tends to show that the sale was for cash, and not on credit;—so the trustee testifies, and this is just what would have been intended had no time of payment been stipulated. 2 Kent's Com. *496, *497; Story on Con., § 796; Noy's Maxims §7; Insurance Co. v. De Wolf, 2 Cow, 105. The case, then, stands before us as a contract of sale for cash on delivery: in such case the delivery and payment are to be concurrent acts; and therefore, if the goods are put into the possession of the buyer in the expectation that he will immediately pay the price, and he does not do it, the seller is at lib-

erty to regard the delivery as conditional, and may at once reclaim the goods. In such a case the contract of sale is not consummated, and the title does not vest in the buyer. The seller, may, to be sure, waive the payment of the price, and agree to postpone it to a future day, and proceed to complete the delivery; in which case it would be absolute, and the title would vest in the buyer. But in order to have this effect, it must appear that the goods were put into the buyer's possession with the intention of vesting the title in him.

If, however, the delivery and payment were to be simultaneous, and the goods were delivered in the expectation that the price would be immediately paid, the refusal to make payment would be such a failure on the part of the buyer to perform the contract as to entitle the seller to put an end to it and reclaim the goods.

This is not only eminently just, but it is in accordance with the great current of authorities, which treat the delivery, under such circumstances, as conditional upon the immediate payment of the price. 2 Kent's Com. *497; Chitty on Con., 9th Amer. Ed., §50, note 1 and cases; Story on Con., §§ 796, 804; Palmer v. Hand, 13 Johns. 434; Marston v. Baldwin, 17 Mass. 605; Leven v. Smith, 1 Denio 573, and cases cited. So the doctrine was fully recognized in Russell v. Minor, 22 Wend. 659, where, on the sale of paper, it was agreed that the buyer should give his notes for it on delivery, and the delivery was in several parcels. On delivery of the first, the seller asked for a note; but the buyer answered that he would give his note for the whole when the remainder was delivered, and the parcel now delivered could remain until then. When the rest was delivered, the defendant refused to give his note; and the court held that the delivery of all the goods was conditional, and that the seller might maintain replevin for all the goods. The general doctrine is fully recognized in this state in Lucey v. Rundy, 9 N. H. 288, and more especially in Ferguson v. Clifford, 37 N. H. 86, where it is laid down that if the delivery takes place when payment is expected simultaneously therewith, it is in law made upon the condition precedent that the price shall forthwith be paid. If this condition be not performed, the delivery is inoperative to pass the title to the property, and it may be instantly reclaimed by the vendor.

The question then is, whether the delivery here was absolute, intending to pass the title to the vendee and trust him for the price, or, whether it was made with the expectation that the cash would be paid immediately on the delivery. This is a question of fact, but it is submitted to the court for decision. Ordinarily it should be passed upon at the trial term, but where the question is a mixed one of law and fact, as it is here, it may not be irregular, if the judge thinks it best, to reserve the entire question for the whole court. Assuming that the questions both of law and fact are reserved, we find that the goods were sold for cash, and of course that the delivery of the goods and the payment of the price were to be simultane-

on, and accordingly, when a part had been delivered, and the seller was figuring up the amount, and the buyer had taken out his money to pay the price, the act was arrested by the service of this process.

The evidence relied upon to prove the delivery to be absolute and intended to pass the title at all events, is simply and solely the changing of the hog into another pen, and mixing the sugar with other sugar of the buyer. Without this mixing of the sugar, the case would be just the ordinary one of a delivery of the goods with the expectation that the buyer would at once pay the price; and we think that circumstance is not enough to show a purpose to make the delivery absolute, but rather a confident expectation that the buyer would do as he had agreed, and pay the price at once. The case of *Henderson v. Lauck*, 21 Pa. St. 359, was very much like this. There was a sale of corn, to be paid for on the delivery of the last load; and as the loads were delivered, the corn was placed in a heap with other corn of the buyer, in the presence of both parties. On the delivery of the last lot the buyer failed to pay, and the seller gave notice that he claimed the corn, and brought replevin, which was held to lie,—the court regarding the de-

livery as conditional, and the plaintiff in no fault for the intermingling of the corn. It is very clear that the intermingling of the sugar does not, as matter of law, make the delivery absolute; and I think, as matter of fact, it is not sufficient to prove an intention to pass the title absolutely. When the buyer declined to pay the price, the seller at once reclaimed the goods, and so notified the buyer, who did not object to giving up the sale if he could safely do so.

In respect to the question now before us, it is not material for what reason the buyer declined to pay for the goods, although the service of the trustee process might shield him from damages in a suit by the seller for not taking and paying for the goods. For the purposes of this question, it is enough that the buyer did not pay the price, and thus gave the seller a right to reclaim the goods, which he did at once. The goods themselves were exempt from attachment; and the fact that the trustee process was designed to intercept the price of those goods, could not affect his right to reclaim them when the buyer declined to pay the price.

The exception must therefore be sustained, and the

Trustee discharged.

PERLEY v. BALCH

(23 Pick. 283.)

Supreme Judicial Court of Massachusetts. Essex. Nov. Term, 1839.

Assumpsit on a promissory note. At the trial in the court of common pleas, before Williams J., the defendant introduced evidence tending to prove, that the consideration of the note was the sale of an ox by the plaintiff to the defendant, with a warranty, that the ox would fatten as well as any one the defendant then had; that one eye of the ox, which was then apparently defective and diseased, was falsely and fraudulently represented by the plaintiff to have been hooked out, whereas, in fact, it had been destroyed by a cancer; and that this disease was incurable, and rendered the ox incapable of being fattened and entirely worthless for any other purpose.

It did not appear, that the defendant had returned or offered to return the ox to the plaintiff, or had ever notified to the plaintiff, that he was dissatisfied with the contract, until after the commencement of this action, which was several years after the sale. The defendant kept the ox in his pasture, &c. for several months, and was at some trouble to ascertain whether it would answer his purpose. It did not appear what became of the ox afterwards.

The defendant also offered evidence tending to show, that he purchased the ox for the sole purpose of fattening it, and that this was known to the plaintiff at the time of the sale; and he contended, that, upon these facts, there was an implied warranty on the part of the plaintiff, that the ox should be reasonably fit for that purpose.

The judge instructed the jury, that no such implied warranty arose from these facts; that if they were satisfied that the plaintiff warranted, that the ox would fatten as well as any one which the defendant then had, and that the warranty was false, or if they were satisfied, that the plaintiff falsely and fraudulently represented the eye of the ox to have been hooked out, whereby the defendant was induced to purchase it, and if they were further satisfied, that the ox, if it had been returned to the plaintiff in a reasonable time, would have been of no pecuniary value to him, the defendant would be entitled to a verdict; but that, otherwise, their verdict should be for the plaintiff.

The jury returned a verdict for the plaintiff; and the defendant excepted to the instructions to the jury.

Lord, for plaintiff. Perkins, for defendant.

MORTON, J. The instruction, that there was no implied warranty, is not now complained of, and is undoubtedly correct. See *Emerson v. Brigham*, 10 Mass. R. 197; *Shepherd v. Temple*, 3 N. Hamp. R. 455. Every sale of chattels contains an implied warranty, that the property of them is in the vendor. But it is well settled by authority as a general

rule, that no warranty of the quality, is implied from the sale. The maxim, caveat emptor, governs. 2 Kent's Com. 178; *Chittly on Contr.* 133; *Champlion v. Short*, 1 Campb. 53; *Bragg v. Cole*, 6 Moore, 114; *Stuart v. Wilkins*, 1 Doug. 20; *Parkinson v. Lee*, 2 East, 341; *Mockbee v. Gardner*, 2 Har. & Gill, 176.

But the learned justice of the common pleas further instructed the jury that if there was a fraud in the sale, or an express warranty and a breach of it, in either case, the defendant might avoid the contract, by returning the ox within a reasonable time; or, if the ox would have been of no value to the plaintiff, then without returning him. Whether the jury found their verdict upon the ground, that no fraud or express warranty was proved, or that the ox was of no value, does not appear. If therefore any part of the instructions was incorrect, the defendant is entitled to a new trial.

Where the purchaser is induced by the fraudulent misrepresentations of the seller, to make the purchase, he may, within a reasonable time, by restoring the seller to the situation he was in before the sale, rescind the contract, and recover back the consideration paid, or, if he has given a note, resist the payment of it. Here was no return of the property purchased, but if that property was of no value, whether there was any fraud or not, the note would be *nudum pactum*. The defendant's counsel, not controverting the general rule, objects to the qualification of it. He says, that the ox, though valueless to the defendant, might be of value to the plaintiff, and so the defendant would be bound by his contract, although he acquired nothing by it. But a damage to the promisee is as good a consideration as a benefit to the promisor. If a chattel be of no value to any one, it cannot be the basis of a bargain; but if it be of any value to either party, it may be a good consideration for a promise. If it is beneficial to the purchaser, he certainly ought to pay for it. If it be a loss to the seller, he is entitled to remuneration for his loss.

But it is apparent, that a want of consideration was not the principal ground of defence. The defendant mainly relied upon fraud or a warranty. And to render either available to avoid the note, it was indispensable, that the property should be returned. He cannot rescind the contract, and yet retain any portion of the consideration. The only exception is, where the property is entirely worthless to both parties. In such case the return would be a useless ceremony, which the law never requires. The purchaser cannot derive any benefit from the purchase and yet rescind the contract. It must be nullified in toto, or not at all. It cannot be enforced in part and rescinded in part. And, if the property would be of any benefit to the seller, he is equally bound to return it. He who would rescind a contract, must put the other party in as good a situation as he was before, otherwise he cannot do it. *Chittly on Contr.* 276. *Hunt v. Silk*, 5 East, 449; *Conner v. Henderson*, 15 Mass. R. 319.

The facts relied upon by the defendant

to defeat the note, might, if proved, be used in mitigation of damages. If there was a partial failure of consideration, or deception in the quality and value of it, or a breach of warranty, the defendant may avail himself of it to reduce the damages to the worth of the chattels sold, and need not resort to an action for deceit, or upon the warranty. *Chitty on Contr.* 140; *Germaine v. Barton*, 3 Stark. R. 32; *Basten v. Batter*, 7 East, 489; *Poulton v. Lattimore*, 9 Barn. & Cressw. 259; *Bayley on Bills*, (2d Amer. Ed.) 531, and cases cited. But he is not bound to do this. He may

prefer to bring a separate action, and he has an election to do so. The present judgment will not bar such an action. But however this may be, it does not appear, that any instructions were given or refused upon this point. The value of the property to the defendant would have been the true rule of damages. And had he desired it, doubtless, such instructions would have been given. But as he did not request them, he cannot complain of their omission.

Judgment of the court of common pleas affirmed.

PETERS et al. v. FT. MADISON CONST. CO.
et al.

(34 N. W. Rep. 190, 72 Iowa, 405.)

Supreme Court of Iowa. Oct. 5, 1887.

Appeal from circuit court, Lee county.

This is an appeal by plaintiffs from a final order made by the circuit court in a supplemental proceeding for the enforcement of a judgment. The facts are stated in the opinion.

James H. Anderson, for appellants. D. N. Sprague and H. C. Stemple, for appellees.

REED, J. In February, 1879, the Ft. Madison Construction Company was incorporated, and soon afterwards began the work of building a railroad, that being the object for which it was organized. The amount of its paid-up capital was \$31,500, which was evidenced by $31\frac{1}{2}$ shares of stock of \$1,000 each, of which S. & J. C. Atlee held five shares; J. C. Atlee, five shares; defendant George Schlapp, 10 shares; N. C. Roberts, two shares; Charles Doerr, one share; A. L. Cartwright, one share; Peters & Bernhard, three shares, and C. H. Peters four and one-half shares. After building about 11 miles of road, the corporation sold out to the Ft. Madison & N. W. Ry. Co., and ceased to do business. The consideration for the sale was \$40,000 of first mortgage bonds of the purchasing company. At the time of the sale the corporation was indebted (in addition to its indebtedness to the stockholders for their payments to its capital stock) in the sum of \$22,542.78. The greater part of this indebtedness was to the stockholders for moneys advanced by them in addition to their stock subscriptions, for the benefit of the corporation, and for liabilities assumed by some of them for it. But \$34,500 of the mortgage bonds of the purchasing company was ever delivered, and that amount was delivered in various amounts to the individual stockholders. A suit in equity was instituted for the winding up of the business of the corporation, and for the distribution of the assets, after the payment of its debts, among the stockholders.

The judgment rendered in the action determines the facts enumerated above. It also determines that the mortgage bonds in the hands of the stockholders, together with the interest received by them thereon, were assets of the corporation; and the receiver appointed by the court was ordered to collect the same, and apply the proceeds in payment of the debts of the company and the costs of the proceeding. It also determines that defendant George Schlapp held \$10,000 of the mortgage bonds, and that he had received as interest thereon the sum of \$2,405. The indebtedness of the corporation to individuals was also determined, and it was determined that it was indebted to Schlapp in the sum of \$2,794.75, and to him and A. L. Cartwright in the sum of \$3,239.48; the latter sum being the amount of judgment obtained against Schlapp and Cartwright for an indebtedness incurred by them for the benefit of the corporation.

The judgment also contained the following provision: "It is further ordered that, if any of the parties desire, they may apply the amount due thereon, respectively, upon their pro rata proportion of the charges as aforesaid against the property, and pay the balance, if any, in cash, and thereupon they may retain their pro rata amount of bonds, or be entitled to receive their pro rata amount of bonds from the receiver; and, if the amount due them should exceed their pro rata amount of their charges against the property, they may apply so much as is necessary, and retain or receive their bonds, and be entitled to receive the balance from the funds in the hands of the receiver."

That judgment was entered on the twenty-seventh of March, 1884. Defendant Schlapp did not deliver the mortgage bonds to the receiver, nor did he pay over to him the amount of the money he had received as interest thereon; and, on the twenty-sixth of February following, an execution was issued on the judgment, directing the sheriff to collect from him the bonds, and the amount of money received by him, but the execution was returned unsatisfied. On the eleventh of April, 1885, the plaintiffs, who are stockholders in the corporation, instituted this proceeding for the purpose of enforcing the judgment against Schlapp. They alleged in their petition that he had converted the bonds and money in his hands, and that he was indebted to the corporation in the amount of their value, and they prayed that a money judgment be entered against him for that amount, and the same be applied in satisfaction of the corporate debts. They also made Marie Schlapp, the wife of George Schlapp, a defendant in the proceeding, and sought to subject certain property, which they alleged she holds in fraud of the rights of the creditors of her husband, to the satisfaction of whatever judgment might be rendered against him. The circuit court, on the hearing, dismissed the petition as against Marie Schlapp. It also entered an order or judgment which determines that George Schlapp holds the \$10,000 of mortgage bonds as assets of the corporation, and required him to pay the same over to the receiver within 20 days from the rendition of the judgment, or pay to him the sum of \$4,880.50,—the amount which it is found would be due from him in case he retains the bonds. It is from this order that the present appeal is presented. By an amended abstract the defendant shows that since the rendition of the judgment he has delivered the bonds to the receiver, which delivery was made within the 20 days allowed therefor by the judgment, and that the circuit court has ordered the receiver to sell the same, and apply the proceeds to the payment of the debts. This order, however, was made at a term subsequent to that at which the judgment was entered.

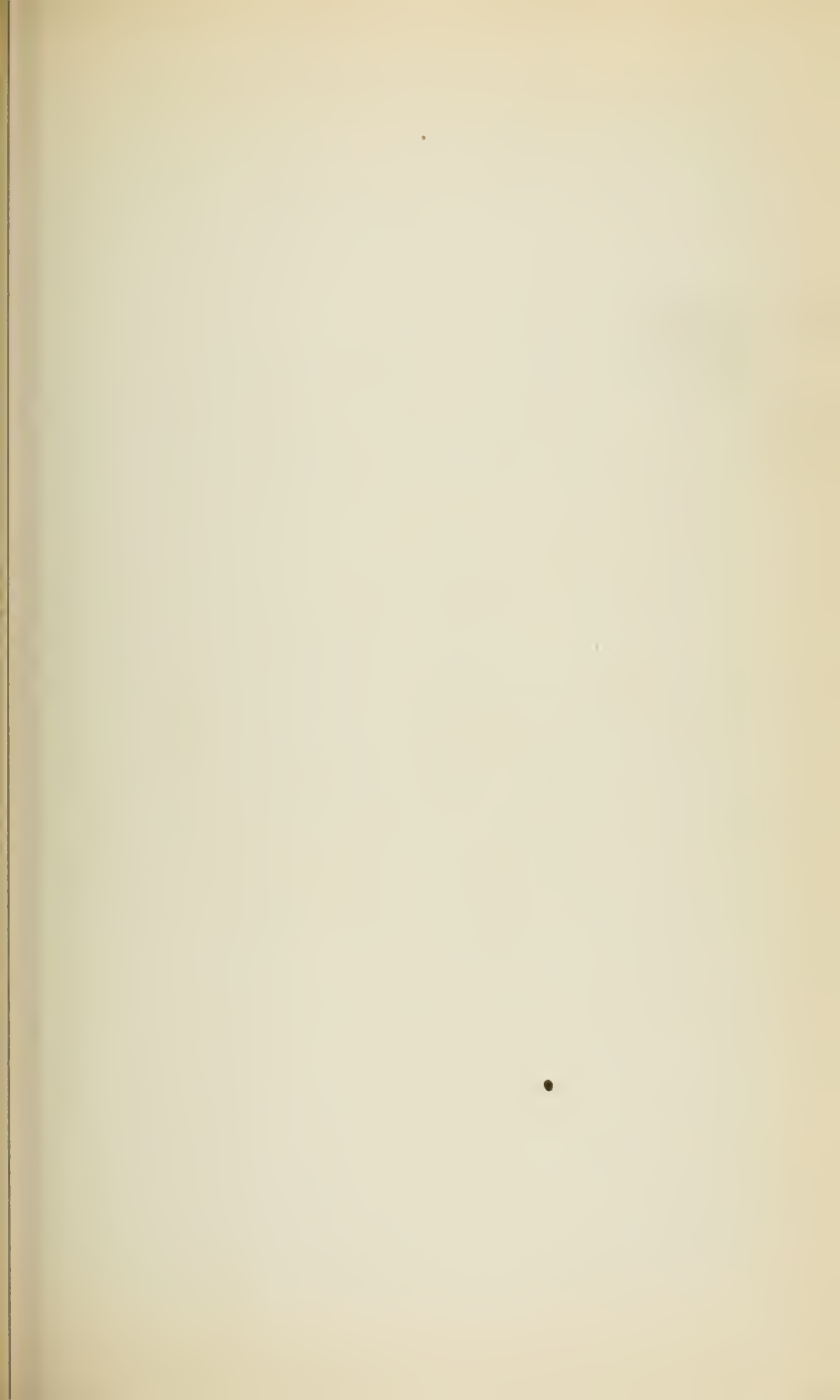
It is insisted by the appellants that, upon the facts, they were entitled to an absolute money judgment for the amount which defendant ought to pay as his pro rata share of the debts, and we think this position must be sustained. Under the

original judgment, defendant was required to pay over the bonds and money in his hands to the receiver; but, under the provision of the judgment set out above, he had the election to retain them, and pay to the receiver the balance remaining after deducting the indebtedness which the corporation was owing him. On the facts, he must be held to have made this election. He retained the property when the supplemental proceeding was instituted. He refused to surrender it to the officer who sought to recover it on the execution issued on the judgment, and he did not even offer to surrender it pending the supplemental proceedings. While he did not in express words express an election to retain it, all his conduct indicated that he had determined to avail himself of the privilege accorded to him by the judgment to retain it; and, having made that election, he cannot now be permitted, after the circumstances have changed, and the value of the property may have depreciated, to make a different election, and the circuit court erred in awarding him a second election. We do not consider the matters shown by defendant's amended abstract. The records embodied in that abstract relate to proceedings subsequent to the order or judgment appealed from. They do not relate to that judgment, and cannot be considered in determining the questions of its correctness. The appeal does not bring them here for review.

2. Having reached the conclusion that plaintiffs are entitled to an absolute money judgment against George Schlapp, we will inquire as to the correctness of the order dismissing the petition as against Marie Schlapp. The property which she claims to own is \$22,500 of United States bonds. These bonds formerly belonged to George Schlapp. It is claimed that he, in 1879, made an absolute gift of them to his wife. The proof is that he, being the owner of the bonds, and being about to go on a journey to a foreign country, called his wife's attention to them, and said to her: "I give these bonds to you, and I show you how to cut the coupons so you may know how to do it

yourself, and use the money for your living." He did not, however, deliver them to her, but took them to a bank, in the vault of which he had a drawer in which he kept his private papers. He placed them in the drawer, which he locked, and the key to which he retained. During his absence his father had access to the drawer, and as the interest on the bonds matured, he detached the coupons, and delivered them to the bank for collection, and as the money was collected it was paid to Mrs. Schlapp. When George returned from his journey, he assumed control of the drawer, and as the interest fell due on the bonds he would detach the coupons, and deliver them to the bank for collection, and when the money was received by the bank it was passed to his credit. The business was transacted in this manner for about two years; after which the bank, by George's direction, opened an account in the name of Mrs. Schlapp, in which it credited the interest as it was collected. He, however, continued to draw out money as he needed it, on checks drawn on the bank by himself in his wife's name. She has never had the bonds in her possession, nor has she ever seen them since they were first locked up in the drawer in the bank vault. It is very clear that she is not vested with the title to them. To constitute a valid gift of personal property, there must be an actual delivery of the property, or some act must be done which in law is the equivalent of such delivery. *Wiley v. Backus*, 52 Iowa, 401, 3 N. W. Rep. 431. Nothing of the kind was done in the present case. The title to the property remains in the husband. At his death it would descend to his personal representatives as assets of his estate, and during his life it may be subjected by his creditors to the payment of his debts. He claims to be insolvent, and said bonds are the only property within the reach of his creditors.

The judgment will be reversed, and judgment in harmony with this opinion will be entered in this court, or the cause will be remanded for the entry of such judgment in the court below, as the parties may elect. Reversed.



PETERS BOX & LUMBER CO. v. LESH et al.

(20 N. E. Rep. 291, 119 Ind. 98.)

Supreme Court of Indiana. Feb. 21, 1889.

Appeal from circuit court, Huntington county; Henry B. Sayles, Judge.

Action of replevin against the Peters Box and Lumber Company by W. H. and J. A. Lesh, to recover certain lumber. Judgment for plaintiffs, and defendant appeals.

A. Zollars, H. Colerick, and W. S. Oppenheim, for appellant. F. W. Rawles and T. E. Ellison, for appellees.

COFFEY, J. This action was brought by the appellees against the appellant in the Allen circuit court, to recover certain lumber and logs described in the complaint. The cause was put at issue by a general denial, and the venue was changed to the Huntington circuit court. The cause was tried by a jury, who returned a verdict for the appellees, assessing the value of the property at \$270. Motion for a new trial overruled and excepted to, and judgment on the verdict.

The errors assigned in this court are: (1) That the Huntington circuit court had no jurisdiction over the cause; (2) that the court erred in overruling the motion for a new trial. No point is made in the brief of counsel for the appellant on the first assignment of error, and, therefore, the same is waived. The evidence on the part of the appellees tends to prove that the appellant is a corporation carrying on a large saw-mill and lumber business at the city of Fort Wayne, Ind.; that the appellees, in November, 1883, had been and were operating a saw-mill at Sidney, Kosciusko county, Ind.; that a man calling himself Milliard came to Sidney, and represented to the appellees that he was the agent of the appellant, to buy lumber and logs for it. The appellant had, before that, to the knowledge of the appellees, bought such property in that vicinity, and they supposed he was such agent. One of the appellees went with the said Milliard to several places, where he bought logs for the appellant, and they finally sold him, as the agent of appellant, the property in question, for \$263. By their agreement, it was to be measured, put on the cars, the measurement to be sent to the appellant and it to immediately pay the bill by a draft on New York. The property was measured, sold, and shipped on Monday, and Milliard left Fort Wayne on Tuesday. The draft not coming, one of the appellees went to Fort Wayne on Tuesday, where he met Mr. Papa, the appellant's president, and asked him to pay for said property. Papa denied the authority of Milliard to act for the appellant, and, after demand, refused to deliver the property, and also refused to say much about the contract of appellant with Milliard, or to say how much he had been paid for the property. The appellant did in fact pay Milliard \$125 for the property in controversy. Immediately after the delivery of the property to it by Milliard, the appellant commenced to saw up the logs and

mix the lumber with its own. Up to this point there seems to be no disagreement about the facts. It is claimed by the appellant that bills of lading were made out for the property in the name of Milliard, with the consent of one of the appellees, but this fact is disputed by the appellees, who claim that there was nothing made out at the freight office from which the property was shipped except a receipt for the property.

The court gave to the jury the following instruction: "Should you find from the evidence that the title and right to possession of the property in controversy is in the plaintiffs, and if you further find that the defendant, in the purchase of said property, was in no fault, then you should find the value of said property at what you believe was its fair market value in the condition and place it was situated when the plaintiffs demanded the same of the defendant, if such demand were made, exclusive of any expenses or labor the defendant may have invested in manufacturing the same into lumber up to the time said demand was made. But if the evidence shows defendant knew or ought to have known that Milliard was not the real owner, then you should not take into consideration any expense or labor the defendant put upon said logs and lumber, but give the plaintiffs a verdict for the full value at the time and place it was demanded, and in its condition then." To the giving of this instruction the appellant excepted.

The court had previously instructed the jury, substantially, that if Milliard had represented himself to the appellees as the agent of the appellant, and they, relying on such representation, sold him the property in controversy as such agent, without any intention of vesting the title in him, but intending to vest it in the appellant, when he was in fact not the agent of the appellant, such sale was void and vested no title in Milliard, and he could not by a subsequent sale vest title to the property in the appellant.

This case comes clearly within the law as enunciated in the case of *Alexander v. Swackhamer*, 105 Ind. 81, 4 N. E. Rep. 433, and 5 N. E. Rep. 908. It is there distinctly decided that in a case like this no title passes to the fraudulent purchaser, and that such purchaser cannot by any subsequent sale transfer title to another, for the reason that he has none to transfer. It must be true, then, that at the time the appellees demanded possession of the property of the appellant, at Fort Wayne, the title was in them, as well as the right to the possession. It was the duty of the appellant to surrender to them such possession, and upon its failure or refusal to do so, what were they entitled to recover? It is earnestly contended by the learned counsel for the appellant that, as the freight from Sidney to Fort Wayne was paid by the appellant, the measure of the appellee's damages was the value of the property at Sidney. But it must be remembered that the appellant did not purchase the property at Sidney. It was purchased at Fort Wayne; and the ap

pellant must be presumed to have taken into consideration the amount he would be compelled to pay to obtain possession of the property, in fixing its value at the time of the purchase. It certainly will not be contended that the appellant could refuse to deliver the possession, upon demand, because it had paid the freight. Nor can it be successfully claimed that Milliard, the fraudulent purchaser, could claim to have the freight refunded to him if he had been caught at Fort Wayne, before he had disposed of the property. Section 572, Rev. St. 1881, provides that in actions to recover the possession of personal property judgment for the plaintiff may be for the delivery of the property, or the value thereof in case a delivery cannot be had, and for damages for the detention thereof. It is not denied that at the time of the demand the appellant had the property in controversy, and that it could have delivered it to the appellees. By refusing to do so, we think it became liable to the appellees for the value of such property at the time and place of such demand and refusal, less any additional value it may have had by reason of labor bestowed upon it, in good faith, before such demand was made. *Mitchell v. Burch*, 36 Ind. 529; *Wells*, Rep. §§ 549, 563; *Cushing v. Longfellow*, 26 Me. 306. It is claimed that in actions for trover the rule is different, but, as this is an action of replevin, we need not, and in fact do not, decide that question.

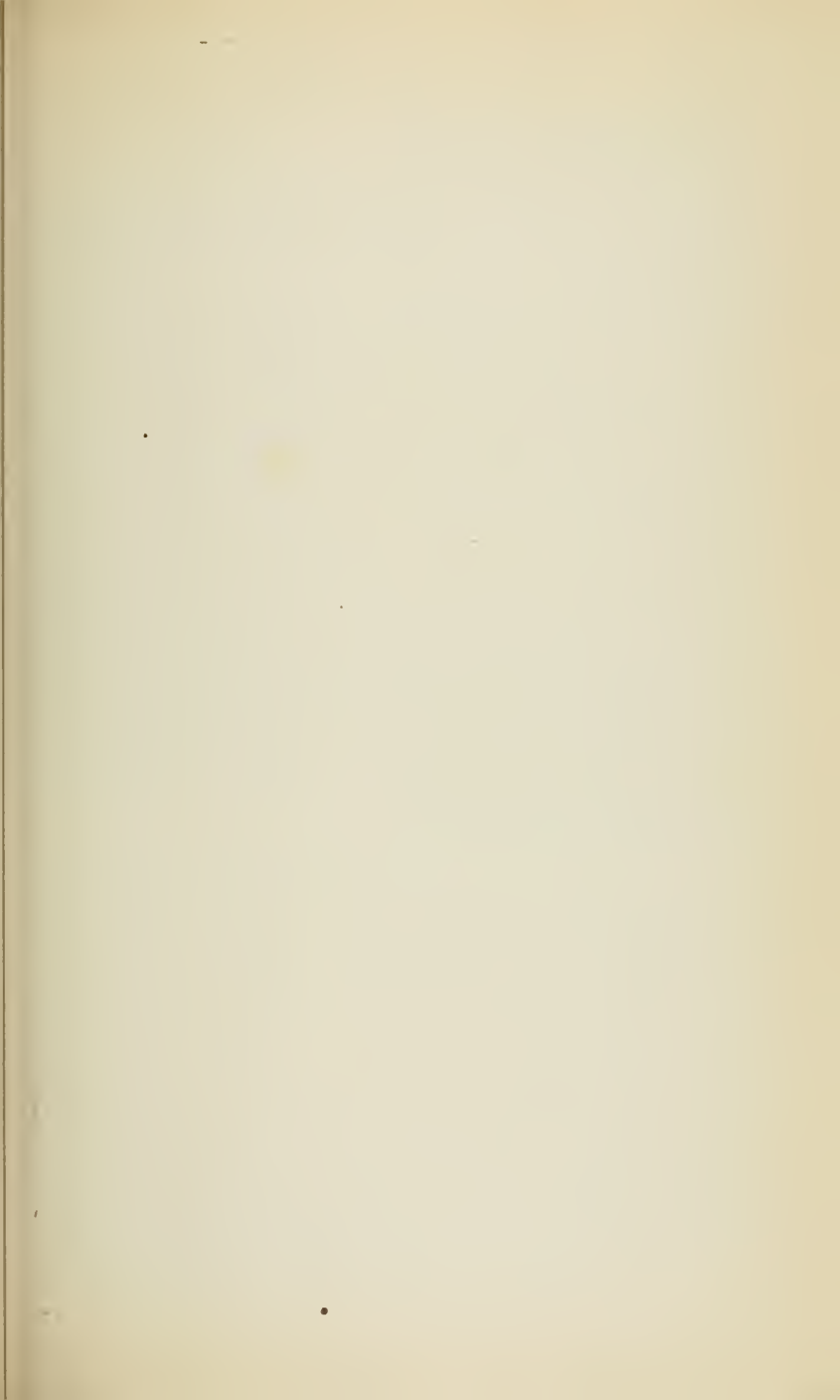
It is earnestly insisted by the learned counsel for the appellant that as the appellees permitted Milliard to take bills of lading in his name, and thus enabled him to sell the property to an innocent purchaser for full value, they are now estopped from claiming the property in controversy in the hands of the appellant. Instructions were given by the court,

and others asked by the appellant, and refused, which fairly raise this question.

The court instructed the jury that if Milliard had the bills of lading made out in his own name as the consignor, to enable him to fraudulently sell the same to the defendant, and the plaintiffs knew that the property was so shipped, and that Milliard's purpose in so shipping said property was that he might fraudulently sell the same to the defendant, then their verdict should be for the defendant. In the case of *Alexander v. Swackhamer*, supra, this court, by Mitchell, J., says: "The appellee was not estopped on the ground of negligence in delivering the cattle under the circumstances disclosed. To constitute an estoppel the party sought to be estopped must have designedly done some act or made some admission inconsistent with the claim or defense which he proposes to set up, and another must have acted on such admission with his knowledge and consent." If the appellees acted under the belief that Milliard was the agent of the appellant, and that they were selling the property to the appellant, basing such belief on the representations made to them by Milliard, we do not think that they would be estopped from claiming their property by reason of permitting the bills of lading to be made out in the name of the supposed agent. The instructions asked by the appellant ignore this phase of the case, and we think the court properly refused to give them. We are of the opinion that the instruction given by the court properly stated the law applicable to the case as made by the evidence.

We find no error in the record for which the judgment should be reversed. Judgment affirmed.

Petition for rehearing overruled.



PHILADELPHIA & R. R. CO. v. WIREMAN.

(83 Pa. St. 264.)

Supreme Court of Pennsylvania. Jan. 20, 1879.

Action by the Philadelphia & Reading Railroad Company against Jacob Wireman to recover the value of property misdelivered by said company to defendant. Verdict for defendant, and plaintiff appeals. Affirmed.

Spaulding & Son, of Elmira, sold certain merchandise to one Fislser, payment to be made in defendant's paper, indorsed by Fislser. The vendors delivered the goods to the Lehigh Valley Railroad Company to be forwarded to defendant at plaintiff's station in Philadelphia, at the same time sending Fislser their bill, the receipt of the railroad company, and a draft for defendant's acceptance and Fislser's indorsement. The sellers then hearing that Fislser and Wireman were not responsible, and failing to get additional security from them, left orders with plaintiff's railroad not to deliver the goods to defendant. The goods having been transhipped to plaintiff's railroad, the latter delivered them to defendant on his presentation of the memorandum of shipment and the Lehigh Valley Railroad Company's receipt, which Spaulding & Son had sent to Fislser, and the latter had turned over to defendant. Spaulding & Son returned the paper of Wireman, and brought suit in Elmira against plaintiff railroad company for the value of the goods, and obtained judgment therein. Plaintiff paid this judgment, and then brought this suit.

Before SHARSWOOD, C. J., and MERCER, GORDON, PAXSON, WOODWARD, TRUNKEY, and STERRETT, JJ.

Thomas Hart, Jr., for plaintiff in error.
Rufus E. Shapley, for defendant in error.

STERRETT, J. The plaintiff's claim, as appears by the bill of particulars, was based on the unauthorized delivery of the goods consigned to the defendant Wireman. Hence, the main question was, whether the latter had a right to receive them at the time they were delivered to him by the plaintiff's agent. To show that he had not, the plaintiff mainly relied on the qualification and direction contained in its way-bill, to "deliver only on the order of H. C. Spaulding & Son, of Elmira." Resting upon this alone, the delivery to Wireman, without the order of Spaulding & Son, would have been unauthorized; but the testimony adduced by the defendant tended strongly to prove that Fislser had purchased the goods from Spaulding & Son, to be delivered at Elmira, consigned to Wireman, and to be paid for in the negotiable paper of the consignee, endorsed by Fislser; that, pursuant to agreement, the goods were delivered at Elmira to the Lehigh Valley Railroad Company, whose receipt, for their delivery to Wireman at Philadelphia, without any qualification or restriction, was taken by Spaulding & Son, and immediately sent

by them to Fislser in a letter, advising him of the shipment and enclosing draft for the amount to be accepted by Wireman, endorsed by Fislser and remitted to the consignors; and that on the arrival of the goods in Philadelphia, Wireman, who had agreed to purchase them from Fislser, presented the receipt of the Lehigh Valley Railroad Company, paid the freight and received the goods. If these facts were found by the jury, as they doubtless were, from the testimony submitted to them, they constituted a complete answer to the alleged want of authority in Wireman to demand and receive the consignment. The learned judge was therefore clearly right in receiving the testimony and submitting it, as he did, to the jury.

The testimony fairly justified the inference that after Spaulding & Son had taken the receipt of the Lehigh Valley Railroad Company, and mailed it to Fislser, they doubted the solvency of Wireman and Fislser, and induced the company to restrict the delivery to the consignee, by adding to the bill of lading the words above quoted, and when the goods were transferred to the plaintiff company, at Allentown Junction, the same direction was inserted in its way-bill. But neither Fislser nor Wireman was a party to this change in the terms of shipment, and were not bound by it. If the goods were purchased and delivered at Elmira, as contended by the defendant, the title had passed from Spaulding & Son and vested in the purchaser. After an unqualified delivery to the carrier at Elmira they were no longer at the risk or under the control of Spaulding & Son, and they had no right to say that, on reaching their destination, they should not be delivered to the consignee without their order. If the plaintiff company had refused to deliver the goods on presentation of the receipt and tender of the freight by the consignee, he could have sustained replevin by proving the facts which the jury must have found under the instructions of the court in this case.

There may be apparent hardship in the failure of the plaintiff to recover, after having been sued by the consignors, in the state of New York, for misdelivery of the goods, and compelled to pay the value thereof; but with this we have nothing to do. It may be that the right of the consignee to receive the goods, was not urged or sustained in that case as it was in this. In the present case, as we have seen, the action was based exclusively on the ground that the consignee had no right to receive the goods without the order of the consignors, a position which the plaintiff failed to maintain. Perhaps the result might have been different if the action had been in the name of the consignors to the use of the railroad company. As it was, however, the case hinged on the question of Wireman's authority to receive the goods. The facts were for the jury, and the testimony, submitted to them with appropriate instructions, fully justified the verdict.

Judgment affirmed.

PHILLIPS v. REITZ.

(16 Kan. 396.)

Supreme Court of Kansas. January Term, 1876.

Error from Johnson district court.

Replevin, brought by Perry Phillips, for the undivided one-half interest in nine head of horses, one phaeton, two buggies, harnesses, etc. Phillips claimed to be the owner, and entitled to the possession of the property, and alleged that it had been wrongfully taken and was wrongfully retained by Vick Reitz. Reitz answered, that the property in question was the property of one I. N. Phillips, and not the property of plaintiff; that defendant was sheriff of Johnson county, and as such sheriff he had received and held a writ of execution to him duly issued and delivered, upon a judgment duly recovered in the Johnson county district court, by B. A. Feineman & Co. as plaintiffs against said I. N. Phillips as defendant, for \$160.35 and costs, April 15th 1874; that by virtue of said writ of execution he (Reitz) as sheriff had levied upon said property as the property of said I. N. Phillips; that he found said property in the possession and under the control of said I. N. Phillips, and that he (the sheriff) had taken the same, and now held and retained the possession thereof as such sheriff, and by virtue of said writ of execution. Trial at the August term 1874. The evidence showed that I. N. Phillips and one Thomas Muir had been partners, carrying on the livery business in the city of Olathe for a long time; that the horses, carriages, etc., levied on by Sheriff Reitz had been owned by said Phillips & Muir, and used in their said business; that said I. N. Phillips, in March 1874, was largely indebted, and suits were pending against him; that his homestead, and all his real property except the undivided half of the livery-stable lot was mortgaged; that Perry Phillips, the plaintiff, was his brother; that Perry resided on a farm ten miles distant from Olathe; that on the 4th of April 1874 said I. N. Phillips and one McKeever went to the residence of the plaintiff, and there said I. N. Phillips sold his interest in the livery stable and stock to the plaintiff for \$1,200, for which sum the plaintiff executed his promissory note, which was immediately indorsed to said McKeever as collateral security for the payment of the purchase-money of a farm sold by said McKeever to said I. N. Phillips, upon which farm McKeever held a mortgage given to secure said purchase-money; that the livery stock and property was all at Olathe at the time, and the plaintiff did not go to see or take possession of it; that I. N. Phillips and Muir continued the livery business as partners, but one witness for plaintiff had testified that plaintiff had employed him (the witness) to take charge of the stock and attend to the plaintiff's interests in the livery business. It also appeared that Feineman & Co. had recovered a judgment against I. N. Phillips, April 15th 1874, and an execution thereon had been issued, as alleged in Reitz's answer; that Reitz had levied said execution upon the property in controversy on the 20th of April; that

thereupon I. N. P. dispatched a messenger for the plaintiff who immediately came to Olathe, and then (after said levy) said I. N. P. went with the plaintiff to the livery stable, and undertook to make formal delivery of the property to the plaintiff, but they were notified by Muir that the sheriff had levied upon the property and had left it in his (Muir's) care, and that no delivery or change of possession could be made; that after said levy Muir and I. N. Phillips had a settlement between themselves, which included partnership accounts in the livery business down to the day of the settlement. It also appeared that Perry Phillips had obtained possession of the property, at the commencement of the action, and that at the time of the trial a part of the stock, and two of the carriages were in the possession of I. N. Phillips. The material part of the instructions is copied into the opinion, *infra*. The jury found for the defendant, and assessed the value of the property at \$732.50. New trial refused, and judgment on the verdict in favor of defendant Reitz for a return of the property, etc. Phillips brings the case here on error.

John T. Burris and John T. Little, for plaintiff.

BREWER, J. This was an action of replevin, and the question was as to the validity of a sale claimed to have been made by one I. N. Phillips to plaintiff. Defendant was sheriff of Johnson county, and under an execution against I. N. Phillips levied on the property. The property consisted of livery stock in the city of Olathe. Plaintiff was a farmer living some miles off in the country. The sale was made at the farm of plaintiff. He was not from the time of the sale to the time of the levy in Olathe, and I. N. Phillips remained in the actual charge, though, as was claimed, as the agent of plaintiff. The errors alleged are in the giving of instructions. The two propositions to which specific objections are made are—

1st, "The unexplained possession by the vendor, after the sale, is conclusive evidence of fraud."

2d, "The actual participation by the vendee in the vendor's fraudulent intent, is not necessary to avoid the sale. It is enough if he knew of such intent, or of facts sufficient to excite the suspicions of a prudent man, and put him on inquiry."

That good faith is as essential to support a sale like the one before us, as a sufficient consideration, will not be questioned. *Twyne's Case*, 3 *Coke*, 80, 1 *Smith's Leading Cases*, 42; *Baldwin v. Peet*, 22 *Texas*, 708; *Chandler v. Van Roeder*, 24 *How. (U. S.)* 224; *Pulliam v. Newberry's Adm'r*, 41 *Ala.* 168. And that a continuance of possession is evidence of a want of good faith, as well as a want of sufficient consideration, is settled by the statute, *Gen. Stat.*, p. 504, § 3. That possession may be retained, and still there be a valid sale, is also clear, and so in unmistakable language the court instructed the jury. And this instruction, as to the effect of an unexplained possession, must be considered in reference to and as quali-

fied by the other instructions. There has been a vast amount of controversy as to the effect of a retained possession upon an alleged sale, when challenged by a creditor, or subsequent purchaser. It is all based upon the idea that possession follows title, and that where there is a transfer of title there should be a change of possession. In some courts it has been held, that a failure to change possession is so inconsistent with a transfer of title that it creates a presumption of law against the alleged sale. This presumption of law, no evidence of the good faith of the parties, and of the payment of full consideration, can overthrow. In others, such failure to change possession is merely evidence against a sale, which may be explained. The presumption is one of fact, and like all presumptions of fact open to explanation by other testimony. It is like the presumption of guilt which flows from the possession of recently-stolen property. It casts upon the possessor the duty of explanation. (See for a full discussion of this question and the authorities thereon, *Twyne's Case*, and notes thereon, in 1 *Smith's Leading Cases*, *Hare & Wallace's notes*, p. 47, and following.) Our statute has accepted the latter construction, and provides in the section cited, that "Every sale * * * unaccompanied by an actual and continued change of possession, shall be deemed to be void, * * * until it is shown that such sale was made in good faith, and upon sufficient consideration." In other words, proof of actual good faith, and payment of sufficient consideration, does away with the presumption which flows from a re-

tained possession—shows that such possession does not imply a retained title, or secret trust—in short, explains the possession. Until it is so explained, it is evidence against the sale; and unless so explained, it is conclusive evidence. To that extent, and only to that extent, do we understand the instructions of the court, taken as a whole, to have gone; and in that is no error. See upon this, *Ayres v. Moore*, 2 *Stewart* (Ala.) 336; *Peck v. Land*, 2 *Kelly* (Georgia) 1; *Fleming v. Townsend*, 6 *Georgia*, 104; *Beers v. Dawson*, 8 *Georgia*, 557; *Robinson's Ex'rs v. Robards*, 15 *Mo.* 459.

As to the second objection, the court distinctly charges that the vendee must be a party to the fraud to avoid the sale, and then, in another instruction, apparently in explanation of what was necessary to make him a party to the fraud, charged that it was enough if he knew of the vendor's fraudulent intent, or of facts sufficient to put him upon inquiry. Is this error? We think not. Knowledge of facts sufficient to excite the suspicions of a prudent man, and put him upon inquiry, is, as a general proposition, equivalent to knowledge of the ultimate fact. *Garahy v. Bayley*, 25 *Texas*, (Suppl.) 294; *Pitney v. Leonard*, 1 *Paige* (Ch. 461. And if the vendee knew of the fraudulent intent of the vendor, and bought with that knowledge, he can scarcely claim to be a bona fide purchaser, for he was knowingly helping the vendor to accomplish the fraud and do the wrong.

There appearing no error in these rulings, the judgment must be affirmed.

All the justices concurring.

PITKIN et al. v. NOYES.

(48 N. H. 294.)

Supreme Judicial Court of New Hampshire.
Coos. Jan., 1869.

Assumpsit by Samuel P. Pitkin and others against Asa Noyes for nonperformance of a contract to deliver potatoes. Case reversed. Defendant, in 1863, made a verbal agreement with plaintiffs' testator to raise three acres of potatoes, and deliver them during the year at testator's place of business, for twenty cents a bushel; and, according to some of the evidence, this agreement provided that he should do the same in 1864. Defendant raised and delivered the potatoes in 1863, but plaintiffs raised some question as to the price to be paid, claiming that the previous agreement was not binding because not in writing. They finally agreed in January, 1864, to pay twenty cents for the 1863 potatoes if defendant would raise and deliver the same quantity in 1864. This action was brought for failure to deliver the potatoes for 1864.

Ladd, for plaintiffs. Ray, for defendant.

BELLOWS, J. If the bargain in the spring of 1863 was for the potatoes of that year, and also for the year 1864, it would be within the statute of frauds, as to the potatoes of the last year at least, as an agreement not to be performed in one year. Emery v. Smith, 46 N. H. 151. The question then is, whether a valid agreement for the crop of 1864 was made in January of that year; and we propose to inquire in the first place whether such a contract as is stated in the testimony of the plaintiff is to be regarded as a contract for work, labor and materials, or a contract of sale of the crop of potatoes. If the former, it is not within the statute of frauds, but if the latter it is.

It is manifest from the nature of the case that it must be very difficult to draw a line of distinction between these two classes of contracts. In some instances the distinctions must be very nice, and it is to be expected that we should find the authorities not altogether harmonious.

It is now settled, however, that a contract for the sale of goods is not without the statute because it is executory, and it is well settled that a contract for work and labor and materials found is not within the statute.

In the early English cases it was held that a contract for the sale of articles to be afterwards manufactured and delivered was not within the statute; as in *Towers v. Osborne*, 1 Str. Rep. 506, where defendant bespoke a chariot; and so of a contract to deliver wheat not then threshed, as in *Clayton v. Andrews*, 4 Burr. 2101. In both of these cases the decision went upon the ground that the contract was executory. But these cases were soon after qualified by decisions holding that contracts of sale though executory were within the statute. *Randall v. Wyatt*, 2 H. Blk. 63, and *Cooper v. Elston*, 7 T. R. 14; and yet the results reached in *Towers v. Osborne* and *Clayton v. Andrews* have

been in some cases recognized as correct, although upon a different ground; namely, that the articles were not existing at the time of the bargain, and so incapable of delivery and acceptance; as in *Groves v. Buck*, 3 M. & S. 178; 2 Starkie Evl. 698, and cases cited in note C.

But in *Garbutt v. Watson*, 5 B. & Ald. 613, it was held that a contract to sell 100 sacks of flour, at a price fixed, to be ready in three weeks, was within the statute, though the flour was not then ground.

Of the same character is *Smith v. Surman*, 9 B. & C. 561, where it was decided that a bargain for certain timber trees growing on the owner's land at a fixed price per foot, was a contract for the sale of goods, and within the statute, although to be cut afterwards by the seller; holding that when cutting them he was doing work for himself and not for the buyer. *Littledale, J.*, holds that where the contracting parties contemplate a sale of goods, although at the time of making the contract the subject matter does not exist as goods, but is to be converted into that state by the seller's bestowing work and labor on his own raw materials, that is a case within the statute; and he says further that it is sufficient, if at the completion of the contract the subject matter be goods, wares and merchandise; and *Parke, J.*, says the true question in such cases is whether the contract be substantially a contract for the sale of goods, or for work and labor and materials found.

These two last cases modify materially the doctrine of *Groves v. Buck*, and the earlier cases of *Towers v. Osborne* and *Clayton v. Andrews*, and hold that it is not essential that the goods be capable of delivery at the making of the contract, to bring it within the statute. So the fact that the goods are to be transported to another place and there delivered does not take the case out of the statute. *Kent v. Huskinson*, 3 B. & P. 233, and *Astey v. Emery*, 4 M. & S. 262.

The weight of American authority is in accordance with the doctrine of *Garbutt v. Watson*, 5 B. & Ald. 613, and *Smith v. Surman*, 9 B. & C. 561, that the mere fact that the goods are not, at the making of the contract, in the condition in which they are to be when delivered, does not take a case out of the statute.

If, however, a person contract to manufacture and deliver at a future time certain goods, at prices then fixed, or at reasonable prices, the essence of the agreement being that he will bestow his own labor and skill upon the manufacture, it is held not to be within the statute. If on the other hand the bargain be to deliver goods of a certain description at a future time, and they are not existing at the time of the contract, but the seller does not stipulate to manufacture them himself or procure a particular person to do so, the contract is within the statute. The distinction is that in the one case the party stipulates that he will himself manufacture the article and the buyer has the right to require him to do it, and cannot be compelled to take one as good or even better if made by another, while in

the other case the seller only agrees to sell and deliver the article, and is under no obligation to make it himself, but may purchase it of another.

This is the doctrine laid down by Shepley, J., in *Hight v. Ripley* et al., 19 Maine Rep. 137, where the distinction between the cases is well explained, and the doctrine has been since followed by the Maine courts, *Abbott v. Gilchrist* et al., 38 Maine 230; *Fickett v. Swift*, 41 Maine 68; and *Edwards v. Grand Trunk Railway Co.*, 48 Maine 379. This doctrine of *Hight v. Ripley* is recognized as sound by Prof. Parsons in his work on Contracts, 2d vol. 334, where in a note the authorities are collected.

This distinction is also recognized in Massachusetts. In *Gardner et al. v. Joy*, 9 Met. 179, Shaw, C. J., lays it down thus: "If it is a contract to sell and deliver goods, whether they are then completed or not, it is within the statute. But if it is a contract to make and deliver an article or quantity of goods it is not within the statute." Here the contract was for one hundred boxes of candles by a manufacturer, and although the candles were not then made it was held that the contract was within the statute, there being no stipulation by the manufacturer to make them.

In *Mixer v. Howarth*, 21 Pick. 205, it was held that an agreement by defendant to build a carriage for the plaintiff, or to finish one for him from materials partly wrought, was not within the statute; it being held by Shaw, C. J., that a contract to sell an article then existing, or which the vendor usually has for sale in the course of his business, is within the statute; but it is otherwise if the agreement by a workman be to put materials together and construct an article for the employer, whether at an agreed price or not.

The same general doctrine is recognized in *Spencer v. Cone* et al., 1 Met. 283, holding that an agreement to make certain machines for another at a specified price is not within the statute, but an agreement for labor and materials. The distinction is also recognized in *Waterman v. Meigs* et al., 4 Cush. 499, and in *Lamb v. Crafts*, 12 Met. 356.

In New York the distinction is fully recognized between an agreement for the sale and delivery at a future day of articles then existing, and an agreement to sell and deliver articles not thus manufactured, but to be made afterwards, holding that the latter are contracts for work and labor and materials found, and not within the statute; but the New York cases do not appear to mark the difference between the contract of a party to manufacture and deliver an article, and his contract to deliver it merely, whether made by himself or another. A contract of sale though executory is held to be within the statute. *Bennett v. Hull*, 10 Johns. 364; *Jackson v. Covert*, 5 Wend. 141.

The cases that hold that a contract to make an article is not within the statute are *Crookshank v. Burrell*, 18 Johns. 58, which was an agreement to make the woodwork of a wagon; *Sewall v. Fitch*, 8 Cow. 215, which was a contract for nails of a particular manufacture, but not then

made; *Robertson v. Vaughn*, 5 Sandford, 1, which was a contract to make and deliver one thousand molasses shoos at a fixed price, which was decided not to be within the statute, upon the authority of *Sewall v. Fitch*. Duer, J., who gave the opinion, thought the case to be within the mischiefs of the statute and was disposed to question the earlier cases.

So in *Bronson v. Wiman*, 10 Barb. 406, where it was held that a contract for flour to be ground from wheat, bargained for, but not then received, is not within the statute.

So in *Donovan v. Willson*, 26 Barb. 138, there was a contract to deliver at a future day an article to be manufactured by defendant, and it was held not to be within the statute.

So is *Parker v. Schenck*, 28 Barb. 38, and *Mead v. Case*, 33 Barb. 202, where the agreement was to finish a monument, with the inscription, and deliver it to the other party.

In most of the cases the party himself agreed to manufacture the goods, and that would bring them within the doctrine of *Hight v. Ripley*, 19 Maine, 137, before cited, although the distinction does not seem to be adverted to.

In *Downs v. Ross*, 23 Wend. 270, a contract for the sale of seven hundred bushels of wheat, part of which was yet to be threshed, and the rest to be cleaned more thoroughly, and all to be delivered in six days at a price fixed, was held to be a contract for the sale of goods, and within the statute; Cowen, J., dissenting upon the ground that the question was settled by the early English and New York cases; but saying that were it an open question he would not deny that a contract to manufacture and sell would more correctly be considered a sale within the statute. This case falls within the principle of *Garbutt v. Watson*, 5 B. & Ald. 613, and *Smith v. Surman*, 9 B. & C. 561, before cited, where something was to be done by the seller to perfect the goods before delivery.

In Connecticut it was held that an agreement to deliver to a party one hundred sewing machines of a certain description, at a time and place designated, on condition that a part of them not then completed were finished in season by a third person who worked in seller's shop and with his materials, was a contract of sale, and not for the manufacture of the machines, but even if it were otherwise as to the part not completed, sixty-four in number, still as the contract was entire and as it was clear that in respect to the thirty-six it was a sale, the whole it was said must be regarded as within the statute. *Atwater v. Hough*, 29 Conn. 508.

In *Phipps v. McFarlane*, 3 Minn. 109, (Gil. 61,) there was an agreement to furnish materials, and fit them for a steam mill, which was portable; and it was held that it was not a contract of sale; but it blends together the price of the thing, and compensation for work and labor and materials, and is not within the statute.

In our own courts in *Ghman et al. v. Hill*, 36 N. H. 311, where there was a contract made in August to sell to the plaintiff all the sheep pelts taken off by the

seller who was a butcher, between the first of July and the first of October, it was held that in respect to all, as well those not then taken off as those that were ready for delivery, it was a contract of sale of goods, and not for work and labor, and was within the statute.

In 2 Kent's Commentaries 504 and 511, note b, the earlier English doctrine is recognized that if the article sold existed at the time in *solido*, and was capable of delivery, the contract was within the statute; but otherwise if it was to be afterwards manufactured or prepared for delivery by work and labor.

And much the same is Story on Con. sec. 787, and note. In Browne on Frauds, this subject is well considered, and the conclusion reached is expressed in section 308, that if the contract be essentially a contract for the article manufactured or to be manufactured, the statute applies to it; but if it is for the manufacture, for the work, labor and skill, to be bestowed in producing the article, the statute does not apply.

Upon the whole we are satisfied that if the contract be substantially for the goods, it is within the statute, whether they are then manufactured or not; but it is otherwise if the contract be to manufacture and deliver the goods, that is, if the labor and skill of the seller is stipulated for and makes part of the contract.

It is quite obvious that the labor and skill of a workman may be bargained for in this way as well as in any other—his compensation being in the price of the article he makes; and the only question in the particular case is whether the skill and labor of that workman was especially contracted for, so that the employer was entitled to that, and could be obliged to take no other.

In many cases, then, there could be no difficulty in determining whether the labor and skill of the particular person was of the essence of the contract, or whether it was, in the contemplation of the parties, substantially a sale.

If an artist contract to paint the portrait of another, although he is to find the canvas and paints, it would readily be conceded that the substance of the contract was for the skill and labor of the particular artist. So if a printer contract to print a book for an author, though he is to furnish the paper and ink, as held in *Clay v. Gates*, 1 H. & N. 73. So if a carpenter agree to erect a building for another upon his land and find all the materials, it is a contract for work and labor and materials. *Courtright v. Stewart*, 19 Barb. 455. So it would be if a person carry cloth to a tailor who agrees to make a coat for him, even if the tailor is to find the trimmings.

The contract may be for work and labor simply, for work and labor and materials, or for the sale and delivery of goods, wares and merchandise. In respect to the two last the line of separation must often be indistinct and difficult to trace; and we are not able to discover any established rule or criterion by which to distinguish them readily.

The rule established in New York, namely, that, if the goods contracted for are

not then in existence but are still to be manufactured, it is to be considered as a contract for work and labor, originated at an early period in a disposition of the English courts to limit the operation of the statute of frauds, and must obviously exclude from the operation of that statute a large class of cases that are within its mischiefs, and at the same time are, in substance, contracts of sale.

On the other hand the doctrine of *Littledale, J.*, in *Smith v. Surman*, 9 B. & C. 561, is that if the parties contemplate a sale of goods, although the subject matter at the time of making the contract does not exist in goods, but is to be converted into that state by the seller bestowing work and labor on his own raw materials, it is a case within the statute—holding that it is sufficient, if at the time of the completion of the contract the subject matter be goods, wares and merchandise; and this general doctrine seems to be recognized in *Watts v. Friend*, 10 B. & C. 446, per Lord Tenterden. So in *Lee v. Griffin*, 1 Best & Smith, Excheq. Rep. 272, (23 E. S. Dig. 277.) it was held that a contract to make a set of artificial teeth, and fit them to the mouth of the other party who died before they were completed, was a contract for the sale of goods and within the statute.

This doctrine of *Littledale, J.*, brings us round to the question whether in the contemplation of the parties the contract was substantially a contract for the sale of goods, or for work and labor.

In Massachusetts a distinction is made between a contract for the sale and delivery of articles which the seller is habitually making, and a contract to make an article pursuant to the agreement, the former being regarded as a contract of sale, but the latter not. *Lamb v. Crafts*, 12 Met. 353. This must be because it was supposed to bear on the question whether the stipulation that the party himself should make the goods was of the essence of the contract, and so a contract for work and labor.

As a rule of law, however, it does not strike us as affording a very satisfactory distinction between a contract of sale, and a contract for work, labor and materials. If it be of the substance of the contract that the manufacturer shall himself apply his own labor and skill to the manufacture of the goods for the buyer, who is not bound to receive any other, it can make no difference whether the goods are habitually made by such manufacturer or not. If he does habitually make such goods for sale, he may nevertheless contract to bestow his own labor and skill in making them for a particular person, and the real inquiry is whether in a given instance he has done so or not.

In the absence of explicit and distinct terms, the circumstances may be such as to indicate clearly that the labor and skill of the particular artist was especially stipulated for, as in the case of an agreement to paint a portrait, to execute a marble statue, or any other work of high art. In such cases, and especially where the materials used in the work are of slight importance compared with the labor and skill of the artist, it might well

be supposed that the skill and labor was of the essence of the contract, and such seems to have been the opinion of Pollock, C. B. in *Clay v. Yates*, 1 H. & N. 73, before cited.

On the other hand if the contract be for goods which are usually in the market, and there is nothing in the terms used or in the nature of the case to indicate that the labor and skill of the contractor was stipulated for especially, it must be deemed a contract of sale and within the statute.

If the article to be manufactured or the crop to be raised is not a marketable commodity, but of value chiefly to the one who contracts for it, that circumstance has been supposed to indicate that the labor and skill of the other was bargained for. *Browne on Statute of Frauds*, sec. 308, citing *Cason v. Cheely*, 6 Geo. Rep. 554, which is based upon such a distinction. Whether such a distinction as a rule of law is well founded or not, it certainly presents a strong equity in favor of holding such cases as not to be within the statute.

In the case before us the question is whether the essence of the contract was a sale of the expected crop of potatoes at twenty cents a bushel, or a stipulation for defendant's work and labor and materials in producing them. The proof is of an agreement by defendant to raise three acres of potatoes in 1861, and deliver them at the plaintiffs' mill at twenty cents the bushel; was it, then, an essential part of the contract that the defendant should himself raise the potatoes? If it was, it would seem from the principles stated that the contract cannot be regarded as a sale.

In the case of *Gardner et al. v. Joy*, 9 Met. 177, the plaintiffs inquired of the defendant what he would take for sperm candles, and upon being told, said they would take one hundred boxes, which was assented to; defendant who was a manufacturer then said they were not then manufactured, but he should or would manufacture and deliver them in the course of the summer. The court held this to be a contract for the sale of goods within the statute; and that what was said as to the subsequent manufacture had reference only to the time of delivery, and that the delivery of good merchantable candles of another person's manufacture would have been a compliance with the contract.

In the case before us was the defendant bound himself to raise three acres of potatoes, or only to deliver good merchantable potatoes in quantity equal to the ordinary product of three acres? Or in other words was the stipulation in respect to the three acres introduced only to determine the quantity to be delivered, and not to oblige the defendant to raise them?

It is obvious that the plaintiffs might have an interest in stipulating that defendant should himself raise the potatoes, and as the terms of the contract are explicit that he should do so, we cannot be justified, as the evidence now stands, in holding that this is not an essential part of the agreement.

We are aware of the case of *Watts v. Friend*, 10 B. & C. 446, before cited. There A. agreed to supply B. with a quantity of turnip seed, and B. agreed to sow it upon his own land and sell the crop to A. at £1, 1s. per bushel, and it was held that in good common sense this must be considered as substantially a contract for goods and chattels for the thing agreed to be delivered would at the time of delivery be a personal chattel.

The reason assigned here for this decision would apply to all cases where the labor and materials employed were to result in goods and chattels, the price of which was to be the measure of compensation, and without regard to the question whether in the contemplation of the parties labor and skill were especially contracted for or not, and for the reasons already suggested, we are not prepared to assent to that view.

Upon the whole our conclusion on this point is that as the question is a mixed one of law and fact, it will be proper to leave it to the jury, in view of all the circumstances of the case, to find whether the contract was essentially for the work and labor and materials of the defendant in raising the potatoes, so that he was bound himself to raise them; or whether it was substantially a sale of potatoes, which he might raise himself, or procure by purchase or otherwise. If it was the former it would not be within the statute of frauds; but if the latter it would be.

Another question raised is in regard to the consideration for defendant's agreement. If the plaintiffs agreed to take and pay for the crop of potatoes at the price fixed, that of course would be a sufficient consideration. We are of the opinion also, that the compromise of doubtful and conflicting claims is a good and sufficient consideration to uphold an agreement. 1 *Parsons on Con.* 364; *Chitty on Con.* sec. 42, and note 1 and cases; *Longridge v. Dorville*, 5 B. & Ald. 117; *Crowther et al. v. Farrer*, 15 A. & E., N. S., *Queen's Bench Rep.* 677; *Barlow v. Ocean Ins. Co.*, 4 Met. 270; *Tuttle v. Tuttle*, 12 Met. 551; *Crans v. Hunter*, 28 N. Y. 389; *Gates v. Shutts*, 7 Mich. 127; *Union Bank of Georgetown v. Geary*, 5 Peters 99; *Fleming v. Ramsey*, 46 Penn. St. Rep., 252; *Parker v. Way*, 15 N. H. 45; *Burnham v. Dunn*, 35 N. H. 560.

The law indeed highly favors the compromise of doubtful claims; but the surrender or discharge of a claim which is utterly without foundation and known to be so, is not a good consideration for a promise; *Kidder v. Blake*, 45 N. H. 330, and cases cited; but it is otherwise if the claims are doubtful and so understood by the parties, and in such a case the consideration will not be defeated by showing that in fact no valid claim really existed.

In the case before us it does not appear that there was any doubt about the contract for the first year, and if not, an agreement to perform it would be no valid consideration for a new promise. What the evidence on that point was, however, we do not know and the only question here is as to the law in such cases.

Case discharged.

POPE *et al.* *v.* ALLIS.

(6 Sup. Ct. Rep. 69, 115 U. S. 363.)

Supreme Court of the United States. Nov. 9, 1885.

In error to the circuit court of the United States for the eastern district of Wisconsin.

The facts fully appear in the following statement by WOODS, J.:

Edward P. Allis, the defendant in error, was the plaintiff in the circuit court. He brought his suit to recover from the defendants Thomas J. Pope and James E. Pope, now the plaintiffs in error, the sum of \$17,840, the price of 500 tons of pig-iron, which he alleged he had bought from them and paid for, but which he refused to accept because it was not of the quality which the defendants had agreed to furnish. The plaintiff also demanded \$1,750 freight on the iron, which he alleged he had paid. The facts appearing upon the record were as follows: The plaintiff carried on the business of an iron-founder in Milwaukee, Wisconsin, and the defendants were brokers in iron in the city of New York. In the month of January, 1880, by correspondence carried on by mail and telegraph, the defendants agreed to sell and deliver to the plaintiff 500 tons of No. 1 extra American and 300 tons No. 1 extra Glengarnock (Scotch) pig-iron. The American iron was to be delivered on the cars at the furnace bank at Coplay, Pennsylvania, and the Scotch at the yard of the defendants in New York. By a subsequent correspondence between the plaintiff and the defendants it fairly appeared that the latter agreed to ship the iron for the plaintiff at Elizabethport, New Jersey. It was to be shipped as early in the spring as cheap freights could be had, consigned to the National Exchange Bank at Milwaukee, which, in behalf of the plaintiff, agreed to pay for the iron on receipt of the bills of lading. That quantity of American iron was landed at Milwaukee and delivered to the plaintiff about July 15th. Before its arrival at Milwaukee the plaintiff had not only paid for the iron, but also the freight from Coplay to Milwaukee. Soon after the arrival in Milwaukee the plaintiff examined the 500 tons American iron, to which solely the controversy in this case referred, and refused to accept it, on the ground that it was not of the grade called for by the contract, and at once gave the defendants notice of the fact, and that he held the iron subject to their order, and brought this suit to recover the price of the iron and the freight thereon.

The defenses relied on to defeat the action were (1) that the iron delivered by the defendants to the plaintiff was No. 1 extra American iron, and was of the kind and quality required by the contract; and (2) that the title having passed to the plaintiff when the iron was shipped to him at Elizabethport, he could not afterwards rescind the contract and sue for the price of the iron and the freight which he had paid, but must sue for a breach of the warranty.

It was conceded upon the trial that if

the plaintiff was entitled to recover at all, his recovery should be for \$22,315.49. The defendants pleaded a counter-claim for \$5,371, which was admitted by the plaintiff. The jury returned a verdict for the plaintiff for \$16,513.11, for which sum and costs the court rendered a judgment against the defendants. This writ of error brought that judgment under review.

W. P. Lynde and Geo. P. Miller, for plaintiffs in error. Eppa Hinton, Jeff. Chandler, and J. G. Jenkins, for defendant in error.

WOODS, J., after stating the facts as above, delivered the opinion of the court.

1. The first assignment of error relates to nine exceptions to the admission of evidence by the court against the objection of the plaintiffs in error. The complaint having alleged that the contract between the parties was for the delivery of the iron at Milwaukee, the plaintiffs in error objected to the introduction of evidence offered by the defendant in error which tended to show a contract for the delivery of the iron at Coplay or Elizabethport, because the proof offered did not support the averments of the complaint, and the court having overruled their objections and admitted the evidence, they now contend that the judgment should for that reason be reversed. But it is clear that, under section 2603 of the Revised Statutes of Wisconsin, which constitutes a rule for the guidance of the federal courts in that state, this assignment of error is not well taken. The section mentioned provides: "No variance between the allegations in pleading and the proof shall be deemed material unless it shall actually mislead the adverse party to his prejudice in maintaining his action or defense on its merits. Whenever it shall be alleged that a party has been so misled, the fact shall be proved to the satisfaction of the court in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as may be just." The answer of the plaintiffs in error denied that the contract provided for the delivery of the iron in Milwaukee, and averred that the iron was to be delivered at Coplay. We do not think that evidence offered by the defendant in error, which tended to establish the averments of the answer rather than of the complaint, was such a variance as could mislead the plaintiffs in error to their prejudice in maintaining their defense upon the merits; but, if they had been really misled, they should have proved the fact to the satisfaction of the court upon the trial. Having neglected to do this, they cannot now complain. It is clear that, under the statute of Wisconsin, the plaintiffs in error had no just ground of exception to the admission of the evidence objected to. *Bonner v. Home Ins. Co.*, 13 Wis. 677; *Leopold v. Van Kirk*, 29 Wis. 553; *Giffert v. West*, 33 Wis. 617. These cases show that the discrepancy between the pleading and the proof was a variance within the meaning of the statute of Wisconsin, and that the section cited is applicable to the question in hand.

2. The next contention of the plaintiffs in error is that evidence was improperly admitted by the circuit court to show that the iron landed at Milwaukee was not of the quality required by the contract; the defendant in error not having shown, or offered to show, as the plaintiffs in error insisted, that it was the same iron which the defendant in error had purchased, and which had been shipped at Elizabethport. And on the ground that the identity of the iron was not shown, the plaintiffs in error insist that the court erred in refusing to charge the jury, as requested by them, to return a verdict in their favor. We think the assignment of error is not supported by the record. The defendant in error did introduce evidence, and, as it seems to us, persuasive evidence, to show that the iron shipped for the defendant in error at Elizabethport was the iron landed and delivered to him at Milwaukee. The testimony introduced tended to prove that one Hazard, on whose dock, at Elizabethport, New Jersey, iron belonging to the plaintiffs in error was stacked, shipped between April 28th and May 12th, at Elizabethport, on five canal-boats, whose names are given, 500 tons of American iron, consigned to Thomas J. Pope & Brother, care National Exchange Bank, Milwaukee, Wisconsin, and to be transported to Milwaukee by the river, canal, and lakes; that about the same time there was shipped to the same consignees, and to the care of the same bank, the 300 tons of Scotch iron which had been sold by the plaintiffs in error to the defendant in error.

It was further shown that, on June 9th and 15th following, 800 tons of iron, 500 being American and 300 Scotch, were transferred from the dock at Buffalo to two schooners, and the bills of lading given by the schooners stated that the 500 tons of American iron were the cargo of canal-boats of the same name as those on which the iron had been shipped at Elizabethport, and it appeared that both the American and Scotch iron transferred to the schooners was consigned to Thomas J. Pope & Brother, care National Exchange Bank, Milwaukee, Wisconsin. It was further shown that, about July 15th, the two schooners above mentioned landed at Milwaukee 500 tons American iron and 300 tons of Scotch iron for the consignees mentioned in the bills of lading, and the iron was delivered to the defendant in error, and it was conceded that the 300 tons of Scotch iron was the same which had been sold by the plaintiffs in error to the defendant in error and shipped to said consignees for him.

In addition to this evidence, the defendant in error introduced the deposition of James E. Pope, one of the plaintiffs in error, in which he testified as follows: "There is a suit pending between my firm, as plaintiff, and the Coplay Iron Company, as defendant, relating to the American iron shipped to E. P. Allis & Co." As an exhibit to this deposition there was a copy of the complaint in the suit, sworn to by James E. Pope, from which it appeared that the action was brought to recover of the Coplay Iron Company dam-

ages for the breach of a contract by which that company warranted that a certain 500 tons of iron, sold by it to the plaintiff in said suit as No. 1 extra iron, was of that quality; and it clearly appeared, from the complaint referred to, that one of the facts on which the cause of action was based, was that the 500 tons of iron sold and shipped by the plaintiffs in error to the care of the National Exchange Bank, for the defendant in error, as No. 1 extra American iron, was the identical iron delivered for him to the bank at Milwaukee, and which he had purchased and paid for. We therefore repeat that there was persuasive evidence offered to show that the iron shipped at Elizabethport, for the defendant in error at Milwaukee, was the identical iron landed at Milwaukee and received by him. The assignments of error, based on the contention that there was no such evidence, must therefore fall.

3. The bill of exceptions shows that the complaint above mentioned in the suit of the plaintiffs in error against the Coplay Iron Company was sworn to by James E. Pope; that it contained an averment on information and belief touching the quality of the iron in controversy in this suit; and that the plaintiffs in error asked the court on the trial of this case to charge the jury that such complaint was not evidence of any facts therein stated on information and belief. The court refused the charge, but instructed the jury that, in determining what weight as an admission the complaint should have, they might consider the fact that the allegation in relation to the quality of the iron in question was made on information and belief. The plaintiffs in error, having excepted at the trial, now assign as error the refusal of the court to give the charge requested. We think the court did not err in its refusal. When a bill or answer in equity or a pleading in an action at law is sworn to by the party, it is competent evidence against him in another suit as a solemn admission by him of the truth of the facts stated. *Studdy v. Sanders*, 2 Dowl. & R. 347; *De Whelpdale v. Milburn*, 5 Price, 485; *Central Bridge Corp. v. Lowell*, 15 Gray, 106; *Bliss v. Nichols*, 12 Allen, 443; *Elliott v. Hayden*, 104 Mass. 180; *Cook v. Barr*, 44 N. Y. 156; *Taylor v. Ex.* (7th Ed.) § 1753; *Greenl. Ev.* §§ 552, 555. When the averment is made on information and belief, it is nevertheless inadmissible as evidence, though not conclusive. *Lord Ellenborough in Doe v. Steel*, 3 Camp. 115. The authority cited sustains the proposition that the fact that the averment is made on information and belief merely detracts from the weight of the testimony. It does not render it inadmissible. The charge given by the circuit court on this point, therefore, deprived the plaintiffs in error of no advantage to which they were entitled.

4. The assignment of error mainly relied on by the plaintiffs in error is that the court refused to instruct the jury to return a verdict for the defendants. The legal proposition upon which their counsel based this request was that the purchaser of personal property, upon breach

of warranty of quality, cannot, in the absence of fraud, rescind the contract of purchase and sale, and sue for the recovery of the price. And they contended that, as the iron was delivered to defendant in error either at Coplay or Elizabethport, and the sale was completed thereby, the only remedy of the defendant in error was by a suit upon the warranty. It did not appear that at the date of the contract the iron had been manufactured, and it was shown by the record that no particular iron was segregated and appropriated to the contract by the plaintiffs in error until a short time before its shipment, in the latter part of April and the early part of May. The defendant in error had no opportunity to inspect it until it arrived in Milwaukee, and consequently never accepted the particular iron appropriated to fill the contract. It was established by the verdict of the jury that the iron shipped was not of the quality required by the contract. Under these circumstances the contention of the plaintiffs in error is that the defendant in error, although the iron shipped to him was not what he bought, and could not be used in his business, was bound to keep it, and could only recover the difference in value between the iron for which he contracted and the iron which was delivered to him.

We do not think that such is the law. When the subject-matter of a sale is not in existence, or not ascertained at the time of the contract, an undertaking that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract; because the existence of those qualities being part of the description of the thing sold becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted. *Chanter v. Hopkins*, 4 Mees. & W. 404; *Barr v. Gibson*, 3 Mees. & W. 390; *Gompertz v. Bartlett*, 2 El. & Bl. 849; *Okell v. Smith*, 1 Stark. N. P. 107; notes to *Cutter v. Powell*, 2 Smith, Lead. Cas. (7th Amer. Ed.) 37; *Woodle v. Whitney*, 23 Wis. 55; *Boothby v. Scales*, 27 Wis. 626; *Fairfield v. Madison Manuf'g. Co.*, 38 Wis. 346. See, also, *Nichol v. Godts*, 10 Exch. 191. So, in a recent case decided by this court, it was said by Mr. Justice Gray: "A statement" in a mercantile contract "descriptive of the subject-matter or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law; that is to say, a condition

precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract." *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. Rep. 12. See, also, *Pilley v. Pope*, 115 U. S. 213, 6 Sup. Ct. Rep. 19. And so, when a contract for the sale of goods is made by sample, it amounts to an undertaking on the part of the seller with the buyer that all the goods are similar, both in nature and quality, to those exhibited, and if they do not correspond the buyer may refuse to receive them; or, if received, he may return them in a reasonable time allowed for examination, and thus rescind the contract. *Lorymer v. Smith*, 1 Barn. & C. 1; *Magee v. Billingsley*, 3 Ahn. 679.

The authorities cited sustain this proposition: that when a vendor sells goods of a specified quality, but not in existence or ascertained, and undertakes to ship them to a distant buyer, when made or ascertained, and delivers them to the carrier for the purchaser, the latter is not bound to accept them without examination. The mere delivery of the goods by the vendor to the carrier does not necessarily bind the vendee to accept them. On their arrival he has the right to inspect them to ascertain whether they conform to the contract, and the right to inspect implies the right to reject them if they are not of the quality required by the contract. The rulings of the circuit court were in accordance with these views.

We have been referred by the plaintiffs in error to the cases of *Thornton v. Wynn*, 12 Wheat. 184, and *Lyon v. Bertram*, 20 How. 149, to sustain the proposition that the defendant in error in this case could not rescind the contract and sue to recover back the price of the iron. But the cases are not in point. In the first, there was an absolute sale with warranty and delivery to the vendee of a specific chattel, namely, a race-horse; in the second, the sale was of a specified and designated lot of flour which the vendee had accepted, and part of which he had used, with ample means to ascertain whether or not it conformed to the contract.

The cases we have cited are conclusive against the contention of the plaintiffs in error. The jury has found that the iron was not of the quality which the contract required, and on that ground the defendant in error, at the first opportunity, rejected it, as he had a right to do. His suit to recover the price was, therefore, well brought.

Other errors are assigned, but, in our opinion, they present no ground for the reversal of the judgment, and do not require discussion. Judgment affirmed.

RANDALL v. NEWSON.

(2 Q. B. Div. 102.)

Court of Appeal. Jan. 22, 1877.

Statement of claim, that plaintiff bought of defendant, a carriage manufacturer, a phaeton for two horses, the pole made and supplied for which was so carelessly and negligently made, and of such bad and improper wood, that while the plaintiff was driving the phaeton the pole broke and caused the horses to run away, and the horses were damaged.

Defence, denying that the pole was carelessly or negligently made, or of bad or improper wood; and not admitting that the pole broke by reason of any defect in the wood, or that the defendant sold the phaeton under such circumstances as to render him liable for the consequences of a latent defect. Issue joined.

At the trial before Archibald, J., at the Middlesex Hilary sittings, 1875, it appeared that the plaintiff bought of the defendant, who was a carriage builder, a phaeton, in August, 1874; it was only fitted with shafts for one horse, and the plaintiff gave orders to the defendant for a pole and splinter-bar to be made and fitted to it.

The phaeton was sent home with the pole and splinter-bar, and while the plaintiff was driving it with two horses in October, 1875, the horses swerved and the pole broke short off at the carriage. The horses in consequence became restive and were much damaged.

There was much contradictory evidence as to the cause of the breaking of the pole, the plaintiff's witnesses saying it was of bad wood, while the defendant's stated that the wood was perfectly good. The value of a new pole was agreed at £3, and the plaintiff gave evidence that his horses were damaged to between £130 and £140. The learned judge expressed it as his opinion, that if there were no negligence on the part of the defendant in making the pole, or in the selection of the materials, the plaintiff could not recover more than the £3; and he left to the jury two questions: 1. Was the pole reasonably fit and proper for the carriage? 2. Was the defendant guilty of any negligence? And he asked the jury also to assess the consequential damages, in case they should become material. The learned judge was obliged to leave the court, to attend a meeting of the judges, before the jury had returned their verdict.

The jury answered both questions in the negative, and as to the damages, said they understood from the judge that £3 was all they could find.

On these findings, the verdict and judgment were entered for the plaintiff for £3, with leave to move to enter judgment for the defendant.

The defendant gave notice of motion accordingly; and the plaintiff obtained an order for a new trial on the ground of misdirection by the learned judge as to the measure of damages.

1876. Feb. 19. Sills, (Cave, Q. C., with him.), for defendant.

Gates, Q. C., and Edward Pollock, for plaintiff.

THE COURT (BLACKBURN and LUSH, JJ.) ordered judgment to be entered for the defendant, on the ground that the answers of the jury amounted to a finding of a latent defect in the wood of the pole, which no care nor skill could discover, and that the principle of the decision in *Readhead v. Railway Co.*¹ extended to the sale of an article for a specific purpose.

The plaintiff appealed.

Nov. 17. Gates, Q. C., and R. V. Williams, (Edward Pollock with him.) for plaintiff.

Nov. 18. Cave, Q. C., and Sills, for defendant.

The judgment of the court (KELLY, C. B., MELLISH, L. J., and BRETT and AMPHLETT, JJ. A.) was delivered by

BRETT, J. A. This case was tried upon the footing that it was an action brought against the defendant, a coach-builder, to recover damages in respect of injuries to the plaintiff's horses and carriage, by reason of the defendant having supplied to the plaintiff a defective carriage pole. The jury found that the pole was not reasonably fit and proper for the use of the carriage; but that there was no negligence on the part of the defendant (including, of course, his servants or agents) in supplying the pole. The price of a new pole was £3. The damage done to the horses and carriage was much more. But the only damages found by the jury were £3. Upon these findings the court of queen's bench, applying to this contract the principle laid down in *Readhead v. Railway Co.*² gave judgment for the defendant. No dispute was made at the trial, or in argument, as to the nature of the order given and accepted; the questions argued were whether the defendant was liable at all, and what was the extent of damages to which he might be subjected, if he was liable at all. Now as to these questions, it is to be taken, although nothing specific seems to have been said, that the order given and accepted was not merely for a pole in general, but for the supply of a pole for the plaintiff's carriage; and that the contract therefore was for the purchase and sale, or supply, of an article for a specific purpose. In other words, the subject-matter of the contract was not merely a pole, but a pole for the purchaser's carriage; or, to state the proposition in an equivalent form, the thing, which would, if the contract were formally drawn up, be described in it as the subject-matter of it, would not be merely a pole generally, but a pole to be purchased for a specific purpose, namely to be used in the plaintiff's carriage. The question is, what, in such a contract, is the implied undertaking of the seller as to the efficiency of the pole? Is it an absolute warranty that the pole shall be reasonably fit for the purpose, or is it only partially to that effect, limited to defects which might be discovered by care and skill?

¹ L. R. 4 Q. B. 379.

² L. R. 2 Q. B. 412; in error L. R. 4 Q. B. 379.

In order to decide this question it seems advisable to ascertain the primary or governing principle on which the earlier cases were decided, and to see whether the principle on which they were decided ought to be modified by the decision in *Readhead v. Railway Co.* The earliest case seems to be *Parkinson v. Lee*,³ in 1802. It is sufficient to say of it that, either it does not determine the extent of a seller's liability on the contract, or it has been overruled. Neither can the case of *Fisher v. Samuda*,⁴ in 1808, be said to decide anything. The first cases of importance are *Gardiner v. Gray*,⁵ and *Laing v. Fidgeon*,⁶ in 1815. In *Gardiner v. Gray* the contract was for the purchase and sale of "waste silk." The silk was imported, and the bulk had not been seen either by the defendant, the seller, or the plaintiff, the buyer. Lord Ellenborough, said: "I am of opinion that, under such circumstances" (i. e. a sale of silk as waste silk) "the purchaser has a right to expect a saleable article, answering the description in the contract. Without any particular warranty, this is an implied term in every such contract." The contract was for the purchase and sale of a commodity described generally, not described to be ordered or supplied for a particular purpose. The description of it was that it was waste silk. From that it is implied that it is, or in other words it is assumed that it might be, specifically described as saleable waste silk. The decision, therefore, is that the commodity offered and delivered must answer the description of it and be saleable waste silk. The principle is that the commodity offered must answer the description of it in the contract. *Laing v. Fidgeon* is to the same effect. In *Gray v. Cox*,⁷ in 1825, the case was decided on a variance; but Abbott, C. J., stated that he was of opinion, "that if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose." The commodity offered was copper for sheathing the ship *Coven-try*. It was proved that no defect could be discovered by inspection of the article, and it was admitted that the defendants were ignorant of the defective quality of the copper. It is obvious that Lord Tenterden did not consider the seller relieved by reason of the defect being latent.

This ruling of Lord Tenterden was adopted in the decision of *Jones v. Bright*,⁸ in 1829. The contract was for copper sheathing for a ship. The question proposed by Ludlow, Serjt., in argument was, "whether the law will, according to the dictum of Lord Tenterden, in *Gray v. Cox*" lay upon the seller or manufacturer an obligation to warrant in all cases that the article which he sells shall be reasonably fit and proper for the purpose for which it is intended, and render him re-

sponsible for all the consequences which may result, if it shall be found not to answer the purpose for which it was designed, and that, on account of some latent defect of which he was ignorant, and which shall not be proved to have arisen from any want of skill on his part, or the use of improper materials, or any accident against which human prudence might have been capable of guarding him." Here, therefore, the whole proposition, with and without limitations, was plainly laid before the judges for their consideration.

The answer given by Best, C. J., was: "I wish to put the case on a broad principle. If a man sells an article he thereby warrants that it is merchantable,—that it is fit for some purpose. If he sells it for that particular purpose, he thereby warrants it fit for that purpose. . . . Whether or not an article has been sold for a particular purpose is, indeed, a question of fact; but if sold for such purpose, the sale is an undertaking that it is fit. . . . The law then resolves itself into this,—that if a man sells generally, he undertakes that the article sold is fit for some purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose." Nothing can be more clear than that the rule is advisedly enunciated as a warranty without limitation. *Brown v. Edgington*¹⁰ is to the same effect.

In *Wieler v. Schillizzi*,¹¹ the contract was for "Calcutta linseed." Jervis, C. J., told the jury that the question for them to consider was, "whether there was such an admixture of foreign substances in it as to alter the distinctive character of the article, and prevent it from answering the description of it in the contract." Cresswell, J., said, "They were to say whether the article delivered reasonably answered the description of Calcutta linseed." Crowder, J., said, "The jury in effect found that the article delivered did not reasonably answer the description in the contract." Willes, J., said, "The purchaser had a right to expect, not a perfect article, but an article which would be saleable in the market as Calcutta linseed. If he got an article so adulterated as not reasonably to answer that description, he did not get what he bargained for." In this case it is to be observed that all the judges adopted the form of stating the principle which was used by Lord Ellenborough in *Gardiner v. Gray*.¹² In *Nichol v. Godts*¹³ the contract was for "foreign refined rape oil, warranted only equal to samples." The oil offered was equal to samples, but both samples and oil were adulterated. Parke, B., told the jury "that the statement in the sold-note as to the samples related to the quality only of the article, and that according to the contract the defendant was entitled to have rape oil delivered to him." Platt, B., in banc, said: "I understand that the oil to be delivered was to

³ 2 East, 314.

⁴ 1 Camp. 190.

⁵ 4 Camp. 144.

⁶ 6 Taunt. 108.

⁷ 4 B. & C. 108, 115.

⁸ 5 Bing. 533, 540.

⁹ 4 B. & C., at p. 115.

¹⁰ 2 M. & G. 279.

¹¹ 17 C. B. 619, 622; 25 L. J. (C. P.) 89.

¹² 4 Camp. 144.

¹³ 10 Ex. 191; 23 L. J. (Ex.) 314.

be equal to the samples in quality. But the defendant did not refuse to accept the oil tendered to him on the ground that it did not equal the samples, but on account of its not being foreign refined rape oil at all. And the learned judge told the jury that if they should think that was so, the defendant was not bound to accept it. That direction was perfectly correct. If the jury had found that the article which the plaintiff tendered was known in the market under the name and description of foreign refined rape oil, the plaintiff would have been entitled to succeed; but the question was put to the jury, and they were of opinion that it was not known as such." And Parke, B., said "the evidence went to show that the oil offered did not answer the description of the article sold."

This form of stating the rule was distinctly adopted in *Josling v. Kingsford*,¹⁴ by Erie, C. J., and Willes, J. Erie, C. J., told the jury "that the defendant could only perform his part of the contract by delivering that which in commercial language might properly be said to come under the denomination of oxalic acid; and that if they should be of opinion that the article delivered by the defendant as oxalic acid did not properly fulfil that description they should find for the plaintiff."

I have cited these cases, and the principles laid down in them, in order clearly to ascertain what is the primary or ultimate rule from which the rules which have been applied to contracts of purchase and sale of somewhat different kinds have been deduced. Those different rules, as applied to such different contracts, are carefully enumerated and recognized in *Jones v. Just*,¹⁵ i. e., some contracts the undertaking of the seller is said to be only that the article shall be merchantable; in others, that it shall be reasonably fit for the purpose to which it is to be applied. In all, it seems to us, it is either assumed or expressly stated, that the fundamental undertaking is, that the article offered or delivered shall answer the description of it contained in the contract. That rule comprises all the others: they are adaptations of it to particular kinds of contracts of purchase and sale. You must, therefore, first determine from the words used, or the circumstances, what, in or according to the contract, is the real mercantile or business description of the thing which is the subject-matter of the bargain of purchase or sale, or, in other words, the contract. If that subject-matter be merely the commercial article or commodity, the undertaking is, that the thing offered or delivered shall answer that description, that is to say, shall be that article or commodity, saleable or merchantable. If the subject-matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description, that is to say, it must be that article or commodity, and reasonably fit for the particular purpose. The governing principle, therefore, is that the thing offered and delivered under a contract of

purchase and sale must answer the description of it which is contained in words in the contract, or which would be so contained if the contract were accurately drawn out. And if that be the governing principle, there is no place in it for the suggested limitation. If the article or commodity offered or delivered does not in fact answer the description of it in the contract, it does not do so more or less because the defect in it is patent, or latent, or discoverable. And accordingly there is no suggestion of any such limitation in any of the judgments in cases relating to contracts of purchase and sale. Unless, therefore, there is some binding authority to the contrary, we ought not now to introduce by implication a limitation into contracts of purchase and sale which has never been introduced before.

It is said that the case of *Readhead v. Railway Co.*¹⁶ in error is such a binding authority. But in answer to the cases cited of the implied undertaking in contracts of purchase and sale, *Montague Smith, J.*, says: "The counsel for the plaintiff referred to some of the cases in which it had been held that in contracts for the supply of goods for a particular purpose, there is an implied warranty that the goods supplied shall be reasonably fit for that purpose. . . . But the agreement to sell and supply for a price which may be assumed to represent their value is a contract of a different nature from a contract to carry, and has essentially different incidents attaching to it." It is true that the learned judge afterwards says: "Even in the cases of contracts to supply goods it may be a question, on which it is not now necessary to express an opinion, how far and to what extent the vendor would be liable to the vendee in the case of a latent defect of the kind existing in the present case which no skill or care could prevent or detect." But it seems impossible logically to hold that a case, in which the court declined to follow the decisions on contracts of purchase and sale, on the ground that those contracts are of a different nature and have essentially different incidents from the contract to carry, which was in discussion in that case, can be fairly binding on this court, so as to oblige it to introduce a particular limitation into a contract of purchase and sale, because, in that case, it was introduced into a contract to carry passengers.

The case of *Francis v. Cockrell*¹⁷ is based upon *Readhead v. Railway Co.* and is therefore of itself no more a binding authority on us in this case than the other. It is true, however, that the lord chief baron, going farther than the doubt expressed by *Montague Smith, J.*, does recognize the limitation as applicable to contracts of purchase and sale.¹⁸ But the statement of the learned judge was not necessary, and therefore is not binding, though of course inviting a careful consideration of the older cases. After such consideration, for the reasons before

¹⁴ 13 C. B. (N. S.) 447; 32 L. J. (C. P.) 94.

¹⁵ L. R. 3 Q. B. 197.

¹⁶ L. R. 4 Q. B. 379, 386.

¹⁷ L. R. 5 Q. B. 501, 503.

¹⁸ L. R. 5 Q. B. at page 503.

given, we are of opinion that the undertaking of the present defendant was not restricted by the limitations applied to the contract of carriage in *Readhead v. Railway Co.*, and that so long as the verdict in this case stands it imposes a liability on the defendant. We are, therefore, of opinion that the judgment of the court of queen's bench directing the judgment to be entered for the defendant was wrong.

In the court of queen's bench a cross rule had been obtained on behalf of the plaintiff for a new trial on the ground of misdirection as to the measure of damages. In consequence of the decision that the defendant was not liable at all, it became useless to argue the point. But Mr. Gates has renewed it before us, and has asked for a new trial on the ground of such misdirection, desiring to have such new trial confined to the question of damage only. We think that a question should have been left to the jury similar to that which was left in *Smith v. Green*,¹⁹ namely, whether the injury to the horses was or was not a natural consequence of the defect in the pole. There has been a miscarriage in this respect at all events. We are asked to confine the new trial to the question of damages, but considering that

the real question is not whether the pole was perfect, but only whether it was reasonably fit, we cannot think that the findings of the jury as to the questions left to them in order to determine the liability of the defendant are so satisfactory as to authorize us to confine the question to be raised on a new trial to the damages only. We think that the judgment of the court of queen's bench should be reversed, and that the order should be for a new trial generally, if the plaintiff elects to have a new trial at all. If he does not, the verdict and judgment for the plaintiff for £3 will stand.

The plaintiff has succeeded on the appeal, and should therefore have the costs of the appeal.

KELLY, C. B., in assenting to the judgment of the court, observed, that, if the language imputed to him in *Francis v. Cockrell*²⁰ be correctly reported, he must have expressed himself inaccurately, and he had no intention to apply the doctrine in *Readhead's Case*²¹ to a contract for the sale and purchase of an article to be applied to a specific purpose.

Judgment reversed.

¹⁹ 1 C. P. D. 92.

²⁰ L. R. 5 Q. B. at page 503.

²¹ L. R. 4 Q. B. 379.

RODLIFF et al. v. DALLINGER.

(4 N. E. Rep. 805, 141 Mass. 1.)

Supreme Judicial Court of Massachusetts. Suffolk. Jan. 11, 1886.

Exceptions from superior court, Suffolk county; Knowlton, Judge.

This was an action of replevin to recover possession of 20 bags of California wool. The plaintiffs were wooldealers in Boston, and on or about November 15, 1882, delivered said wool to one Henry Clementson, a wool dealer and broker in Boston. The defendant was a public warehouseman in Boston, and received the wool on storage from Clementson about November 15, 1882, not knowing where he obtained it, and issued a warehouse receipt for the same on the day after the delivery of the wool. Clementson applied to the Massachusetts Loan & Trust Company, of Boston, for a loan of \$2,000 on the wool in the warehouse, and, after an examination of the article, the loan was made; the trust company taking the warehouse receipt from Clementson, having no knowledge where Clementson obtained the wool, his statement being that he purchased the wool to sell; and the trust company, being the real party in interest, defended the suit.

Upon the foregoing facts the court instructed the jury that there were three possible views of the transaction: (1) That they might find it was an ordinary sale to Clementson; or (2) that it was not a sale to Clementson, but was a delivery to Clementson as a broker, with a view to his selling it to some customer, whom he expected afterwards to negotiate with, and with whom to consummate a sale; and if they found this, then there was a special provision of the statute which protects parties dealing in good faith with a broker having property in that way, so far as they make advances or loans upon property in pledge, in good faith, to persons who have custody of property as brokers, with authority to sell or dispose of it; or (3) that it was not a sale to Clementson, or a delivery to him as broker with authority to sell, but that it was a delivery to Clementson upon his representation that he came from a purchaser representing him, with an offer for it,—a purchaser he did not disclose,—and that these goods were delivered to him as the agent of that purchaser,—as a sale to that purchaser; and if that was the fact, that the plaintiffs were entitled to the property, notwithstanding it was subsequently pledged to the Massachusetts Loan & Trust Company.

The court also further instructed the jury upon the third view "that if this was a transfer upon a false representation made by Clementson,—a representation that he came with an offer from a third person whose name he did not wish to disclose,—and the goods were delivered to Clementson as a sale to him as the agent of this third person, whose offer he was bearing, with the view that the property should pass at the time to that third person, and thus constitute a sale to that third person, from whom payment was

to be made subsequently, and the payment to be brought back by Clementson as the agent of that third person, that Clementson had no right afterwards to deal with that property at all. He got it into his possession by fraud, and he got it into his possession without any authority to make any subsequent sale or to do anything with it. It was wrongly in his possession from the start, and any person who saw fit to advance money upon it or to buy it, however honestly, and in perfect good faith, would be the loser, and plaintiffs could pursue the property, and get it wherever they could find it, whenever the fraud practiced upon them should come to their knowledge."

Upon the foregoing facts and rulings, the jury found for the plaintiffs, and the defendant, having duly excepted to the third instruction of the court, being so much of the judge's rulings as authorized the jury to find for the plaintiffs, prays that these his exceptions to said rulings may be allowed.

Alfred Hemenway, for plaintiffs. Henry D. Hyde, for defendant.

HOLMES, J. The plaintiffs' evidence warranted the conclusion that they refused to sell to Clementson, the broker, but delivered the wool to him on the understanding that it was sold to an undisclosed manufacturer in good credit with plaintiffs. This evidence was not objected to, and was admissible, notwithstanding the fact that the sale was entered on the plaintiffs' books as a sale to Clementson, and that a bill was made to him. *Com. v. Jeffries*, 7 Allen, 548, 561. It was admitted that Clementson in fact was not acting for such an undisclosed principal, and it follows that, if the plaintiffs' evidence was believed, there was no sale. There could not be one to the supposed principal, because there was no such person; and there was not one to Clementson, because none purported to be made to him; but, on the contrary, such a sale was expressly refused, and excluded. *Edmunds v. Merchants' Despatch Transp. Co.*, 135 Mass. 283; *Aborn v. Same*, Id.

It was suggested that this case differed from the one cited, because there the principal was disclosed, whereas here he was not, and that credit could not be supposed to have been given to an unknown person. We have nothing to say as to the weight which this argument ought to have with a jury, beyond observing that the plaintiffs had reason, in Clementson's representations, for giving credit to the supposed manufacturer. But there is no rule of law that makes it impossible to contract with or sell to an unknown but existing party, and if the jury find that such a sale was the only one that purported to have been made, the fact that it failed does not turn it into a sale to the party conducting the transaction.

Schmaltz v. Avery, 16 Q. B. 655, only decided that a man's describing himself in a charter-party as "agent of the freighter" is not sufficient to preclude him from alleging that he is the freighter. It does not hint that the agent could not be ex-

cluded by express terms, or by the description of the principal, although insufficient to identify the individual dealt with, as happened here; still less, that, in favor of third persons, the agent would be presumed, without evidence, to be the undisclosed principal, although expressly excluded.

The invalidity of the transaction in the case at bar does not depend upon fraud, but upon the fact that one of the supposed parties is wanting, it does not matter how. Fraud only becomes important, as such, when a sale or contract is complete in its formal elements, and therefore valid unless repudiated, but the right is claimed to rescind it. It goes to the motives for making the contract, not to its existence; as, when a vendee expressly or impliedly represents that he is solvent, and intends to pay for goods, when in fact he is insolvent, and has no reasonable expectation of paying for them; or, being identified by the senses, and dealt with

as the person so identified, says that he is A. when in fact he is B. But when one of the formal constituents of illegal transactions is wanting, there is no question of rescission,—the transaction is void ab initio,—and fraud does not impart to it, against the will of the defrauded party, a validity that it would not have if the want were due to innocent mistake. The sale being void, and not merely voidable, or, in simpler words, there having been no sale, the delivery to Clementson gave him no power to convey a good title to a bona fide purchaser. He had not even a defective title, and his mere possession did not enable him to pledge or mortgage. The considerations in favor of protecting bona fide dealers with persons in possession, in cases like the present, were much urged in *Thacher v. Moors*, 134 Mass. 156, but did not prevail. Much less can it be allowed to prevail against a legal title without the intervention of statute. Exceptions overruled.

ROSS et al. v. DRAPER.

(55 Vt. 404.)

Supreme Court of Vermont. Franklin. Jan. Term, 1883.

Replevin. Heard by the court on the report of a referee, September term, 1882, Royce, C. J., presiding. Judgment for the defendant.

Farrington & Post, for plaintiffs. John I. Gleed, for defendant.

ROSS, J. I. This is an action of replevin for a piano. The case was referred and came to the county court on the referee's report. Such a judgment was then to be rendered upon the facts reported as any legitimate amendment of the declaration would admit of. An amendment alleging that the plaintiffs were husband and wife, and that the piano was the property of the wife, would neither add a new cause of action nor a new party to the suit, and would be permissible. The cause of action would be the piano both before and after the amendment, and the right in controversy would be that of the two plaintiffs to recover it. If the piano is the sole property of the wife, in an action at law the joinder of the husband as a co-plaintiff would be necessary. The bond was conditioned upon the right of the plaintiffs to have the piano delivered to them as against the defendant who had attached it as the property of a third person. Under the decisions of this court in regard to judgments on referees' reports, holding that the cause of action or subject-matter in controversy is the foundation of the judgment, if the pleadings can be so amended legally as to conform to the facts reported, we entertain no doubt of the right of the plaintiffs to maintain the action, if the facts reported entitle the wife to the possession of the piano.

II. The controlling facts found by the referee are that in 1861 the wife's father bought the piano for her, and, in two or three months after, on the occasion of her attaining her majority, gave her a birthday party, and in the presence of the assembled guests, took her to the piano, told her that was her birthday present from him and that he gave it to her; that thereafter the family always spoke of it as her property and that she used and treated it as such; that she remained at home until her marriage in 1867; that she then went away from home to live, and left the piano in her father's house, and never removed it therefrom, as she never had a suitable place to put it; that she visited her father's house from time to time, stopping three or four months seven or eight years ago, and had been living in her father's family for the last three years and more, and on all these occasions used and treated the piano as her own; that the piano remained all this time in the house of her father; that her husband always treated it as her separate property; that in 1877 it was attached and sold by the consent of her father as his property unbeknown to her, but was not removed from his house. There

is no fact found, save his consent to its sale, that after the gift the father ever exercised dominion over the piano further than to store it in his house. The only question submitted by the referee to the court is whether these facts constitute a valid gift of the piano from the father to the plaintiff wife. We entertain no doubt on this question. The language used, as well as the occasion, indicate a clear intention of the father to pass the title of the piano to the daughter, and as clearly her intention to accept the gift. There was, therefore, the making and acceptance of the gift. He spoke of it, as did the family thereafter, as her property. She used and treated it as her property. This must mean that she assumed and exercised the dominion of an owner, took and retained such possession as the nature of the property admitted of, if capable of being locked, took possession of the key, locked and unlocked it, used it herself, and dictated in regard to its use by others. It matters not that the property was of such a nature that she could not take it into manual possession, as she could have a watch, ring, or set of jewelry. If the gift had been of either of the last-named articles, and the referee had found that thereafter the daughter ever used and treated it as her property; that the father and family so treated and spoke of it, although it had been kept in her father's house, and on her marriage and leaving the home of her childhood, because she had no suitable place to keep it she still left it there, could there be the least doubt it would be a perfected gift, that the owner would be the daughter both as against the father and his creditors? We think not. The law recognizes the fact that all species of personal property are not capable of the same kind of possession, and it only requires the purchaser or donee to take such possession as the character and nature of the property admit of, in order to protect it against attachment by the creditors of the vendor or donor. *Sanborn v. Kittredge*, 20 Vt. 632; *Hutchins v. Gilchrist*, 23 Vt. 82; *Birge v. Edgerton*, 28 Vt. 291; *Fitch v. Burk*, 38 Vt. 683; *Sterling v. Baldwin*, 42 Vt. 311.

The property in contention was of that bulky character that forbids manual possession. The only possession its nature admitted of consisted in its use and treatment. The treatment of an owner includes acts of dominion and control. The property itself was such as is much more generally used by females than males and for that reason more likely to be owned by the former. The occasion when the gift was made, especially in a country town, would give notoriety to the transaction equal to a sale in market overt. It is to be remembered that in these days it is not an uncommon thing for the wife and the children, while living at home, each to have and keep separate property in the common home of them all. It is not a matter of course, and no creditor has the right to assume, that all the personal property in the house belongs to the husband and father. It is not uncommon for the daughters to have rooms set apart for their special use, furnished with

furniture purchased by, or given to them, nor for them to own sewing machines or musical instruments. The facts reported do not show a joint possession of the piano by the father and daughter during the two or three years she was at home after the gift and before her marriage, nor after her marriage. He allowed it to be kept upon premises owned by him. This was the extent of his use, control and acts of ownership, save alone his consenting to its sale on his debt some twelve or thirteen years after he had given it away, and this act was not known by the daughter until long after it transpired. The attaching creditor, who was the purchaser at the sale, never took possession of it. The defendant attached it as the property of such purchaser. He found it not in his possession but on the premises of the father, and in the possession of the daughter. He was bound to take notice of the fact that the property he was attaching was not in the possession of the debtor, and was bound to inquire of those

on whose premises and in whose possession he found it, for whom they had the piano in store and in possession. *Hildreth v. Fitts*, 53 Vt. 684. Being bound to inquire, he and the creditor for whom he was acting were affected by all the knowledge that would be gained by such inquiry. He would have learned of the gift, of the notoriety that accompanied the making of it, that thereafter the father and family spoke of and treated it as the property of the daughter; that she always so used and treated it, and for over two years before her marriage had it in her personal possession, so far as the nature of the property was capable of personal possession. The transaction was natural, honest, notorious, and of long standing. There was no fraud in fact intended or attempted. The property was not in the possession of the debtor, hence no fraud in law.

Judgment reversed, and judgment rendered for the plaintiff to recover nominal damages and costs.

ROWLEY et al. v. BIGELOW et al.

(12 Pick. 307.)

Supreme Judicial Court of Massachusetts. Suffolk and Nantucket. March 19, 1832.

Trover for 627 bushels of yellow corn, valued at 55 cents a bushel.

At the trial, before Wilde, J., it was proved by the plaintiffs, that on the 24th of May, 1830, the corn belonged to them and was in their possession, in the city of New York, on board the sloop *Milan*, of which S. Dunning, one of the plaintiffs, was master, and that it was measured and delivered on board the schooner *Lion*. They alleged that one William N. Martin, a merchant there, fraudulently obtained possession of it by pretending to purchase it for cash; and it was proved that on the 25th of May he shipped it on board the *Lion*, consigned to the defendants at Boston, and that the vessel sailed in the afternoon of that day for Boston. On the 26th, Dunning, having ineffectually demanded payment for the corn, at Martin's counting-house, proceeded to Boston to reclaim it. He reached Boston before the arrival of the *Lion*, and on the 29th gave notice to the defendants, to whom by Martin's orders the corn was to be delivered, that Martin had fraudulently obtained it from the plaintiffs, and that they intended to repossess themselves of it. On the 30th, when the *Lion* had arrived in Boston harbour, Dunning boarded her and demanded of the master possession of the corn, giving him notice that Martin had obtained it fraudulently from the plaintiffs. The master notwithstanding delivered it to the defendants; after which Dunning demanded it of them and tendered them any freight or charges which they had paid. They refused to deliver the corn, and thereupon the suit was commenced.

In order to establish the fraud on the part of Martin, the plaintiffs relied on the depositions of C. A. Jackson and others, merchants in New York, who testified that Martin had made similar purchases of them about the same time, and under circumstances tending to show that he was insolvent, and that he knew it and had no reasonable expectation of paying for the merchandise according to his contract. The defendants objected to the admission of these depositions, but the judge permitted them to be read to the jury.

The defendants, to establish their right to hold the corn against the plaintiffs, offered in evidence a bill of lading, dated May 17th, 1830, signed by the master of the *Lion*, purporting to be for 2000 bushels of yellow corn shipped by Martin and consigned to the defendants; also an invoice corresponding to the bill of lading and purporting to be for 2000 bushels of corn consigned to the defendants for sale on the shipper's account, and signed by Martin; also a letter from Martin to the defendants, dated May 17th (to which the bill of lading and invoice were annexed) advising that he valued on them in favor of Henry Bennett for \$1000, at ten days' sight, and directing them, if he had valued too much on this shipment, to charge it to

some previous one, there being an existing account between Martin and the defendants. And it was proved that a bill drawn accordingly by Martin, was accepted by the defendants on the 20th of May and paid by them at maturity.

There was no evidence that the defendants had any knowledge of the fraudulent conduct of Martin, but it appeared that they received the bill of lading and invoice and accepted the draft in the usual course of business.

Upon this evidence the judge ruled, that the defendants had a good title to the property notwithstanding the fraudulent conduct of Martin, and notwithstanding the bill of lading had been signed before the corn was shipped; to which the plaintiffs excepted.

A verdict was taken for the defendants by consent; and if the whole court should be of opinion that they had a valid title to the corn, under the invoice and bill of lading, judgment was to be rendered upon the verdict; but if the court should be of opinion that the ruling was wrong, the verdict was to be set aside and the defendants defaulted, unless the court should also be of opinion that the depositions above mentioned were improperly admitted; in which case a new trial was to be granted.

Fletcher and W. J. Hubbard, for plaintiffs. Curtis, for defendants.

SILAW, C. J. The first question arising in this cause is, whether the depositions of Jackson and others, under the circumstances, ought to have been admitted as competent. These were generally persons, of whom Martin had made similar purchases, of like articles, about the same time, and under circumstances tending to show that he was insolvent and had no reasonable expectation of paying for the merchandise according to his contract.

The objection to this evidence is placed on two grounds, first, that these persons having similar claims of their own, some of which are pending here, they have an interest in establishing the fraud which they are called to prove; and secondly, that the transactions being *res inter alios*, have no tendency to prove the fact in issue in this particular case.

But in our opinion, the objection cannot be sustained upon either ground. As to the first, it is quite clear, that the verdict and judgment in this case would not be evidence in either of theirs; that their interest is in the question and subject matter and not in the event of the suit, and therefore that the objection, such as it is, goes to the credit and not to the competency of the witnesses. As to the other objection, we think this evidence has a direct and material bearing upon the fact in issue. It tends to show, that at the time this ostensible purchase was made, Martin was insolvent, that he knew he was insolvent, that he had no reasonable ground to believe that he could pay the cash and did not expect or intend to pay the cash for the merchandise which he purchased, and so that he obtained the goods by false pretences. The fact of insolvency,

of his knowledge of his insolvency, and that he had no expectation or intention of paying for the corn in question, is a material fact and the principal fact in controversy on which this case rests, and is material to the issue. The evidence bears upon the question *quo animo*, the intent, the fraudulent purpose.¹

2. It is next contended on the part of the plaintiffs, that no property passed by the fraudulent purchase of Martin, from the plaintiffs to him, so as to enable him to make a title to the defendants.

The evidence clearly shows that there was a contract of sale and an actual delivery of the goods, by their being placed on board a vessel, pursuant to his order; and this delivery was unconditional, unless there was an implied condition arising from the usage of the trade that the delivery was to be considered revocable, unless the corn should be paid for, pursuant to the contract and to such usage. This contract and delivery were sufficient in law to vest the property in Martin, and make a good title, if not tainted by fraud. But being tainted by fraud, as between the immediate parties, the sale was voidable, and the vendors might avoid it and reclaim their property. But it depended upon them to avoid it or not, at their election. They might treat the sale as a nullity and reclaim their goods; or affirm it and claim the price. And cases may be imagined, where the vendor, notwithstanding such fraud, practised on him, might, in consequence of obtaining security, by attachment or otherwise, prefer to affirm the sale. The consequence therefore is, that such sale is voidable, but not absolutely void. The consent of the vendor is given to the transfer, but that consent being induced by false and fraudulent representations, it is contrary to justice and right, that the vendor should suffer by it, or that the fraudulent purchaser should avail himself of it; and upon this ground, and for the benefit of the vendor alone, the law allows him to avoid it.

The difference between the case of property thus obtained, and property obtained by felony, is obvious. In the latter case, no right either of property or possession is acquired and the felon can convey none.

We take the rule to be well settled, that where there is a contract of sale, and an actual delivery pursuant to it, a title to the property passes, but voidable and defeasible as between the vendor and vendee, if obtained by false and fraudulent representations. The vendor therefore can reclaim his property as against the vendee, or any other person claiming under him and standing upon his title, but not against a bona fide purchaser without notice of the fraud. The ground of exception in favor of the latter is, that he purchased of one having a possession under a contract of sale, and

with a title to the property, though defeasible and voidable on the ground of fraud; but as the second purchaser takes without fraud and without notice of the fraud of the first purchaser, he takes a title freed from the taint of fraud. *Parker v. Patrick*, 5 T. R. 175. The same rule holds in regard to real estate. *Somes v. Brewer*, 2 Pick. 184.

3. Another ground is, that the plaintiffs had a right to stop in transitu, and exercised that right, in sufficient season, by demanding the goods of the master on his arrival at Boston, and before the goods reached the hands of the defendants.

The right of stoppage in transitu is nothing more than an extension of the right of lien, which by the common law the vendor has upon the goods for the price, originally allowed in equity and subsequently adopted as a rule of law. By a bargain and sale without delivery, the property vests in the vendee; but where, by the terms of sale, the price is to be paid on delivery, the vendor has a right to retain the goods till payment is made, and this right is strictly a lien, a right to detain and hold the goods of another as security for the payment of some debt, or performance of some duty. But when the vendor and vendee are at some distance from each other, and the goods are on their way from the vendor to the vendee, or to the place by him appointed for their delivery, if the vendee become insolvent and the vendor can repossess himself of the goods before they have reached the hands of the vendee or the place of destination, he has a right so to do, and thereby regain his lien. This however does not rescind the contract, but only restores the vendor's lien; and it can only take place when the property has vested in the vendee.²

Without considering what would have been the effect of the bill of lading in defeating the vendor's right to stop in transitu, had the place of destination been Boston, we are of opinion that upon another ground, the right did not exist in the present case.

What does or does not constitute a journey's end, and the termination of the transit, may, in many cases, be a question of difficulty and has often been a subject of discussion. But here we think it very clear, that a delivery of the corn on board of a vessel appointed by the vendee to receive it, not for the purpose of transportation to him, or to a place appointed by him to be delivered there for his use, but to be shipped by such vessel, in his name, from his own place of residence and business to a third person, was a termination of the transit, and the right of the vendor to stop in transitu was at an end. *Noble v. Adams*, 7 Taunt. 59.³

4. It is contended that the defendants

¹See *Bottomley v. United States*, 1 Story R. 135; *Bradford v. Boyiston F. & M. Ins. Co.* 11 Pick. 162; *Rex v. Hough*, 1 Russ. & Ry. 120; *Rex v. Ball*, *ibid.* 132; *Rex v. Dunn*, 1 Mood. Cr. Cas. 146; *Rex v. Hunt*, 3 Barn. & Ald. 566; *Phillips & Amos on Evl.* (8th Lond. ed.) 494.

²See *Clay v. Harrison*, 10 Barn. & Cressw. 99; *James v. Griffin*, 2 Mees. & Welsby, 632; *Edwards v. Brewer*, *ibid.* 379; *People v. Haynes*, 14 Wend. 566.

³See *Bolin v. Hufnagle*, 1 Rawle, 9; *Allan v. Gripper*, 2 Crompt. & Jervis, 218; *Foster v. Frampton*, 6 Barn. & Cressw. 107; *Townley v. Crump*, 5 Nev. & Mann. 606; *Buckley v. Furniss*, 15 Wend. 137; *Newhall v. Vargas*, 1 Shepl. 93.

were not purchasers for a valuable consideration and bona fide, so as to be entitled to the benefit of the exception in their favor. But we are of opinion that they do stand in that relation, and are entitled to the benefit of it. It appears that they advanced, either in cash or by the acceptance of Martin's drafts in favor of third persons, to an amount equal to the value of the goods, and that after having been furnished with bill of lading and invoice and in the ordinary course of business. The ground upon which the plaintiffs rely is, that at the time the bill of lading was signed, the corn was not on board, and in fact, as appears by a comparison of dates, had not been purchased of the plaintiffs. This was undoubtedly irregular; and if done by collusion between Martin and the master to enable the former to get money or credit on the bill of lading, was a gross fraud upon any person deceived by it. But it is not perceived how the plaintiffs can avail themselves of this, supposing it to be a fraud. A bill of lading is a contract of carriage for hire, by which the master engages to deliver the goods to the shipper or his order, and so is quasi negotiable. It operates by way of estoppel against the master and also against the shipper and indorser.

The bill of lading acknowledges the goods to be on board, and regularly the goods ought to be on board before the bill of lading is signed. But if, through inadvertence or otherwise, the bill of lading is signed before the goods are on board, upon the faith and assurance that they are at hand, as if they are received on the wharf ready to be shipped, or in the shipowner's warehouse, or in the shipper's own warehouse, at hand and ready, and afterwards

they are placed on board, as and for the goods embraced in the bill of lading, we think, as against the shipper and master, the bill of lading will operate on these goods by way of relation and by estoppel.

It is asked, how long after the signature of the bill of lading property may be delivered on board, so as to be bound by it and become the subject on which it shall operate. We think, at any time whilst the vessel is taking in her cargo for that voyage, as described in the bill of lading, and before she sails upon it. Here there was a time, when the bill of lading might have been properly signed by the master, namely, after the corn was delivered and before the vessel sailed; and it is admitted that this was received as and for the corn mentioned in the bill of lading. And it can make no difference to the plaintiffs, whether the bill of lading was signed after this shipment, or a few days before, in anticipation of such shipment. Supposing, then, that when the goods were shipped, as against the shipper and master the bill of lading operated upon this property and would have bound the master to deliver it to the consignee, as we think it would, then by the uniform course and practice of merchants, the bill of lading represents the property, and any bona fide title for valuable consideration obtained by a transmission or negotiation of the bill of lading, gives as valid and effectual a title to the goods, as could be obtained by an actual delivery of the goods themselves.⁴ The defendants have shown such a title, and therefore the order of the court must be

Judgment on the verdict.

⁴See *Allen v. Williams*, 12 Pick. 297.

RUHL et al. v. CORNER et al.

(63 Md. 179.)

Court of Appeals of Maryland. Feb. 12, 1885.

Before ALVEY, C. J., and YELLOTT, STONE, MILLER, ROBINSON, IRVING, and BRYAN, JJ.

W. Irvine Cross and John K. Cowen, for appellants. Joseph C. France and John Prentiss Poe, for appellee.

IRVING, J. The appellee being a commission merchant in Baltimore, between the month of August, 1881, and the month of January, 1882, received consignments of flour from Oliver Merion, of Minneapolis, Minnesota, for sale upon commission. Upon the 21st of January, 1882, Merion shipped to Corner & Co., without order, a car-load of "Champion" flour, being one hundred and twenty-five barrels, by Milwaukee and St. Paul Railroad and Baltimore and Ohio Railroad via Chicago. On the same day he wrote Corner & Co. advising of this shipment, and naming a price at which Corner, his factor, should sell the same. No bill of lading was sent to Corner & Co.; but at the time of the shipment a shipping receipt was taken from the railroad for the flour, and that with a draft on Corner & Co. for five hundred dollars was placed in bank for transmission to Baltimore, but was subsequently withdrawn, and was never sent. Subsequent to the shipment to Corner & Co., Merion received an order for flour from Conrad Ruhl & Son of Baltimore, and decided to change the shipment and to send to Ruhl & Son this car of flour on their order. Accordingly, on the 24th of January, 1882, the railroad having been notified, its agent at Minneapolis telegraphed the Chicago agent to hold the car of flour, as Merion wished to change the consignment to Ruhl & Son. On the 30th of January, the original receipt was surrendered to the railroad agent at Minneapolis, and a bill of lading for the flour was taken out to Ruhl & Son. The agent on the 24th had taken steps to have the address of Corner & Co. removed from the car, and to have that of Ruhl & Son substituted. He telegraphed to Chicago directing this change to be made, but it was neglected, and the flour came through to Baltimore labeled for Corner & Co., and was delivered to them; the Baltimore agents of the railroad not being advised of the change of destination, and Corner & Co. as yet, having received no information of Merion's change of purpose, and the actual consignment, by bill of lading, to Ruhl & Son. The proof shows, that on the 24th of January, three days after the shipment spoken of, but before Corner knew of it, he wrote to Merion advising against further shipments unless Merion chose to ship a car of "Clematis" flour, without draft, as the margins on the flour still on hand were exhausted. On the 26th of January, Corner acknowledged the receipt of the letter telling him of the shipment of "Champion," promising it should be sold for the best prices, and saying, "we note you have not made draft on this car, as if in anticipation of our re-

quest of the 24th to send us a car without draft to cover the margins on shipments now on hand."

Corner says in the testimony he sold the flour on the 9th of February, although on the 27th of February he wrote Merion he had received no orders, and does not apprise him of a sale until the 4th of March.

The bill of lading, though issued on the 30th of January, was dated back to the 21st of January to correspond with the actual shipment. This bill of lading in favor of Ruhl & Son, with draft on them for \$615, was presented by Merion to the Security Bank of Minnesota, and the draft was cashed by the bank, which sent both bill of lading and draft to the Bank of Commerce in Baltimore, at which bank Ruhl & Son paid the draft and received in consideration of such payment, viz., the bill of lading for the flour. Ascertaining the flour had been received by Corner, appellants in the latter part of February, or early in March, demanded payment for the same; and the Baltimore and Ohio Railroad also in March demanded the flour.

Upon this state of facts the question arises, who was entitled to this flour—the appellants, or the appellee? It is conceded that no bill of lading or invoice was ever sent to or received by Corner; whereas it is equally well established and not denied, that Ruhl & Son did receive a bill of lading, and did pay a draft on them for \$615 on it.

The appellants insist, that although the flour was originally shipped to Corner & Co., it was reshipped without their order, and that afterwards, and while it was in the power of the shipper to do so, the consignment was changed, and the flour was sold to Ruhl & Sons, to whom a bill of lading and draft were sent, and who paid therefor. They claim that title never passed from Merion to Corner & Co., but that it did pass to Ruhl & Son. The appellants further and strongly relied on the act of 1876, chap. 262, in respect to bills of lading, and the effect of the possession of such bills of lading upon title. But the decision of this case does not involve any consideration by the court of the effect of the act of 1876 or what construction shall be given it; for there are well settled principles established and acted upon in very many cases, which will control the decision of this case irrespective of any act of assembly.

It is the well-settled law, that the delivery of goods to a common carrier for one who has purchased and who has ordered them, is a delivery to the purchaser, though it does not amount to an acceptance of them. 1 Benjamin on Sales, pp. 182 and 195. But it is equally well settled, that where goods have been shipped to one who has not ordered them, title does not pass to the consignee by delivery to the carrier, and the right to change the consignment and destination during the transportation remains in the shipper; and this is so far the manifest reason that there is a want of the essential element of mutual assent to constitute a contract of sale. So that in all cases where goods

are shipped upon the account of, and at the risk of, the shipper, this right remains in him. *The Francis*, (Boyer, Master,) 8 Cranch, 418; *Mitchel vs. Ede*, et al., 11 Adolphus & Ellis, 888; *Scothorn vs. The South Staffordshire Railway Co.*, 8 Exch., 340; 3 Condensed Rep. U. S., 245, and notes; *Elliot vs. Bradley*, et al., 23 Vermont, 217; *Hodges & Co. vs. Kimball & Farnsworth*, 49 Iowa, 577; *Hutchinson on Carriers* secs. 134 and 337; *Blanchard, et al. vs. Page*, et al., 8 Gray, 285; and *Walter vs. Ross*, 2 Wash. Cir. Ct. Rep. 286. In this last case of *Walter vs. Ross*, the subject was fully considered, and Judge Washington says, "the factor has no interest or property in the goods beyond his commissions, and, of course, cannot controvert the right of his principal. If, indeed, he be a creditor of the shipper, he has a contingent interest in virtue of his right of lien which the possession would give; but for the perfection of his right he must acquire and retain an actual possession of this property—constructive possession will not do."

The same principles are declared in *Grosvenor & Starr vs. Phillips*, 2 Hill, (N. Y.), 147, and in *Bank of Rochester vs. Jones*, 4 Comstock, 500. In *Boaner, et al. vs. Marsh et al.*, 10 Sm. & Mar., 376; *Chaffe vs. Miss. & T. R. R. Co.*, 59 Miss., 185; *Woodruff vs. Nashville and Chattanooga R. Co.*, 2 Head, 87, and several other Tennessee cases, the law is laid down more stringently, as against the factor, than the weight of authority justifies. There can be no doubt, upon the weight of authority, that if the factor have claims for advances against his principal, and it be expressly agreed, that goods shall be shipped to the factor to pay those advances, then, in such cases, the law makes the delivery to the carrier a delivery to the consignee, though a factor; and the appellee's counsel endeavor to bring the appellee within the operation of this rule as laid down in *Bailey* and others vs. *Hudson River Railroad*, 49 N. Y., 70, and *Straus vs. Wessel*, 30 Ohio State Rep., 211. But those cases are not analogous to the present one. In *Bailey's* Case it was decided that title had passed. The court said that the plaintiffs in that case "occupied the legal position of vendees after having paid the purchase money and received delivery of the goods." It is true, the court says, in addition, that it is not necessary to hold in that case that the plaintiffs occupied the position of vendees strictly; but still the decision is wholly based on the ground that "the actual agreement and transaction proved by two members of the firm, and uncontradicted, prevailed." It was because of the agreement expressly proved that title was held to have passed to the consignee on delivery to the carrier, and in that way the shipper's right to change consignment and destination was lost. The court say in that case, the goods were not sold outright to the consignee at specified price, but they were by agreement sent to him for sale, and that the proceeds should be applied to the payment of the debt; creating thereby the quasi relation of trustee, to whom, for the purposes of the trust, the title passed. In

Straus vs. Wessel, 30 Ohio State, 211, the advances had been made on the particular lot of pork to be shipped, which, by express contract, was shipped to pay the indebtedness; and it was held, that under these circumstances, the delivery to the carrier was a delivery to the consignee, who, the court say, in such case, is in the position of purchaser, having paid for the goods.

If the present case by the proof, measured up in its facts to these last considered cases we should think the delivery complete so as to pass title unless the act of 1876 interposes an insuperable barrier to such a view, which the necessities of this case do not require us to consider. According to the facts of the case, which are undisputed, we think it very clear that there was no intention in the original shipment to pass the title out of the shipper, which, Judge Church says, in *Bailey's* Case, already considered, is the true test to be applied. There was certainly no contract that the flour should be shipped to pay the margins or advances on account of the goods still in Corner's hands and unsold. The flour was shipped without order from Corner & Co. The letter advising Corner of the shipment and naming the price at which he was to sell, bears evidence of its being an unsuggested shipment, and that Corner had been writing despondingly of flour prospects. Not a word was said in the letter about designing that shipment to pay former advances; and we are warranted in supposing he did not know that the margins on the flour still in his factor's hands were exhausted; for it does not appear that Corner & Co. ever informed him, until he did so by the letter of the 24th of January, at which time the flour was on its way to Baltimore, and could not be received until some days afterwards. In fact, the proof shows that Merion thought a considerable balance was due him from Corner & Co. on the previous shipments. As already stated, when the flour was shipped to Corner & Co., a draft for \$500 was drawn and put in bank for transmission to Baltimore for presentation to Corner & Co., but it also appears it was subsequently withdrawn and was never sent, because Merion had received an order from C. Ruhl & Son for flour, and determined to change the consignment, and send this flour to Ruhl & Son instead of to Corner & Co. The Chicago railroad agent was telegraphed by the Minneapolis agent to hold the flour for this change to be made before Corner & Co. sent their letter of the 24th of January, suggesting there was an exhaustion of margins, and if any flour should be shipped, that it be shipped without draft. It is clear, therefore, there was no mutual assent between Merion and Corner & Co. to the flour being sent by Merion to Corner & Co. to pay for previous advances on former orders. Without such assent, of course there was no contract. Unfortunately, the carding of the car, by the neglect of the railroad or of Merion, was not changed, and the flour came through to Baltimore, and was delivered to Corner & Co., and this complication has produced all the

trouble. If the flour was Merlon's when Corner received it, of course Corner's liens for previous advances would at once attach, and Merion would have to pay them to release the flour; but if, on the other hand, Merion had, while the flour was in transitu and at his risk, parted with the title, and the flour was no longer his, the liens of Corner & Co. would not and could not attach. We have seen that when the flour was shipped it was sent to Corner without order, and the carrier was Merion's agent and not Corner's; and that nothing afterwards occurred to change the relation of the carrier and make it the agent of Corner & Co. is clear; for the sale to Ruhl & Son was made before Corner & Co. had ever made their proposition of the 24th of January. Suppose, instead of the flour being received by Corner & Co., it had been received by Ruhl & Son, could Corner & Co. have maintained replevin or trover for the flour? It certainly could not be contended, upon the proof that they could. If not, then Corner & Co. had no title, and Ruhl & Son had acquired title and the right to sue Corner & Co. If Corner & Co. have been misled to their injury, they must look elsewhere for redress. What the law or equity would do, if the controversy was between Merion and Corner & Co., must not be considered to divert the mind from the rights of Ruhl & Son.

The court below erred in granting the defendant's prayer. It is entirely at variance with the law of the case, as we have declared it. The first prayer of the plaintiff was correct in principle, but it omitted some of the facts necessary for the jury to find. It ought to have submitted to the jury to find the fact, that the original shipment to the defendant was without his order, and was sent without bill of lading and actual draft on Corner & Co., and that before Corner & Co. received the flour from the carrier, the sale was made to Ruhl & Son. When these elements are incorporated in the prayer, it will be right. The second prayer was correctly refused, for it submits a question which, under

our view, the jury had nothing to do with, inasmuch as the factor's authority was revoked by the sale to Ruhl & Son. It was unnecessary. The third prayer was correctly refused, for it claims as the measure of damages that which belongs to the action of trover, and not to the form of action adopted by the plaintiffs. In the action of assumpsit, in the absence of proof of actual sale of the goods to the defendant the plaintiff can only recover for the money had and received from the sale of the flour to the use of the plaintiff. The prayer was therefore inconsistent with the form of action.

The question raised by the first bill of exception needs no discussion. The proof tendered was wholly immaterial, and without bearing upon the issue. The previous admission of irrelevant testimony, without objection, did not render its rebuttal competent. There was, therefore, no error in its rejection.

The objection which has been raised by the appellee's counsel, that the first and second bills of exception are not sufficiently connected, by apt language, to entitle the court to look at the evidence in the first bill of exception, for the purpose of determining upon the correctness of the court's rulings upon the instructions, cannot be maintained. All the evidence was in, and the prayers were not intended to be mere abstractions. They were offered with reference to the proof, as their form shows. The most appropriate language is not used for connecting the two bills of exception, but we regard it as entirely sufficient. The case is similar to and covered by *Baltimore and Ohio Railroad Company vs. State*, 30 Md., 47. The language used is, "all the testimony being in, the plaintiffs offered the following prayers." Reference to the testimony recited is manifestly made. It is equivalent to saying "there being no other testimony," or "this being all the testimony." The intention is too plain to be disregarded.

Judgment reversed, and new trial awarded.

RUPLEY et al. v. DAGGETT.

(74 Ill. 351.)

Supreme Court of Illinois. Sept. Term, 1871.

Replevin brought by John F. Daggett against Abram Rupley and Jacob Rupley to recover a mare which the defendants claimed they had bought of the plaintiff. At the first conversation about the mare, Rupley asked the price, the plaintiff swearing that he replied \$165, while the defendant testified that he said \$65. In the second conversation Rupley says he told Daggett that, if the mare was as represented, they would give \$65, and Daggett said he would take him down next morning to see her. Daggett testified that Rupley said to him, "Did I understand you sixty-five?" and that he supposed Rupley referred to the fraction of the \$100, and meant \$165 as named at the previous interview. He answered, "Yes, sixty-five." Both parties then supposed the price was fixed, Rupley supposing it was \$65, and Daggett supposing it was \$165. The next day Rupley saw the mare, and took her home. Judgment for plaintiff, and defendants appealed.

Fellows & Leonard, for appellants. Hill & Dibell, for appellee.

SCOTT, J. It is very clear, from the evidence in this case, there was no sale of the property understandingly made. Appellee supposed he was selling for \$165, and it may be appellant was equally honest in the belief that he was buying at the price of \$65. There is, however, some evidence tending to show that appellant Rupley did not act with entire good faith. He was told, before he removed the mare from appellee's farm, there must be some mistake as to the price he was to pay for her. There is no dispute this information was given to him. He insisted, however, the price was \$65, and expressed his belief he would keep her if there was a mistake. On his way home with the mare in his

possession, he met appellant, but never intimated to him he had been told there might be a misunderstanding as to the price he was to pay for her. This he ought to have done, so that, if there had been a misunderstanding between them, it could be corrected at once. If the price was to be \$165, he had never agreed to pay that sum, and was under no sort of obligation to keep the property at that price. It was his privilege to return it. On the contrary, appellee had never agreed to sell for \$65, and could not be compelled to part with his property for a less sum than he chose to ask. It is according to natural justice, where there is a mutual mistake in regard to the price of an article of property, there is no sale, and neither party is bound. There has been no meeting of the minds of the contracting parties, and hence there can be no sale. This principle is so elementary it needs no citation of authorities in its support. Any other rule would work injustice and might compel a person to part with his property without his consent, or to take and pay for property at a price he had never contracted to pay.

There was no error in refusing instructions asked by appellants. The court was asked to tell the jury if they believed, from the evidence, appellee had "sworn willfully and corruptly false in any material portion of his testimony, then they are at liberty to disregard his entire testimony, except so far as it may be corroborated by other evidence in the case." Conceding this instruction states a correct abstract principle of law, there was no necessity for giving it under the facts proven in this case. The verdict was right, and appellants were not prejudiced by the refusal of the court to give it.

All that was pertinent to the issues in the other refused instructions was contained in others that were given, and there was no necessity for repenting it.

No material error appearing in the record, the judgment must be affirmed.

Judgment affirmed.

SAFFORD et al. v. McDONOUGH.

(120 Mass. 290.)

Supreme Judicial Court of Massachusetts. Suffolk. May 6, 1876.

T. H. Sweetser and B. F. Hayes, for plaintiffs. S. A. B. Abbott, for defendant.

MORTON, J. This is an action of contract to recover the price of a quantity of leather, exceeding fifty dollars in value, alleged to have been sold by the plaintiffs to the defendant. There was no memorandum in writing of the contract, and the purchaser did not give anything in earnest to bind the bargain or in part payment.

It appeared on the trial that the defendant on May 17, 1872, went to the plaintiffs' store and agreed to purchase the leather at the price named, to be paid for by a satisfactory note.

On the thirty-first day of the same month, he again went to the plaintiffs' store, examined the leather, had it weighed, marked with the initials of his name, and piled up by itself, to be taken away by him upon giving a satisfactory note for the price, or the payment of the price in money, but not otherwise. He never complied with the terms of the agreement. The plaintiffs refused to allow him to take the leather from their store without such compliance, claiming a lien upon it for the price due. It remained in their store till November 9, 1872, when it was burnt with the store. Upon this evidence the presiding justice of the superior court ruled that the leather had not been so accepted and received by the defendant as to take the contract out of the statute of frauds, and the plaintiff excepted to such ruling.

It should be kept in mind that the question is not whether, if a valid contract of sale upon the terms above named had been proved, the title in the property would have passed to the defendant so that it would be at his risk. In such a case, the title would pass to the purchaser unless there was some agreement to the contrary, but the vendor would have a lien for the price, and could retain possession until its payment. *Haskins v. Warren*, 115 Mass. 514. *Morse v. Sherman*, 106 Mass. 430. *Townsend v. Hargraves*, 118 Mass. 325. But the question is whether

the defendant had accepted and received the goods, so as to take the case out of the statute of frauds, and thus complete and make valid the oral contract relied on. Unless there was such acceptance and receipt, there was no valid contract by virtue of which the title to the goods would pass to the defendant. To constitute this, there must be a delivery by the seller, and some unequivocal acts of ownership or control of the goods on the part of the purchaser. *Knight v. Mann*, 118 Mass. 143, and cases cited.

In the case at bar, there was no actual acceptance and receipt of the goods by the defendant. They were never in his possession or control, but remained in the possession and control of the plaintiffs, who refused to allow him to take them, claiming a lien for the price. If they had and asserted a lien as vendors, this is inconsistent with the delivery of possession and control, necessary to constitute an acceptance and receipt by the vendee. In *Bulley v. Parker*, 2 B. & C. 37, 44, *Holroyd, J.*, says: "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession, and therefore, as long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute." *Benjamin on Sales*, (Am. ed.) 151, and cases cited. *Browne on St. of Frauds*, § 317.

It is true there may be cases in which the goods remain in the possession of the vendor, and yet may have been accepted and received by the vendee. But in such cases the vendor holds possession of the goods, not by virtue of his lien as vendor, but under some new contract by which the relations of the parties are changed. *Cusack v. Robinson*, 1 B. & S. 299, 308. *Castle v. Swarder*, 6 H. & N. 828. *Dodsley v. Varley*, 12 A. & E. 632.

In the case at bar, the vendors refused to permit the vendee to take possession or control of the goods, but claimed and asserted their lien as vendors for the price. We are therefore of opinion that the ruling of the superior court was correct.

Exceptions overruled.

ENDICOTT and LORD, JJ., absent.

SALTUS et al. v. EVERETT.

(20 Wend. 267.)

Court of Errors of New York. Dec. 1838.

Error from the supreme court. *

Everett brought an action of trover in the superior court of law of the city of New-York against Messrs. Saltus, for a quantity of lead. In August, 1825, Bridge & Vose, merchants at New-Orleans, shipped 179 pigs of lead on board the brig Dove, of which William Collins was master, consigned to Messrs. Tufts, Eveleth, & Burrell, of New-York, on account and risk of Otis Everett, the plaintiff, to whom they were referred for instructions. The Dove put into Norfolk in distress, and part of the lead was sold to pay expenses, and the residue was transferred in December, 1825, by an agent of Capt. Collins, to the schooner Dusty Miller, Captain Johnson, who signed a bill of lading, acknowledging the lead to have been shipped by F. M., agent for William Collins, and promising to deliver the same in New-York, to order, on payment of freight. The Dusty Miller met with a disaster on her voyage to New-York, and on her arrival there, the lead, by the order of Capt. Collins, was delivered to the firm of Collin & Cartwright, who paid the freight, and \$72.87, the average contribution, charged upon the lead, for the loss occasioned by the disaster to the Dusty Miller. On the 9th March, 1826, Collin & Cartwright sold the lead to the Messrs. Saltus, the defendants, for \$542.74, and received payment. The freight of the lead from New-Orleans to New-York, amounted to \$14.72. Everett brought an action against Collin & Cartwright, to recover the value of the lead, but was nonsuited, in failing to prove that before suit brought, he offered to pay the freight, average and charges to which the lead was liable, and which had been advanced by Messrs. Collin & Cartwright, and this court, on application, refused to set aside the nonsuit. (See 6 Wendell, 603.) In October, 1831, the plaintiff demanded the lead of the Messrs. Saltus, and offered to pay any lawful demands they had on the same; to which they answered, they would have no further communication on the subject. It was proved that in March, 1826, one of the firm of Tufts, Eveleth, & Burrell demanded of the Messrs. Saltus, the lead, or its value, and received for answer, that they had bought the lead, and paid for it, and would not do anything about it. Upon this evidence the plaintiff was again nonsuited. Whereupon he sued out a writ of error, removing the record into the supreme court, where the judgment of the superior court was reversed. See opinion delivered in the supreme court. (15 Wendell, 475, et seq.) The defendants then removed the record into this court, where the cause was argued by

T. T. Payne, for plaintiffs in error. T. Sedgwick, Jr., and S. P. Staples, for defendant in error.

By the CHANCELLOR. The plaintiffs in error were not entitled to the goods in question on the ground, that they were the

purchasers thereof without notice of the rights of the real owner; they were in the same situation in this respect as every other purchaser of goods from a person who had no authority to sell. If the owner of the goods had caused the bill of lading to be made out in the name of Collins, so as to give him a prima facie right to the goods as owner, or consignee for his own benefit, a bona fide purchaser might have been entitled to protection. The principle adopted in the case of *Mowrey v. Walsh*, (8 Cowen, 238), might be applicable to such a case; but here the change of the bill of lading itself was a fraudulent act on the part of the master of the vessel, or his agent, and could not defeat the right of the owner of the goods who had not authorized any such change. The bill of lading is, by the custom of merchants, transferable, so as to vest in the assignee the title to the goods which the assignor had in them; but if a person without authority from me ships my goods and takes a bill of lading in his own name, he cannot, by assigning that bill of lading to another, divest my title to the property. If by the perils of the sea, or otherwise, the master of the Dove was unable to continue the voyage, and he was obliged to send on the cargo by another vessel, he had no right to change the consignee of the goods; and if he wished to retain a lien upon the goods for the freight pro rata *inter se*, he should have done so by a special clause in the new bill of lading. In this case the unauthorized sale of the goods in the port of New-York, by the master of the Dove, was probably such an act as would now be a felony, under the provisions of the Revised Statutes prohibiting carriers of goods, delivered to them to be transported for hire, from embezzling the goods or converting the same to their own use; and even at the time when this transaction took place, no rights could be acquired by third parties, as against the owner of the goods, by such a fraudulent act of the carrier to whom they were entrusted for carriage or transportation merely.

The question does not arise on this writ of error whether the Messrs. Saltus by the purchase were substituted in the place of Collin & Cartwright as to the lien upon the goods for the freight paid by them to the master of the Dusty Miller. If there had not been an actual conversion of the goods before the commencement of the suit, the question would arise whether there ever was a lien which the purchasers from Collin & Cartwright could claim the benefit of; and, if such lien existed, whether it had not been waived by putting their claim to retain the goods upon other grounds. It appears, however, by the evidence, that the plaintiffs in error had actually converted the goods, by selling them on the day of their purchase; and if they once had a lien which would have rebutted the presumption of a conversion, from the mere fact of refusing to deliver on demand, when the amount of the lien was not tendered, or offered to be paid, a tender after they had put it out of their power to receive the money and deliver the goods, by an actual sale, would have been a useless ceremony, and was

not necessary to enable the owner of the goods to recover in an action of trover. In such a case, if there was a valid lien in favor of the defendants before the conversion, they would be entitled to be recouped in the damage, to the extent of such lien; but they could not defeat the plaintiffs' action altogether.

The bill of lading signed by Collins at New-Orleans was only *prima facie* evidence that the consignees were the owners of the property, and the letter of Bridge & Vose, the shippers, which was sent to the consignees with the bill of lading, was sufficient to rebut the presumption and to show that the property really belonged to Otis Everett of Boston, in whose name the suit was brought. Besides, one of the consignees was examined as a witness, and proved that Everett and not the consignees at New-York, was the real owner of the goods. I have no doubt, therefore, that the judgment of the supreme court was correct, and that it ought to be affirmed.

By Senator VERPLANCK. This cause, though of small magnitude as to the amount of property in question, has been contested in various forms through all the courts to this tribunal of last resort.

The spirit of contentious litigation ought to find little favor here; yet in this instance, I think, the parties have deserved well of the public, because the main question in the case is of great importance, and must frequently arise in a commercial community. It ought, therefore, to be distinctly settled on principles of general application. That those principles are not very clearly settled in our state, we need no higher evidence than the manner in which the cause now comes before us. The supreme court have reversed the unanimous decision of the superior court of law of the city of New-York, and on the broad principles governing the questions which we are now to decide, there is a direct contrariety between the opinions of our highest court of common law and those of our most eminent commercial tribunal, as delivered by their chief justice, who was formerly chancellor of this state.

The main question depends upon and involves the general rule that ought to govern, between the conflicting rights of bona fide purchasers of personal property, bought without notice of any opposing claim, and those of the original owner, divested of the possession or control of his property by accident, mistake, fraud, or misplaced confidence. The original owner now claims his lead against purchasers who bought for a fair price, in the usual course of trade, from persons holding the usual evidence of such property, (a bill of lading endorsed to them,) and in actual possession of the goods. Of these two innocent parties, which of the two is to bear the loss arising from the wrong doing of the third?

The universal and fundamental principle of our law of personal property, is, that no man can be divested of his property without his own consent; and, consequently, that even the honest purchaser

under a defective title cannot hold against the true proprietor. That "no one can transfer to another a better title than he has himself," is a maxim, says Chancellor Kent, "alike of the common and the civil law, and a sale, *ex vi termini*, imports nothing more than that the bona fide purchaser succeeds to the rights of the vendor." The only exception to this rule in the ancient English jurisprudence was, that of sales in markets overt, a custom which has not been introduced among us. "It has been frequently held in this country that the English law of markets overt had not been adopted, and consequently as a general rule, the title of the true owner cannot be lost without his consent." (2 Kent's Comm. 324, and cases there cited.)

To whatever and however numerous exceptions this rule of our law may be subject, it is unquestionably the general and regulating principle, modified only by the absolute necessity or the obvious policy of human affairs. The chief justice of the superior court has said, in his opinion on this case, that "it must be conceded that a purchaser for a fair and valuable consideration, in the usual course of trade, without notice of any conflicting claim or any suspicious circumstances to awaken inquiry, or to put him on his guard, will, as a general rule, be protected in his purchase, and unaffected by any latent claim. But there are exceptions to this rule." Now, I cannot agree with the learned chief justice that this is the general rule. On the contrary, I think it obvious that it is but the broad statement of a large class of exceptions to the operation of a much more general principle, and that statement of exceptions is subject again to many limitations. I have stated the general and governing law; let us now see what are precisely the exceptions to it.

The first and most remarkable class of these exceptions relates to money, cash, bank bills, checks, and notes payable to the bearer or transferable by delivery, and in short whatever comes under the general notion of currency. It was decided by Lord Chief Justice Holt, at an early period of our commercial law, that money and bills payable to bearer, though stolen, could not be recovered after they had passed into currency; and this "by reason of the course of trade which creates a property in the holder." "They pass by delivery only, and are considered as cash, and the possession always carries with it the property." (Anon., 1 Salk. 126.) A long series of decisions, beginning with *Miller v. Race*, (1 Burr. 452), has now settled the law, that possession of such paper is presumptive proof of property, and that he who received it in the course of trade for a fair consideration, without any reason for just suspicion, can hold it against the true owner, and recover on it against the drawer, maker, and other parties, even if the paper had been stolen from or lost by the former holder; such former holder retaining all his original rights only against the thief or the finder, or whoever received the paper from them under suspicious circumstances. These decisions have been argued upon as authorities (at

least in the way of analogy) both at law and in opinions of the courts, in cases involving the same question as to goods or other movable property. Hence, it was inferred that goods bought or received "in the course of trade, stand on the same footing with bank notes or checks so received." But an examination of the cases will show that this part of the law of negotiable paper rests on grounds quite peculiar to itself, for the following reasons: 1. The protection of the bona fide holder of paper, transferable by delivery, extends even to cases where the paper has been lost or stolen. But it has been often decided that loss by accident, theft, or robbery, does not divest the title of the owner of goods, nor give a title in them to a fair after purchaser. 2. The rule is put by all the authorities on the express and separate ground of the necessity of sustaining the credit and circulation of the currency. Thus Lord Chief Justice Hardwicke: "No dispute ought to be made with the holder of a cash note, who came fairly by it, for the sake of currency, to which discrediting such notes would be a great disturbance." See, too, the reasoning of Lord Mansfield, in all cases on this head decided before him. Thus, says he, in the case of a stolen note, *Peacock v. Rhodes*, (2 Doug. 636:) "An assignee must take the thing assigned, subject to all the equity to which the original party was subject. If this rule was applied to bills, it would stop their currency." Similar reasons are assigned for the same decision by American judges. 3. The analogy between notes and movables or goods, is expressly denied in the leading cases on this head. Thus, in reply to an argument founded on that similarity, Lord Mansfield answers, (*Miller v. Race*, 1 Burr. 457:) "The whole fallacy of the argument rests upon comparing bank notes to what they do not resemble, and what they ought not to be compared to, viz., goods, or securities, or documents for debts. Now, they are not goods, nor securities, nor similar to them; they are treated as cash to all purposes," &c.

Setting wholly aside, then, this part of the law as to cash, bank notes, and bills to bearer, as founded on the peculiar necessities of currency and trade, and regulated by decisions and usages peculiar to itself, what rules do we find to obtain in other instances of conflict between the rights of original owners and those of fair purchasers? After a careful examination of all the English cases and those of this state, that have been cited or referred to, I come to this general conclusion, that the title of property in things movable can pass from the owner only by his own consent and voluntary act, or by operation of law; but that the honest purchaser who buys for a valuable consideration, in the course of trade, without notice of any adverse claim, or any circumstances which might lead a prudent man to suspect such adverse claim, will be protected in his title against the original owner in those cases, and in those only, where such owner has by his own direct voluntary act conferred upon the person from whom the bona fide vendee derives title, the apparent right of property as owner, or of disposal

as an agent. I find two distinct classes of cases under this head, and no more.

1. The first is, when the owner, with the intention of sale, has in any way parted with the actual property of his goods, with his own consent, though under such circumstances of fraud or error, as would make that consent revocable, rescind the sale, and authorize the recovery of the goods as against such vendee. But if the property passes into the hands of honest purchasers, the first owner must bear the loss. Thus, to take an instance from our own reports, where goods were obtained by a sale on credit, under a forged recommendation and guaranty, and then sold to a bona fide purchaser in the customary course of trade, the second buyer was protected in his possession against the defrauded original owner. (*Mowrey v. Walsh*, 8 Cowen, 213.) So, again, where the owner gave possession and the apparent title of property to a purchaser, who gave his worthless note, in fraudulent contemplation of immediate bankruptcy, a fair purchase from the fraudulent vendee was held to be good against the first owner. (*Root v. French*, 13 Wendell, 572. See, also, *McCarty v. Vickery*, 12 Johns R., 318.) In all such cases, to protect the new purchaser, there must be a full consent of the owner to the transfer of property, though such consent might be temporary only obtained by fraud or mistake, and therefore revocable against such unfair purchaser.

II. The other class of cases in which the owner loses the right of following and reclaiming his property is, where he has, by his own voluntary act or consent, given to another such evidence of the right of selling his goods as, according to the custom of trade, or the common understanding of the world, usually accompanies the authority of disposal; or, to use the language of Lord Ellenborough, when the owner "has given the external indicia of the right of disposing of his property." Here it is well settled that, however the possessor of such external indicia may abuse the confidence of his principal, a sale to a fair purchaser divests the first title, and the authority to sell so conferred, whether real or apparent, is good against him who gave it.

Thus, the consignee, in a bill of lading, is furnished by his consignor with such evidence of right of disposal, according to the custom and law of trade, so that the bona fide holder of the bill endorsed by the consignee is entitled to all the rights of property of the consignor in those goods, if bought fairly in the course of business, although the actual consignee, under whose enforcement he holds, has no right to the goods as against the former owner. If such goods were not paid for, they might be stopped in transitu by the owner, unless his consignee has already assigned his bill of lading, but that assignment divests the owner of his right of stoppage against such assignee.

The famous series of decisions in the various courts in the case of *Lickbarrow v. Mason*, (2 T. R. 63; 2 H. Black. R. 211; 5 T. R. 367,) which led to the establishment of the doctrine of this qualified nego-

liability of bills of lading, memorable alike in legal and commercial history, strongly illustrates the whole question before us. There, Buller and his associate judges, trained up at the feet of the great father of English commercial jurisprudence, maintained and established the law as we now hold it, under the influence of Mansfield's genius upon his reasoning and on his authority, against those of Lord Loughborough and others, the most learned lawyers of their times. All the arguments and admissions of both sides show how deeply the general principle is rooted in the law of England, that (to use Lord Loughborough's words) "mere possession, without a just title, gives no property, and the person to whom such possession is transferred by delivery must take the hazard of the title of its author." It is only as an express exception to this rule that it was maintained, and finally established, that the custom of merchants, evidenced and sanctioned by legal decisions, and founded on those conveniences of trade, so admirably stated by Buller, had compelled the courts to consider the owner as giving his consignee evidence of the power of disposal, which it was not for him to dispute when the goods had fairly passed into other hands, on the faith of that evidence. But there is no case to be found, or any reason or analogy anywhere suggested in the books, which would go to show that the real owner could be concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently, as in this present case. The assignment of the bill of lading conveys, not an absolute right to goods, but the right and title merely of the actual consignor, who alone is bound by it.

Again: the owner may lose the right of recovering his goods against purchasers, by exhibiting to the world a third person as having power to sell and dispose of them; and this, not only by giving a direct authority to him, but by conferring an implied authority. Such an authority may be implied by the assent to and ratification of prior similar dealings, so as to hold such person out to those with whom he is in the habit of trading, as authorized to buy or sell. It may be inferred from the nature of the business of the agent, with fit accompanying circumstances. "If a man," says Bayley, J., in *Pickering v. Busk*, (15 East, 44,) "puts goods into another's custody, whose common business it is to sell, he confers an implied authority to sell," and the cause was decided on that ground. But this implied authority must arise from the natural and obvious interpretation of facts, according to the habits and usages of business; and it never applies where the character and business of the person in possession, do not warrant the reasonable presumption of his being empowered to sell property of that kind. If, therefore, to use an illustration of Lord Chief Justice Ellenborough, in the case just cited, a person entrusts his watch to a watchmaker to be repaired, the watchmaker is not exhibited to the world as an owner or agent, and credit is not given as

such, because he has possession of the watch, the owner, therefore, would not be bound by his sale. When these exceptions cease, the general rule resumes its sway; and the law is therefore clear, that an agent, for a particular purpose, and under a limited power, cannot bind his principal if he exceed his power. "Whoever deals with an agent constituted for a special purpose, deals at his peril, when the agent passes the precise limits of his power." (2 Kent's Comm. 621, and the authorities there cited.)

Beyond the precise exceptions I have above stated I think our law has not carried the protection of the fair vendee against the defrauded or unfortunate owner. It protects him when the owner's misplaced confidence has voluntarily given to another the apparent right of property or of sale. But if the owner loses his property, or is robbed of it, or it is sold or pledged without his consent by one who has only a temporary right to its use by hiring, or otherwise, or a qualified possession of it for a specific purpose, as for transportation, or for work to be performed on it, the owner can follow and reclaim it in the hands of any person, however innocent. Among the numerous cases to this effect, I will cite only that of *Hoare v. Parker*, (2 T. R. 376,) which I select not only on account of the strong and unhesitating manner of the decision, but because it was pronounced by the very judges who, in the case of *Lickbarrow v. Mason*, had carried the protection of a bona fide purchaser under a bill of lading far beyond the rigor of the ancient law. There, plate had been pawned by a widow who had only a life interest in it under her husband's will, of which fact the pawnee had no notice. It was not doubted that the lien for the moneys advanced on such pledge was void against the remainderman, after the widow's death. "Per curiam: This point is clearly settled, and the law must remain as it is, until the legislature think it fit to provide that the possession of such chattels is proof of ownership." In order to decide in such conflicts between the claims of equally meritorious sufferers by the wrong of a third party, public policy must draw an arbitrary line somewhere, and the greatest merit of such a rule must be its certainty and uniformity.

The rule of our law, as I understand it, is perfectly consistent with the equity between the parties, as far as such equity can apply; and it serves the great interests of commerce, in a state of such extensive foreign and domestic trade as ours, by protecting the property of the stranger, as well as of our own citizens, against the possible frauds of carriers by sea, or by internal transportation, whilst it throws upon the resident merchant the responsibility of taking care with whom he deals, and teaches him a lesson of wholesome caution. It is no mean proof of the wisdom of the rule, that it agrees in substance with the provisions of the Napoleon Code. The Code, like our law, holds as a general rule, that the sale of goods by any but the true holder, is a nullity; "*La vente de la chose d'autrui est nulle.*" (Code Civil III.

art. 1599.) It confines the authority of the special agent or mandataire to the strict limits of his power; and in sales, the power must always be special and express. (Code Civil, art. 1989.) It allows the right of revendication or stoppage in transitu against the insolvent or fraudulent purchaser or consignee; but that right ceases, as with us, against the consignee, when the goods have been fairly sold according to the bills of lading; "vendues sans fraude sur factures et connaissements." (Code de Commerce, Liv. III., art. 576, 577, 578.) The Scotch law, as I gather from Bell's Commentaries, lays down a different rule, that "a purchaser, in the course of trade, should be protected in the purchase of goods from any one who has them in lawful possession." This agrees with the doctrine of our superior court, and might be a safe enough rule if generally adopted and understood. But it is not the rule of our own law, which is perhaps quite as wise, as well as certainly founded on a much larger and wider commercial experience.

Let us apply these conclusions to the present case. Collins, the person whose sale it is asserted must divest the original owner of his rights in favor of the bona fide purchaser, stands, it is said by the superior court, in a double relation of "a master, who is at the same time the consignee of the goods, and who himself filled the character of shipper, and has therefore an undoubted power to sell, and his bona fide transfer will be effectual to purchasers against any secret trust for others with which his apparent title might be affected." Had the lead been consigned to Collins from the intermediate port, by the owner or his agent, this would be true. But it is shipped by Myers, of whom neither the owner, nor any one with full power to represent him in this matter, had any knowledge as an agent, and under whose care the vessel and cargo were placed by Collins, so that he appeared only as his representative, and thus he styles himself in the bill of lading. The plaintiff below comes in no wise within the rule I have stated. He has neither given to Collins documentary and mercantile evidence of property in a bill of lading from himself or his own agent with competent power, nor the evidence customary in business, such as to hold him out as an agent authorized to change the title of his property in his goods. The assumed authority of shipping goods in his own name and to his own order, at Norfolk, and the documentary evidence of it in the bill of lading, can have no more effect as to the title of the property, than if he had forged such a bill of lading at New Orleans.

Neither does the selection of a ship and its master vest in the master any implied authority to sell the ship, or any part of her cargo. His business is to carry the goods, and no more, with some other clearly defined and very limited powers, to be exercised only in cases of absolute necessity. He stands in the same legal relation to his cargo with the watchmaker, in the case supposed by Lord Ellenborough, who has in his hands a watch to be repaired. He is not exhibited to the world

as the owner, or agent for selling; and if he does sell it, the sale is void against the true proprietor. The law of shipping is well known to the commercial world, to declare that the master has no authority to sell the cargo, or any part of it, unless under circumstances of pressing necessity abroad; and of that absolute necessity, the burden of proof rests on the purchaser, and the presumption is against it. As Judge Bayley states the law, (Morris v. Robinson, 3 Barn. & Cress. 196,) "The captain has no right to act as agent for the owner of the goods, unless in absolute necessity. The purchaser obtains no property by the act of his professing to sell." And this was held where the master acted in perfect good faith. How much stronger is the case of a probable fraud! Thus again, in Freeman v. East India Co., (5 Barn. & Ald. 619,) Abbott, Ch. J., says, "a sale of a cargo, or any part of it, by the master, can confer no title, unless there was an absolute necessity," and the reason of the rule is thus assigned by Judge Best in the same case: "A carrier by sea and by land stands in the same relation to the owner of goods to be carried. Their duty is to carry the goods, and the authority only such as is necessary. The purchaser, knowing that necessity alone can justify the sale, and give him a title to what he buys, will assure himself that there is a real necessity for the sale before he makes the purchase; and caution on his part will prevent what has frequently happened, the fraudulent sale of ships and cargoes in foreign ports." Such, then, being the well-settled and generally known law, the selection of a master or any other carrier, by sea or land, does nothing to exhibit such carrier to the world as having the power of disposing of the goods he carries. The owner does nothing to enable him to commit a fraud on third persons. He gives merely a qualified possession, and if that is turned into an assumed right of ownership, it is tortious conversion, and will not divest the owner's title.

It is true that the rule will sometimes, as was urged by Chief Justice Jones, "involve purchasers in great perils;" but that peril can scarcely be called "unreasonable," since there is a reason of public policy of at least equal weight to counterbalance this inconvenience. It is the same which is the ground of the absolute prohibition to a master or carrier to sell the goods he transports except under insurmountable necessity; it is to prevent, in the language of the court in the case just quoted, (5 Barn. & Ald. 623,) "fraudulent sales of ships and cargoes in foreign ports." Now the fraudulent consignments or change of the apparent evidence of property for the purpose of selling elsewhere, is but another form of the same evil. I may add that this same rule, however rigid and occasionally hard in its operation, is no small safeguard to the protection of the owner's rights in goods and other property, in active commerce necessarily placed under the temporary control, and in the legal though qualified possession of agents, sailors, carriers, boatmen, servants, and clerks, as well as of those

who may have them stored for safe keeping, and their clerks, porters, and servants.

On the other question, as to the right of the defendants below to stand in the place of their vendor, and to be protected to the extent of the charges on the lead for freight, as claimed by Collins, I need say but little. The right of lien in such circumstances, (if any right exists here,) depends upon actual possession by the factor or carrier, or his immediate agent. When the goods are sold and delivered to a third person, the lien, as such, expires with the possession. This is the distinction between the present case and the former suit against Coffin & Cartwright, who were immediate agents or bailees of Collins.

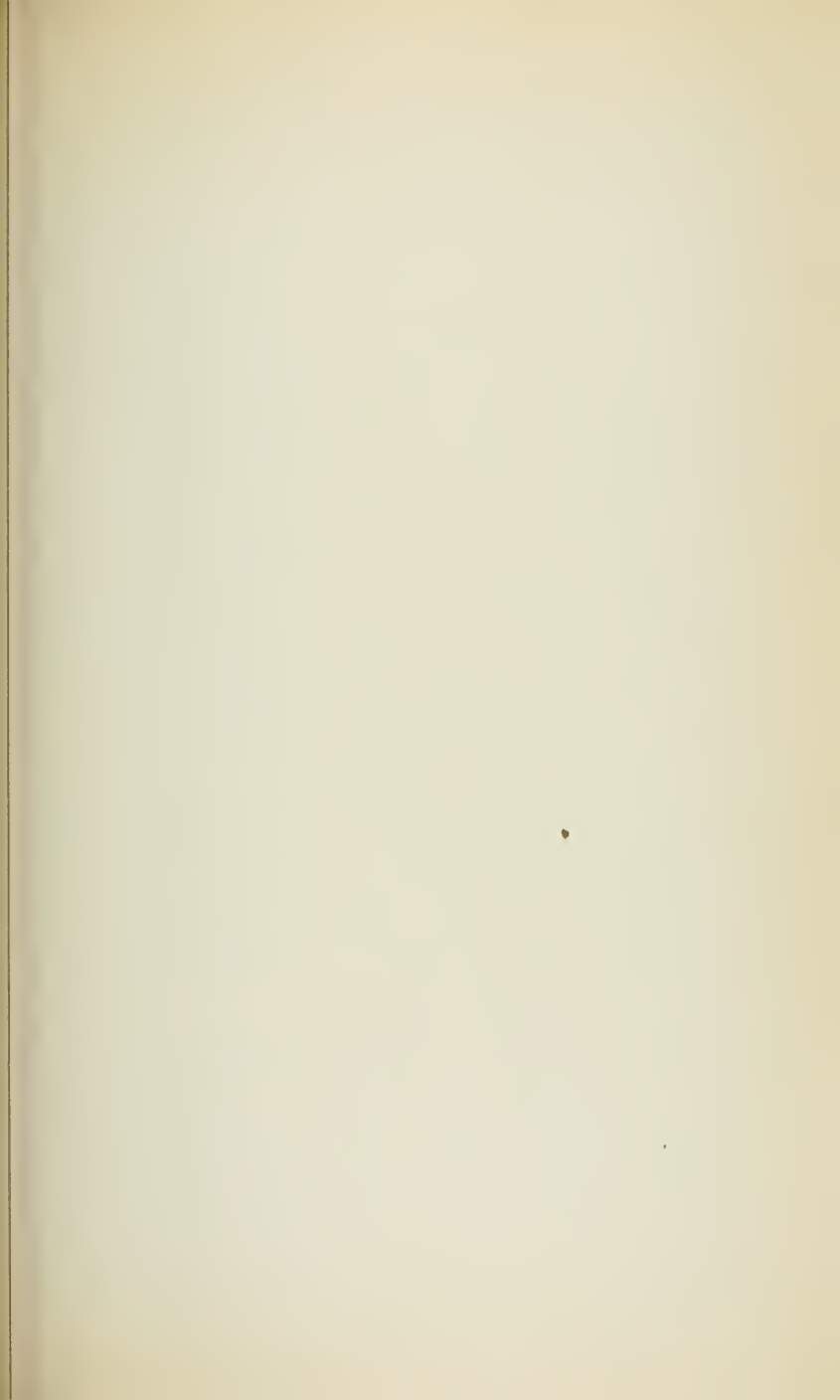
The two courts below have agreed in deciding against the validity of the objections to the evidence raised on the trial of

the cause, and I have nothing to add to the reasons they assign; to all which I fully assent.

The importance of the principles and rules not only of decision but of active business involved in this cause, especially in relation to that vast and busy community which I immediately represent in this body, has lead me to examine this whole head of law with an interest and at a length wholly disproportioned to the amount of value in controversy. If the views I have been able to present shall in any way, directly or indirectly, tend to settle the law on this head, or make it more clearly and correctly understood, the study I have given the subject will have been well bestowed.

I am of opinion that the judgment of the supreme court, reversing that of the superior court of New-York, be affirmed.

Judgment unanimously affirmed.



SANBORN et al. v. FLAGLER.

(9 Allen, 474.)

Supreme Judicial Court of Massachusetts.
Nov., 1864.

Contract brought by plaintiffs, who were partners under the firm of Sanborn, Richardson & Co., against John H. Flagler and ——— Holdane, as partners under the firm of Holdane & Co. The writ was served only upon Flagler. The plaintiffs alleged that the defendants had refused to deliver to them fifty tons of best refined iron, in accordance with a written agreement entered into between them. The defendant set up among other defenses the statute of frauds. One of the plaintiffs was called to the stand, and produced to be offered in evidence a paper, of which the following is a copy as near as can be made: "Will deliver S. R. & Co. best refined iron 50 tons within 90 days—at 5 ct p lb 4 of cash. Plates to be 10 to 16 inches wide and 9 ft to 11 long. This offer good till 2 o'clock Sept. 11, 1862. J. H. F. J. B. R."

The defendant objected that the paper was not a sufficient memorandum in writing of the alleged bargain signed by the party to be charged, and that parol evidence was not admissible so as to make it such a memorandum as could be admitted. The judge ruled that the paper was a sufficient memorandum, and would bind the defendant if he was a member of the firm of Holdane & Co. The witness then testified that the agreement was written by him, and that he and the defendant signed their initials, the defendant writing the initials "J. H. F.," and he the initials "J. B. R.;" and that before the defendant left the plaintiff's office, and before 2 o'clock, he accepted the proposition, and so stated to the defendant verbally. The witness testified that he signed his initials on behalf of the plaintiffs, and that he understood the defendant to sign for the firm of Holdane & Co. This evidence was not denied by the defendant. The judge ruled that said paper, with the explanation given, if Richardson was believed, was a sufficient note or memorandum, and was binding on the defendant if the jury found him to be a partner as alleged. The jury found a verdict for the plaintiffs, and the defendant alleged exceptions.

A. A. Ranney, for plaintiffs. C. T. Russell, for defendant.

BIGELOW, C. J. The note or memorandum on which the plaintiffs rely to maintain their action contains all the requisites essential to constitute a binding contract within the statute of frauds. It is not denied by the defendant that a verbal acceptance of a written offer to sell merchandise is sufficient to constitute a complete and obligatory agreement, on which to charge the person by whom it is signed. In such case, if the memorandum is otherwise sufficient when it is assented to by him to whom the proposal has been made, the contract is consummated by the meeting of the minds of the two parties, and the evidence necessary to render it valid and capable of enforcement is supplied by the signature of the party sought to be

charged to the offer to sell. Indeed, the rule being well settled that the signature of the defendant only is necessary to make a binding contract within the provisions of the statute relating to sales of merchandise, it necessarily follows that an offer to sell and an express agreement to sell stand on the same footing, inasmuch as the latter, until it is accepted by the other party, is in effect nothing more than a proposition to sell on the terms indicated. The acceptance of the contract by the party seeking to enforce it may always be proved by evidence aliunde.

The objections on which the defendants rely are twofold. The first is that the note or memorandum does not set forth upon its face, in such manner as to be understood by the court, the essential elements of a contract. But this position is not tenable. The nature and description of the merchandise, the quantity sold, the price to be paid therefor, the terms of payment, and the time within which the article was to be delivered, are all clearly set forth. But it is urged that the paper does not disclose which of the parties is the purchaser and which the seller, and that no purchaser is in fact named in the paper. This would be a fatal objection if well founded. There can be no contract or valid memorandum of a contract which does not shew who are the contracting parties. But there is no such defect in the note or memorandum held by the plaintiffs. The stipulation is explicit to deliver merchandise to S. R. & Co. It certainly needs no argument to demonstrate that an agreement to deliver goods at a fixed price and on specified terms of payment is an agreement to sell. Delivery of goods at a stipulated price constitutes a sale; an agreement for such delivery is a contract of sale. Nor can there be any doubt raised as to the intrinsic import of the memorandum concerning the character or capacity in which the parties are intended to be named. A stipulation to deliver merchandise to a person clearly indicates that he is the purchaser, because in every valid sale of goods delivery must be made by the vendor to the vendee. We can therefore see no ambiguity in the insertion of the name of the purchaser or seller. The case is much stronger in favor of the validity of the memorandum in this respect than that of *Saboon Falls Manuf. Co. v. Goddard*, 11 How. 416. There only the names of the parties were inserted, without any word to indicate which was the buyer and which was the seller. It was this uncertainty in the memorandum which formed the main ground of the very able dissenting opinion of Mr. Justice Curtis in that case. So in the leading case of *Bailey v. Ogden*, 3 Johns. 399, there was nothing in the memorandum to shew which of the two parties named agreed to sell the merchandise. But in the case at bar, giving to the paper a reasonable interpretation, as a brief document drawn up in the haste of business and intended to express in a few words the terms of a bargain, we cannot entertain a doubt that it indicates with sufficient clearness that the plaintiffs were the purchasers, and the defendant the seller of the mer-

chandise, on the terms therein expressed. Indeed we can see no reason why a written agreement by one party to deliver goods to another party does not as clearly shew that the latter is the purchaser and the former the seller as if the agreement had been in express terms by one to sell goods to the other.

The other objection to the memorandum is that the name of the party sought to be charged does not appear on the face of the paper. If by this is meant that the signatures of all the persons who are named as defendants are not affixed to the memorandum, or that it is not signed with the copartnership name under which it is alleged that the persons named as defendants do business, the fact is certainly so. But it is not essential to the validity of the memorandum that it should be so signed. An agent may write his own name, and thereby bind his principal; and parol evidence is competent to prove that he signed the memorandum in his

capacity as agent. On the same principle, a partner may by his individual signature bind the firm, if the contract is within the scope of the business of the firm, which may be shewn by extrinsic evidence. *Soames v. Spencer*, 1 D. & R. 32; *Long on Sales*, 38; *Browne on Statute of Frauds*, § 367; *Higgins v. Senior*, 8 M. & W. 834; *Williams v. Bacon*, 2 Gray, 387, 393. Besides, in the case at bar, the action is in effect against Flagler alone. He only has been served with process and appears to defend the action. Whether he signed as agent for the firm or in his individual capacity is immaterial. In either aspect he is liable on the contract.

It is hardly necessary to add that the signature is valid and binding, though made with the initials of the party only, and that parol evidence is admissible to explain and apply them. *Phillimore v. Barry*, 1 Camp. 513; *Salmon Falls Manuf. Co. v. Goddard*, ubi supra; *Barry v. Combe*, 1 Pet. 640. Exceptions overruled.

SANGER et al. v. WATERBURY et al.

(22 N. E. Rep. 404, 116 N. Y. 371.)

Court of Appeals of New York, Second Division. Oct. 22, 1889.

Appeal from judgment of the general term of the supreme court, in the second judicial department, entered upon an order made December 14, 1886, which affirmed a judgment in favor of the defendants, entered upon a verdict directed by the court. This was an action of replevin brought to recover the possession of 238 bags of coffee identified and described in the complaint as follows: "89 bags, marked No. 6, H. L. B. & Co., D. B. & Co.; 32 bags, marked No. 8, H. L. B. & Co., D. B. & Co.; 14 bags, marked No. 10, H. L. B. & Co., D. B. & Co.; 29 bags, marked No. 12, H. L. B. & Co., D. B. & Co.; 68 bags, marked No. 14, H. L. B. & Co., D. B. & Co.; 6 bags, marked No. 16, H. L. B. & Co., D. B. & Co." The complaint alleged, and the answer admitted, "that on or about the 22d day of July, 1885, the said goods * * * were sold by the plaintiffs to the defendants John K. Huston and James E. Huston, * * * on the credit of sixty days for one-half thereof, and of ninety days for the balance thereof." It appeared that the plaintiffs, on the 6th day of July, 1885, purchased of Boulton, Bliss & Dallett 605 bags of coffee, then stored with E. B. Bartlett & Co. On the 22d day of July the plaintiffs sold the 238 bags of coffee hereinbefore referred to to J. K. Huston & Co., of Philadelphia. That firm, on the 24th day of July, upon the security of the coffee thus purchased, borrowed from the defendants Waterbury & Force \$2,300, and then transferred the coffee to them. On July 27th following, said firm failed, making a general assignment. On the next day, the plaintiffs commenced this action, by means of which the coffee was taken from the possession of Waterbury & Force. The coffee then was, as it had been from the time of the purchase by the plaintiffs, actually deposited in the warehouse of E. B. Bartlett & Co., and had not as yet been weighed.

William W. Goodrich, for appellants. Edward N. Shepard, for respondents.

PARKER, J., (*after stating the facts as above*.) The appellant contends that the title to the coffee in controversy did not pass to J. K. Huston & Co., and that therefore the transfer to Waterbury & Force did not vest in them the title or the possession. The sale is admitted; but as the coffee had to be weighed, in order to ascertain the amount to be paid to plaintiffs, it is insisted that the title remained in the plaintiffs. In aid of this

contention is invoked the rule that where something remains to be done by the seller to ascertain the identity, quantity, or quality of the article sold, or to put it in the condition which the contract requires, the title remains in the vendor until the condition be complied with. The appellant cites a number of authorities which, he urges, so apply this rule as to make it applicable to the case here presented. It is said in *Groat v. Gile*, 51 N. Y. 431, that this "rule has reference to a sale, not of specific property clearly ascertained, but of such as is to be separated from a larger quantity, and is necessary to be identified before it is susceptible of delivery. The rule or principle does not apply where the number of the particular articles sold is to be ascertained for the sole purpose of determining the total value thereof at certain specified rates, or a designated fixed price." This distinction is recognized and enforced in *Crofoot v. Bennett*, 2 N. Y. 258; *Kimberly v. Patchin*, 19 N. Y. 330; *Bradley v. Wheeler*, 44 N. Y. 495. In *Crofoot v. Bennett*, supra, the court says: "If the goods sold are clearly identified, then, although it may be necessary to number, weigh, or measure them, in order to ascertain what would be the price of the whole at a rate agreed upon between the parties, the title will pass." This expression of the court is cited with approval in *Burrows v. Whitaker*, 71 N. Y. 291, in which case, after a full discussion of the authorities, the court approved the rule as laid down in *Groat v. Gile*, supra. Now applying that rule to the facts in this case, nothing remained to be done in order to identify the goods sold; because while, out of a larger lot, 238 bags of coffee were disposed of, nevertheless, as appears from the complaint and the testimony adduced, the bags were so marked that there was no difficulty about identifying the particular bags sold. There remained, therefore, nothing to be done except to weigh the coffee for the purpose of ascertaining the purchase price; for whether the 238 bags of coffee should prove to weigh more or less than the parties anticipated was not of any consequence. Whatever should prove to be, for that number of pounds J. K. Huston & Co. had agreed to pay. This case, therefore, does not come within the rule contended for by the appellants, but, instead, is governed by the principle enunciated in *Groat v. Gile*. Having reached the conclusion that the title and the possession passed to J. K. Huston & Co., it becomes unnecessary to consider any of the other questions discussed, for the plaintiffs are without title upon which to found the right to maintain an action. The judgment appealed from should be affirmed. All concur.

SAWYER v. DEAN.

(21 N. E. Rep. 1012, 114 N. Y. 469.)

Court of Appeals of New York, Second Division.
June 4, 1889.*Chas. A. Clark*, for appellant. *Wm. P. Cantwell*, for respondent.

POTTER, J. This is an appeal by the defendant from a judgment of the general term of the Fourth department, affirming a judgment against him on a trial before the court at special term. The action is brought to recover damages alleged to have been sustained by Franklin Sawyer, assignor of the plaintiff, in consequence of the neglect and refusal of the defendant to accept and pay for a car-load of 500 hides that he had ordered and purchased of said assignor, and directed to be shipped from Chicago, where said Franklin Sawyer resided and where the hides were, to Owego in the state of New York, where the defendant had a tannery in which he was conducting, on a more or less extensive scale, the business of tanning hides into leather. The bargain for the hides was made through correspondence by letter and by telegraph communications between the parties. After the arrival of the hides at Owego, and some correspondence by telegrams and by letter, and the sending an agent by the plaintiff to Owego to see the defendant, and after an interview with the gentleman so sent by the plaintiff with defendant's agent at Owego, the defendant finally refused to receive the hides unless he had an opportunity of taking them from the depot to his factory, and there opening and examining, if not testing and proving, them. This the plaintiff refuses to allow the defendant to do, and gave him notice, at the proper time and manner, that unless he accepted the hides in accordance with the contract, and especially if he refused, after the offer which had been made, to examine the hides at the railroad station, upon a platform or in a car, the hides would be returned to the seller in Chicago on account of the refusal to receive and pay for the same, and would there be sold for the best price that could be obtained for them, and defendant would be charged with the difference between the price brought on the sale at Chicago and the price agreed upon, together with the necessary expenses growing out of sending the hides to and return from Owego, and other incidental expenses occasioned by the refusal of the defendant to receive and pay for in accordance with the contract. This action is brought to recover that difference and those expenses,—that is, the difference between the contract price and the price at which they were sold at Chicago,—and this recovery is based upon that difference in the price and these expenses.

This correspondence by telegram and by letter commenced on or about the 20th day of October, 1882, and was carried on for a

few days, and culminated, as the trial court found, in an agreement to purchase, on the part of the defendant, the 500 hides, specifying the price per pound and quality of the hides; and that, in pursuance of such contract and purchase, the plaintiff's assignor shipped the hides on the 4th of November to his own order, accompanied by a draft on the defendant, sent through a bank at Owego; the hides to be delivered to the defendant upon payment of the draft, and the carrier of the railroad company was directed to deliver them accordingly. When the hides arrived at Owego on or about the 11th of November, 1882, notice was given to the agent or person in charge of the defendant's tannery that they had arrived. And at this point the question in controversy arises whether the defendant was bound, under the contract made between him and plaintiff's assignor, to take the hides, and pay the draft, without any examination or inspection of them, or whether under the contract he was entitled to an inspection of the hides before accepting the draft, or paying the draft, or acceptance of the hides. There had been nothing said in these negotiations or correspondence between the parties until after the hides were shipped on the 4th of November, as before stated, in respect to the time or manner of payment for the hides. The trial court found that this contract was consummated, and found the contract, by a modification or waiver, resulted in giving to the defendant the right that he claimed, namely, to an examination of the hides before an acceptance of them, or accepting the draft and paying it. The court should, I think, from the evidence have found the correspondence between the plaintiff's assignor and the defendant, commencing with the letter of inquiry on the 20th of October and the actual shipment on November 4th, that the defendant ordered of plaintiff's assignor 500 hides, the quality of which was specified in the correspondence, at prices named per pound for the hides, and the same were to be selected by plaintiff's assignor for the defendant, and the plaintiff's assignor did ship the hides accordingly in his own name; and the same were received at the railroad station near defendant's tannery in good order and in due time. The law arising upon such finding is that the defendant had no right to test or prove the hides, and was not entitled to the possession of them for that or any other purpose until they were paid for.

Upon the ordinary agreement to sell and to purchase personal property, in the absence of any agreement or provision in the agreement as to the time or manner of payment, delivery and payment are simultaneous acts; and, as a tender is equivalent in law to performance, a tender of delivery or payment by one person to the other gives the person making the tender the right to enforce the performance of the contract against the other. *Hayden v. Demets*, 53 N. Y. 426, 428, 429. In the case under consideration, defendant

made no objection that the hides were not of good quality or of the quality specified in the terms of purchase, or in the number of hides. He simply insisted that he had a right, under the contract, to an examination of the hides before acceptance and payment. Under such a contract, as I think the trial judge might have well found from the evidence in this case, it results, as in the case of *Higgins v. Murray*, 4 Hun, 565, and as was in the opinion in that case expressed by Judge DANIELS, the plaintiff by shipping in his own name, was simply keeping the possession of the property, as he had the right to do, until it had been accepted and paid for by the defendant. By shipping in that manner he retained and kept the lien of possession as his security for the payment of the property. The effect of the contract was to transfer the title of the property from plaintiff's assignor to the defendant, subject only to the right of the assignor to retain possession until payment should be made, as long as no credit was to be given, or had been provided for, by the terms of the agreement. After the making of the contract he became the agent of the defendant, save in retaining possession of the property as security for the payment of the purchase money, while title to the property was vested in the defendant. To the same effect is the case of *Bank v. Pfeiffer*, 22 Hun, 327. Also the case of *Morey v. Medbury*, 10 Hun, 540. If the law in this case is not as above stated, the effect would be that a person who under a valid contract has sold his property, sent it to a distant place to the manufacturing establishment of the purchaser, has received no payment, and has parted with the possession of the property and that means of securing payment, must rely upon the responsibility of the purchaser, and his disposition to pay for the property. If this is not satisfactory to the purchaser, he should have made a different bargain. He could have done as he was advised by the plaintiff's assignor, viz., have appointed a hide broker or expert to have made the selection. Then both the buyer and the seller would have been bound by the selection made,—the buyer to accept and pay for, and the seller to deliver. But the defendant chose to make the seller his agent to select, and he must abide by the selection made for him, especially in the absence of any evidence that the hides were not just what he ordered. Indeed, the defendant did not base his refusal to pay upon any allegation, much less upon any proof that the hides were not in accordance with his specification and order, but upon the simple pretext that he wanted to examine them, and that, too, after he had authorized the plaintiff's assignor to select the hides for him.

While the trial court might, and I think should, have found as above indicated, it has found substantially in that way, but with the qualification that the plaintiff's assignor gave the defendant the right to examine the hides before accepting them. This right the

learned trial court bases upon expressions in the letters of October 27th and November 4th, and which, I think, were subsequent to the correspondence which constitutes the contract between the parties. The examination referred to in those letters is not to be an examination which should determine whether the defendant should receive these 500 hides, but the examination of this lot was to determine whether he was so well suited with this lot that he would make further and larger orders; besides, it seems very plain that the plaintiff's assignor did not mean to change the terms of the contract for this shipment, but at all times, and upon the stand as a witness upon the trial, he insisted that the defendant was not entitled as a matter of right to an examination before an acceptance of the hides. There was no consideration for such change of contract, or "waiver" as it is called by the trial court, and it therefore imposed no new or different obligation upon the plaintiff than existed under the former contract. But the trial court made a finding that the contract was so modified as to allow the defendant an examination before acceptance. The trial court also found that plaintiff's assignor had offered to defendant an opportunity to examine the hides, outside of the car in which they were contained, upon the platform or in the store-house; that such opportunity was a just and reasonable one; and that defendant refused, and thus defendant broke the contract; and that the plaintiff's assignor was justified in the course he pursued thereafter. I can see no error in this finding or conclusion. It would afford a fair and reasonable opportunity for the defendant to determine the quality of the hides. None could be better for the purpose of an examination, unless they should be taken to defendant's tannery and there be worked as well as examined. Of course business of this kind could not be practically or successfully carried on in this way; certainly not to the vendor of hides living hundreds, if not thousands, of miles away, and receiving many, if not the most, of the hides he sells from dealers and butchers living and carrying on business as many more miles from the plaintiff's assignor.

We come now to notice the exceptions taken by the defendant. These were first as to the proof of a custom existing in Chicago for the seller of hides to ship and consign to himself at the place of destination, with directions to the carrier to deliver to the vendee upon his accepting a draft for the purchase price. We do not think that the proof of such custom could have harmed or prejudiced the defendant in any way. Whether the contract was to accept the hides, and sign a draft for payment upon notice of their arrival by the carrier, or to do so after reasonable opportunity to examine the hides and refusal by the vendor to avail himself of such opportunity, can make no difference with the legal rights and obligations of the parties to the contract. It was the clear right of the seller, when no other mode or time for payment is provided in the

contract, to retain possession of his property until he was paid for it. The defendant has no right or ground for complaint that the plaintiff insists upon such right. The defendant in this case ordered hides to be sent to Owego. Hides such as he wanted and had ordered were brought and tendered to him at the railroad station at Owego, one of the usual routes and points of shipment. No other route or point had been indicated by the defendant when the hides were shipped. We do not perceive that the defendant's rights have been interfered with, or what just ground of complaint or of refusal to accept the goods the defendant would have had if the goods had arrived in the personal care or possession of the seller, and without any bill of lading or shipping bill whatsoever. The seller has the right to retain his possession until he has received, or is tendered, payment of the price. This mode of doing business is entirely legitimate, and in many cases it is the only way of securing payment. *Bank v. Pfeiffer*, 22 Hun, 434. It certainly would not seem to be any just ground of complaint, upon the part of the defendant that the plaintiff, instead of delivering the goods to the vendee at Chicago by an absolute consignment to him, as he was authorized to have done under the contract in question, took the risk upon himself of the payment of the transportation, and of their arrival in good order and condition at the place where the defendant desired to use and manufacture them into leather. *Higgins v. Murray*, supra. Our conclusion is that this proof of custom did not change or affect the legal relations of the parties to the contract in question, and was not at all necessary or serviceable in the decision of the question in this case. Whether this proof of custom was in or out of the case, the decision must have been the same, and so the defendant has no just ground of complaint, or for another trial without such proof.

We do not think there was any error in allowing proof of the acts of Bond, plaintiff's agent, and Upton, defendant's agent. There can be no doubt of their agencies upon the evidence in the case, outside of any statements made by the alleged agent that he was agent. Being the agents of the parties, their acts and statements, while performing acts for their principals, in the offers and efforts for an opportunity to examine the hides, and to obviate objections and reconcile differences between the parties, were competent evidence.

The defendant, upon the argument, discusses another kind of evidence received upon the trial, viz., the letters and telegrams sent by the seller to the purchaser, and the findings which may in a measure be based upon such evidence. An effectual answer to that argument is that this evidence was

received without objection; and the defendant, when examined as a witness after this evidence was thus received, does not deny that he received them; and I think, when a response does come from the defendant touching the points in the letters and telegrams, it is pretty plain that they were received by the defendant.

Nor do I think that the letters introducing Bond, agent for plaintiff's assignor, to, and informing defendant's agent, Upton, and Mr. Platt, cashier, and to the railroad agent, objectionable. They proved but the authority of Bond to act, and could not until he had acted affect the rights of the parties; and the effect of his action would depend upon his authority, and hence the necessity for proving his authority.

I think we have examined, closely and carefully, the lengthy and exhaustive points furnished by the defendant's counsel upon the argument; and I do not perceive any substantial error on account of which there should be a new trial granted in this case. The case seems to have been thoroughly tried by the court without a jury, the jury having been waived at the close of the evidence, and a consent given that the case be decided by the court. There were numerous incidental and unimportant questions raised and ruled upon during the trial, and exceptions taken in some instances, and in others not taken. I refer to the depositions of witnesses taken under commission, and the rejection of answers or portions of answers, and the question of variance and amendment; but they do not seem to me to be important, and many of them are clearly within the discretion of the court. Such were the statements made to witnesses in identifying the hides sold in Chicago. I do not understand from the defendant's points that any serious contention is made as to the right of the plaintiff to recall the hides, and to sell them at Chicago, the great hide market of the country, after notice to the defendants that that course would be pursued if the defendant refused to accept and pay for the hides in accordance with the terms of the contract. The plaintiff, in the contingency just stated, had the right to pursue this course.

I think the sale was properly made by the plaintiff at Chicago, and that he adopted the best means to get the highest price and occasion defendant the least loss, and that the sale, etc., was conducted in entire good faith by the plaintiff's assignor, and that the amount of the recovery did not exceed the plaintiff's right or the defendant's obligation after he had broken the contract. *Dustan v. McAndrew*, 44 N. Y. 72, 74, 79.

We think judgment should be affirmed, with costs. All concur, except FOLLETT, C. J., not sitting.

SCOTT v. LAUMAN.

(104 Pa. St. 593.)

Supreme Court of Pennsylvania. Jan. 7, 1884.

Feligned issue between George R. Lauman, administrator of William Scott, deceased, as plaintiff, and Andrew Scott, as defendant, to determine the right to a certain fund. Judgment for plaintiff, and defendant brings error. Affirmed.

Deceased, William Scott, had a certificate of deposit in a bank, on which certificate in his last sickness he wrote an assignment to defendant of part of the deposit. He delivered the certificate so endorsed to his attorney, telling him to "take it with him, and put it in his safe; that it was for Andrew Scott;" and the attorney retained the certificate in his office till the death of deceased, when he handed it to defendant.

Before MERCUR, C. J., and GORDON, PAXSON, TRUNKY, STERRETT and CLARK, JJ. GREEN, J., absent.

A. M. Brown and John S. Ferguson,

for plaintiff in error. J. M. Stoner, for defendant in error.

PER CURIAM.—To constitute a valid gift, there must be a delivery of the property to the donee, or to some person for his use. A gift is a contract executed. The act of execution is the delivery of possession. Without delivery, it is only a contract to give, not binding for want of consideration: *Campbell's Estate*, 7 Barr 100; *Withers v. Weaver*, 10 Id. 394; *Kidder v. Kinder*, 9 Casey 268; *Trough's Estate*, 25 P. F. S. 115; *Zimmerman v. Streeper*, 1d. 147.

In the present case there was no delivery to the donee, nor to any person for his use. The donee placed in the hands of his own attorney the certificate of deposit, and the order to pay a part of the sum therein specified to the donee. He did not instruct his attorney to deliver it to the donee. The latter had no knowledge of any act of the donor relating to the intended gift. Without delivery the whole evidence was insufficient to support the paper as an executed contract.

Judgment affirmed.

SCOTT v. WELLS.

(6 Watts & S. 357.)

Supreme Court of Pennsylvania. Dec., 1843.

Assumpsit by Daniel Wells against Hugh Scott for the value of a raft of boards sold and delivered to defendant. Judgment for plaintiff, and defendant appeals. Affirmed.

L. A. Scott, for plaintiff in error. J. M. Read, contra.

GIBSON, C. J.—The material question is, whether the property passed by the sale and delivery in the first instance. The facts were not contested. Eldred, the vendor's agent, sold a raft of boards to Tustin, the purchaser's agent, at a certain rate the thousand feet, and delivered it to a person employed by the latter to take it, at the purchaser's expense and risk, from Richmond on the Delaware to a place on the Schuylkill, where it was afterwards moored. The delivery was unconditional, pursuant to the contract and complete; why then did it not pass the property and put it at the purchaser's risk? Because, say the purchaser's counsel, the number of feet contained, or the sum total of the price, was not settled by the terms of the contract; and the consequence attempted is, that the sale was imperfect in its members. Had there been no delivery, or a conditional one, the purchaser would not perhaps have been bound till the number of feet and entire price had been ascertained; but the parties evinced, by taking the last step, that nothing remained to be done in order to perfect the contract. If I deliver a chattel in execution of an agreement to sell it in terms to be fixed subsequently, the ownership and risk of the property doubtless remain with me in the mean time; but such delivery is conditional, and after an ineffectual effort to perfect the sale, no delivery at all. On the other hand, it is a rule, perhaps without an exception, that whenever there has been an absolute delivery pursuant to a bargain perfect in its members, or capable of being made so by reference to something else than supplemental conditions by the parties or an arbiter appointed by them, the ownership of the property is vested by it. I grant that a sale may be fatally defective in its members; and that, by the civil as well as the common law, the specification of a price is necessary to constitute it. But there is abundant authority to show that it may be supplied by arbitrament, where there is a provision in the contract for it; and why not by calculation where the contract furnishes a basis for it? Surely the price is certain enough when the sum of it can be obtained by computation. For instance, I sell my fat bullocks grazing in a particular field, at so much the head; there are five of them, but the number is not specified in the contract; they are delivered and driven away, but rush over a precipice and break their necks; surely it will not be said that I am to lose the price of them, because the aggregate amount of it or the number was not specified by the terms of the bargain.

Yet the principle is necessarily the same, whether the number be five or five hundred. But I would be bound to bear the loss, were the number, however inconsiderable, determinable by a process provided in the contract. But where no such process is provided, may not a farmer sell his growing crop by the bushel, so as to change the ownership of it in the mean time, without fixing the quantity by an estimate before it is threshed? To sell by the bushel and fix the quantity would, in effect, be to sell for a round sum. Had, indeed the agents of the parties before us made it a condition that the number of feet in the raft should be counted or estimated by a particular person, the sale would have been incomplete, and the property at the vendor's risk till that was done, inasmuch that he might have passed the title to another, leaving the prior vendee to his action for a breach of the contract; but by the bargain actually made, the vendor sold just so many feet as the raft actually contained. There is no process pointed out to ascertain the number; and why may he not recover in proportion to the number ascertained by the evidence? A sale is imperfect only where it is left open for the addition of terms necessary to complete it, or where it is deficient in some indispensable ingredient which cannot be supplied from an extrinsic source. But when possession is delivered pursuant to a contract which contains no provision for additional terms, the parties evince, in a way not to be mistaken, that they suppose the bargain to be consummated. Even where actual possession has not been taken, the ownership and risk pass by the contract. If nothing remains to be done to the property by the vendor, such as counting, measuring, weighing or filling up, to ascertain the number, quantity or weight. Thus in *Rugg v. Minett*, 11 East, 210, turpentine had been sold at so much the hundred weight in casks, to be taken at the marked quantity, except two out of which the others were to be filled up before delivery; and those two were sold as containing indefinite quantities. The buyer employed a person to do the filling, but before he completed it, the warehouse, with its contents, was destroyed by fire; and it was held that the property in those filled up had passed to the buyers, because nothing remained to be done to them by the vendors. Now the number of them, like the number of feet in this raft, could be ascertained only by extrinsic proof; and the case, therefore, is in point. In perfect consistence with it is *Zagury v. Furnell*, 2 Camp. 240, in which a sale of goat skins by the bale, containing a specified number, was held not to pass the property, because the usage of the trade, which was consequently a part of the contract, made it the duty of the seller to count the skins in each bale before they were delivered. So in *Hanson v. Meyer*, 6 East 611, an agreement to sell all the vendor's starch in a particular warehouse, at so much the hundred weight, the number of hundreds to be ascertained before delivery, did not presently pass the ownership. There is no lack of authority for the prin-

ciple, that while anything remains to be done by the terms of the contract, to ascertain the entire price, the property remains at the risk of the vendor; and in *Withers v. Lyss*, 4 Camp. 237, the sale of an unascertained quantity of rosin in a particular warehouse, not taken away, but requested to be kept in the names and at the disposal of the purchasers, was held not to have been completely delivered; but it certainly would have been otherwise had the actual custody of it been changed. In that event the sale would have been perfect, provided the quantity could have been ascertained by proof. In the case before us, the raft was actually delivered; and, in the absence of stipulation to the contrary, the delivery evinced that no more was to be done by the seller. Had he been unable to prove the number of feet which were contained in it, the sale would have been incomplete, and he could not have recovered. As he was able to satisfy the jury on that head, we must take it that the title passed to the vendee. Did the subsequent transactions re-vest it?

The jury were left to judge of the authority given to the agents as a question of fact; and as there was evidence to found a conclusion that their powers were general, we must treat the case as if the fact were so; and we must say that Eldred was competent, with the assent of the other party, to rescind the sale, re-vest the title, and make a conditional sale to the same vendee on terms which would leave the property at his principal's risk till the conditions were performed. Was that done? It certainly was not intended. When he first met Scott, the purchaser, there was no proposal on either side to recede from the bargain or alter its terms. On the contrary, Scott expressly ratified what had been done, and in addition, proposed to fix the number of feet by an estimate, to which Eldred acceded, and a day was appointed to meet at the raft and make it. This new agreement, it will be remarked, was not only an independent but a conditional one, and being itself imperfect, was of no force being unexecuted. At the day appointed, Eldred, and Tustin came and met, not Scott, but a person on his part, who said that Scott would attend; but he came not, and nothing was done. Eldred then

sought him, found him, and agreed with him to have the raft taken out of the water and counted at a day named. Eldred again attended and Scott did not, so that the second agreement turned out to be as abortive as the first, and both became as inoperative as if they had not been made. Moreover, it is obvious that neither of them was intended to impair or alter the sale. The object, a distinct and independent one, was to relieve the purchaser from the alternative of taking the agent's word for the number of the feet, or taking the trouble to ascertain it for himself. To hold that this turned the previous absolute sale into a conditional one, out of which the buyer could creep by refusing to co-operate in what was further to be done, and thus leave the property on the vendor's hands at a place remote from the market, would be not only unreasonable but inconsistent with the evident purpose of the parties.

As to the declarations of Scott, on the one hand, that he had once considered himself the owner of the raft, and the consent of Eldred to remove it to Harding's landing, on the other, it is enough to say that these, though indicative of the understanding of the contract by the parties, were not conclusive of the title, and that they were properly left to the jury. What is conclusive of it, however, is that the terms of the sale were unconditional and sufficiently certain to pass the property in the first instance; that there was no evidence of an act done to rescind or alter it, and that when the subsequent negotiations failed, they left the contract where they found it.

It is impossible to imagine an objection to the competency of Eldred as a witness. The suggestion is that he may have incurred liability to his principal for negligence or misfeasance, from which he would be exonerated by a recovery in this action; the answer to which is, that there was no evidence of negligence or misfeasance, and that, in the absence of proof of it, the law presumes against it. Besides, exposure to the possibility of an action is one of those contingent interests which go only to credibility. Such were the principles that ruled a similar point in *M'Credy v. Navigation Co.*, 3 Whart. 424, and which rule the point before us.

Judgment affirmed.

SCRANTON v. CLARK.

(39 N. Y. 220.)

Court of Appeals of New York, March Term
1868.Appeal from order reversing a judgment
for defendant and ordering a new trial.
Action on a promissory note.L. S. Chatfield, for appellant. James
Emott, for respondents.

BACON, J. If the charge of the learned judge upon the trial had stopped at the first proposition enunciated by him, it is possible the verdict might be upheld, because it may perhaps be said that there is some evidence from which the jury might possibly have found that Jerome was the owner of the note in 1858, when it is claimed that he sold it to Leland. The uncontradicted and indeed overwhelming evidence is that in December, 1857, the note in controversy was sold and delivered to Edwin C. Litchfield, who held it as owner from that time until August or September, 1860, when he sold and transferred it to Jerome, who soon after disposed of it to Elshia B. Litchfield, from whom the plaintiffs derive their title. It is quite likely that in the transaction between Jerome and Leland, which occurred in the fall of 1858, both parties supposed that this note was among the bundle of securities that were traded off for the wild land, but it is as nearly certain, as it can well be rendered by testimony, that Jerome had not then either the possession or ownership of the note, and it can hardly be claimed that the jury, if that naked proposition had been left to them upon the testimony, could have found any such fact. The utmost that can be insisted the testimony conduces to prove is, it seems to me, that Jerome agreed to sell this note, with others, in exchange for the lands; that the other notes were handed to the clerk of Jerome, or to Jerome himself, who held them as the depository of Leland, but that this note was not among the number and was never in the possession of Leland or that of his agent.

Assuming this to be the state of the case, the jury were instructed, that if they believed that Jerome sold, that is, in effect agreed to sell, this note to Leland, although he was not the owner at the time of this agreement, yet as he afterward became the owner, his agreement implied a warranty of title, and this subsequently-acquired title inured to the benefit of Leland, his vendee, and payment to him extinguishes the note. Upon this proposition the jury were authorized to find, as they did, a verdict for the defendant; and the question is, whether the proposition is sound in law; in other words, is there an implied warranty of title in the sale of a chattel where the owner is not in possession?

It is to be assumed that there was no express affirmation of title by Jerome to Leland. There was, on the one hand, a sale of wild lands, and on the other, a sale and transfer by delivering of certain notes, and an agreement to sell another note, but of which no assignment or delivery

was made, and no written transfer executed purporting to convey a present interest, or one in futuro.

On this precise question, as to the implication of a warranty on the sale of a chattel not in possession of the vendor at the time, Chancellor Kent, in his Commentaries, states the doctrine, without qualification, to be, that the rule of caveat emptor applies, and the party buys at his peril. 2 Com. 478. He adds, that if the seller has possession of the article, and sells it as his own, and not as agent for another, and for a fair price, he is understood to warrant the title. In support of the rule as thus stated he cites two or three old cases in the English books. The first is the remark of Tanfield, Chief Baron (in Cro. Jac. 1971), to the effect that if one sells lands, whereof another is in possession, or a horse, whereof another is possessed, without covenant or warranty for the enjoyment, it is at the peril of him who buys, and it is not reason that he should have an action at the law, where he did not provide for himself. In *Medina v. Stoughton*, 1 Salk. 210, Holt, Ch. J., decided that where one having possession of a chattel sells it, the affirmation that it is his amounts to a warranty, but aliter where the seller is out of possession, for there may be room to question the seller's title, and caveat emptor, in such case, to have either an express warranty, or a good title. These cases seem to have settled the law in England, in conformity with the principle laid down by Kent, and we have been cited to no authority doubting or questioning them, unless such an inference may arise from the remark of Buller, in *Pasley v. Freeman*, 3 T. R. 58, which however is merely to the effect that if the seller affirms the chattel not in his possession to be his, he is bound to answer for the title; for in such case the vendee has nothing else to rely upon. This places the liability upon the ground of an affirmation, amounting to a warranty, and is not at all inconsistent with the principle enunciated in the two cases on which the rule as stated by Kent is founded.

In this state the same question was presented, and is very fully discussed both on principle and authority in the case of *McCoy v. Archer*, 3 Barb. 324. The effect upon the question of warranty of title upon a sale where the property is in or out of the possession of the vendor is there considered, and the propositions are established that possession by a vendor of chattels is equivalent to an affirmation of title, and in such case the vendor is held to an implied warranty of title, even although nothing be said on the subject between the parties. But if the property sold be at the time of the sale in the possession of a third party, and there be no affirmation or assertion of ownership, no warranty of title will be implied. In those circumstances, in order to attach any liability to the vendor upon a sale, there must be an affirmation which will amount to a warranty of the title.

The principle established by this case is

¹ Roswell v. Vaughan.

followed and approved in *Edick v. Crim*, 10 Barb. 445, where the court cite the case in *Cro. Jac.* 197, and say the general rule is that the vendor of a chattel impliedly warrants the title, yet when the chattel is not in the vendor's possession, but in that of another, this rule does not prevail. In *Hopkins v. Grienell*, 28 Barb. 533, where the same point arose, the decision was to the same effect, and the proposition in the terms laid down by Kent, was reiterated and approved.

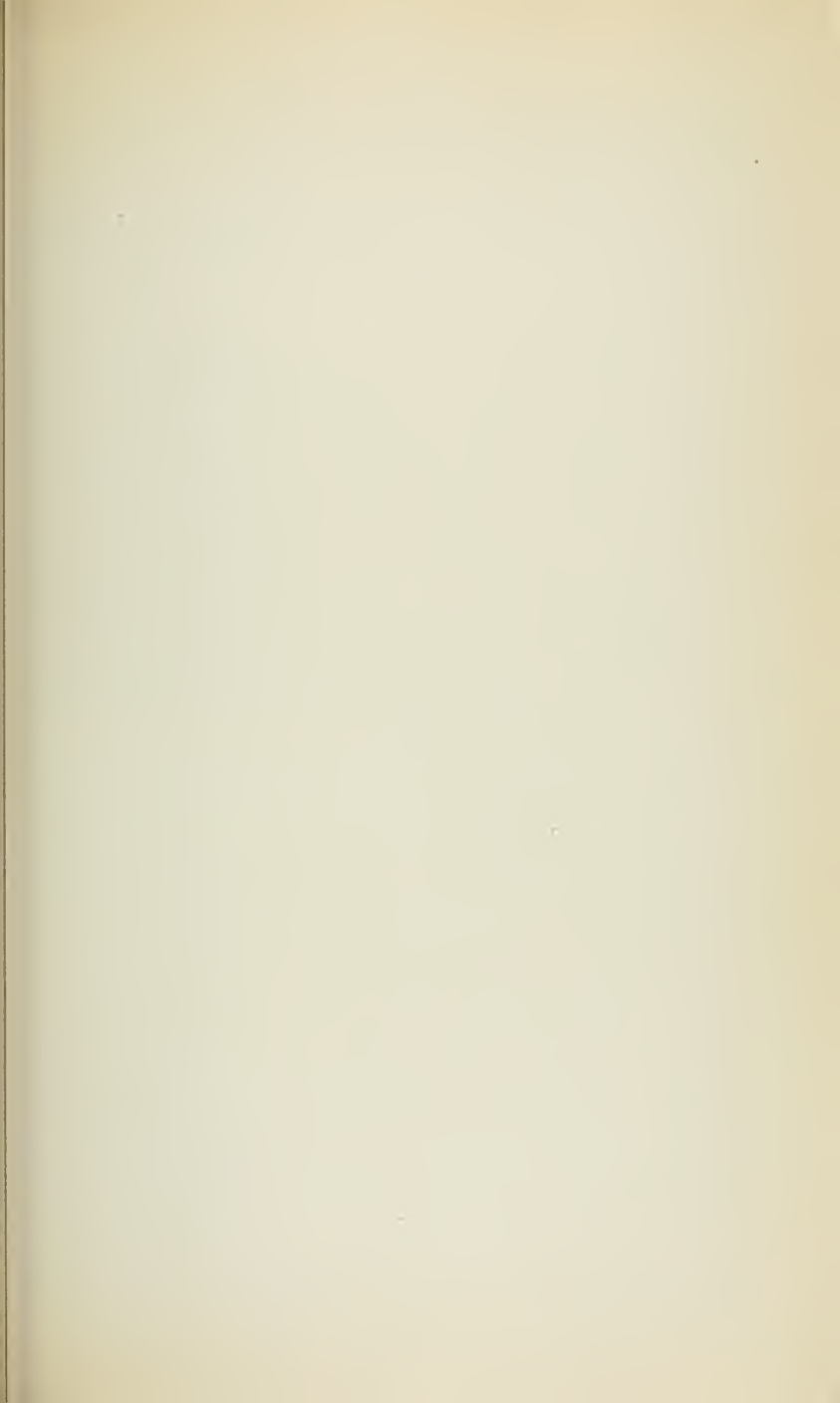
It is not important to cite authorities from other states, several of which are quoted in the opinion of the court in the case of *McCoy v. Artcher*, and are to the same effect. These cases in our own courts settle the doctrine with us, from which there has been no dissent from the earliest case to the present time. The effect of these decisions is sought to be evaded by the assertion of the defendant's counsel, that in these cases the vendor never had possession of the thing sold, either before or after the sale, while here Jerome not only had possession before he sold, but afterward. It is not perceived how this fact, conceding it to exist, can vary the principle. The counsel, in this part of his argument, also insists that Jerome was the owner, and had possession of the note when he sold. If this were conceded, the argument would be at an end, and the proposition of law we have been discussing would be immaterial, but it is to be remarked that the weight of evidence is entirely otherwise, and in the proposition laid down by the court in this case, the judge assumes that Jerome was not the owner of the note at the time of the alleged sale (as he undoubtedly

was not in fact), but that it was his subsequent acquisition of the title that inured to the benefit of the vendee so that he could hold the vendor upon an implied warranty, which as we have seen, the law does not create, but expressly repudiates. In the case of *McCoy v. Artcher*, supra, the note, which was the subject of the sale, was potentially in the possession of the defendants, being held by an agent, for their benefit, some time prior to the transaction, by which they were sought to be charged.

It is said by the defendants' counsel, that the certificate of Jerome to Clark estops him from making any claim on the note against Clark, and this estoppel follows the note into the hands of those deriving title from or through Jerome. It is quite questionable whether this certificate was properly admitted in evidence, the effect being, if it had any, to impeach the title to a chose in action in the hands of another party, after Jerome had parted with it. But it could not operate as an estoppel, for the simple and obvious reason that it was given long after the time that Clark had dealt with Jerome, and had professedly bought the note, and he was induced to no action whatever upon the strength of that certificate, or of any representation made in it. It lacks all the elements of a legal or equitable estoppel, and should properly have had no influence in the case.

I think the judgment of the general term should be affirmed, and judgment in accordance with the stipulation rendered for the plaintiffs for the amount of the note and interest, with costs.

All concur except MASON, J.



SCUDDER v. WORSTER et al.

(11 Cush. 573.)

Supreme Judicial Court of Massachusetts.
Suffolk. Nov. Term, 1853.

This was an action of replevin, for 150 barrels of pork, to which the defendants pleaded only the general issue. It was submitted to this court on an agreed statement of facts.

H. A. Scudder, for plaintiff. W. G. Russell, for defendants.

DEWEY, J. This case is submitted upon an agreed statement of facts, upon which the court are to enter judgment. The first question presented, that of proper pleadings and specification of defence, would have been more properly raised, had the case taken the ordinary course of a trial by jury. By making a statement of facts and asking the judgment of this court thereon, the parties are understood to have waived all questions as to the formal pleadings, unless those questions are in direct terms reserved. For obvious reasons, this ought to be so, as the opportunities for amendments of the pleadings would be much greater, and they could be more conveniently allowed in the earlier stages of the case. The precise objection taken by the plaintiff as to this matter is, that the defendants by pleading the general issue without a specification, alleging the property in themselves in the articles replevied, admit the property in these articles to be in the plaintiff, and deny only the taking of the same.

If this were so, yet in a case when the right of property was in fact the real matter in controversy, and the defendant had through some misapprehension omitted to set forth his claim of right of property, an amendment ought to be allowed to that effect, upon proper terms, if on trial before a jury, or the facts discharged and the case sent to trial, if the case were submitted to the court upon an agreed statement of facts, if it were necessary to secure the defendant a hearing upon the merits of the case. But in the present case we think the right of the defendants to assert their property in the articles replevied, is not concluded by the form of the pleadings; first, for the reason already assigned, that the parties have made a case upon a statement of facts, and thus waived the objection as to the form of the pleadings; and secondly, because under our statute of 1836, c. 273, abolishing special pleading, and allowing no other plea than the general issue, that was properly pleaded, and no call having been made for any specification of defence, and no objection taken to its omission, until the argument was heard here upon the statement of facts, it was too late to raise the point. *Miller v. Sleeper*, 4 Cush. 369. Nor can the plaintiff aid his case by reference to his writ commanding the officer to replevy 150 barrels of pork, "the property of the plaintiff," and the return indorsed thereon by the officer that "he had replevied the within mentioned property." An officer's

return, however conclusive as to the service of process, settles nothing of the right of property of the parties. This case must be decided upon the result we shall come to upon the principal question so fully argued, whether the property in the 150 barrels of pork ever passed from the vendors by a sale so far complete as to authorize the plaintiff to maintain his action of replevin for the same. It appears from the facts stated, that on February 10, 1850, a contract was made by the defendants with Secomb, Taylor, & Company, to sell them 250 barrels of pork branded "Worcester & Hart;" that a bill of sale of the pork was made and delivered to them, and they gave the defendants their negotiable promissory notes of hand therefor, payable in six months; that it was further agreed that the pork should remain in defendants' cellar on storage, at the risk and expense of the purchasers; that Secomb, Taylor, & Company, on the 13th of May, 1850, sold 100 barrels of the pork to one Lang, who received the same of the defendants upon the order of Secomb, Taylor, & Company; that on the 25th of May, 1850, Secomb, Taylor, & Company sold the plaintiff 150 barrels, with an order on the defendants therefor. The next day the plaintiff gave notice to the defendants of the purchase, and requested them to hold the same on storage for him to which the defendants assented. On the 25th of June, Secomb, Taylor, & Company became insolvent, and on the same day the plaintiff called upon the defendants for the purpose of receiving the 150 barrels of pork, but the defendants refused to allow him to do so. On the next day a more formal demand, accompanied by an offer to pay storage, was made, which being refused by the defendants, an action of replevin was instituted, and 150 barrels of pork, the same now in controversy, were taken and removed from said cellar, and delivered to the plaintiff.

The further fact is stated in the case, and it is this which raises the question of property in the plaintiff, that the pork bargained and sold in the manner above stated was in the cellar of the defendants, and a parcel of a larger quantity of the same brand, and also with some of a different brand, and so continued parcel of a larger quantity of similar brand, up to the time of the suing out of the plaintiff's writ of replevin: though this fact was not at the time of the sale stated to the purchasers, or to the plaintiff when he purchased of Secomb, Taylor, & Company. Had these 250 barrels of pork been a separate parcel, or had the parties designated them by any visible mark, distinguishing them from the residue of the vendors' stock of pork, the sale would clearly have been an absolute one, and the property would at once have passed to the purchaser. There was nothing required to have been done but this separation from the general mass of like kind, to have placed the sale beyond all question or doubt as to its validity.

The cases cited by the plaintiff's counsel fully establish the position, that what was done in this case would have transferred the property in the pork, if the sale

had been of all the pork in the cellar, or of any entire parcel separated from the residue, or if the 250 barrels had some descriptive mark distinguishing them from the other barrels not sold. The difficulty in the case is, in maintaining that in the absence of each and all these circumstances, distinguishing the articles sold, the particular barrels of pork selected by the officer from the larger mass when he served this process, were the property of the plaintiff, or had ever passed to him. In addition, however, to the numerous cases cited to establish the general principles contended for on the part of the plaintiff, and which would have been decisive, if it had been a sale of all the pork in the cellar, or a particular parcel, or certain barrels having descriptive marks which would enable the vendee to separate his own from the residue, were cited several more immediately bearing upon the present case, and where property not separable has been held to pass to the vendee. The leading case relied upon is that of *Pleasants v. Pendleton*, 6 Rand. 475. This was an action by the vendor to recover the price of 119 barrels of flour sold to the defendant. No other objection existed to the validity of the sale, except that the 119 barrels were a parcel of 123 barrels, all of similar kind, in the same warehouse. There were certain brands or marks on the entire 123 barrels. The flour was destroyed by fire while on storage, and the vendee refused to pay for the 119, upon the ground that the sale was not perfected for want of separation from the 123 barrels. The court refused to sustain the defence, and gave judgment for the plaintiff. In reference to this case, Grinke, J., in *Woods v. McGee*, 7 Ohio, 127, says: "It is impossible to divest ourselves of the impression that the small difference between the aggregate mass and the quantity sold, the former being 123 barrels, and the latter 119, may have influenced the decision. It was a hard case, and hard cases make shipwreck of principles."

Jackson v. Anderson, 4 Taunt. 24, was an action of trover to recover for the conversion of 1969 Spanish dollars. It appeared that the amount had been transmitted to a consignee for the use of the plaintiff, but they were in a parcel of \$4918, all of which came into the hands of the defendant. Among other points raised at the argument, was this, that there was nothing to distinguish the \$1969 from the entire mass; that there had been no separation, and of course the plaintiff had no property in any particular portion of the money. The point, it seems, was not made at the trial before the jury, but suggested by the court during the argument before the full court, and this is stated by the reporter; the court interrupted the counsel, and intimated a strong doubt, as there was nothing to distinguish the \$1969 from the remaining contents of the barrel, whether the action could lie. At a future day the court gave judgment for the plaintiff. The objection was overruled upon the ground that the defendant had disposed of all the dollars, consequently he had disposed of those belonging to the plaintiff.

The case of *Gardner v. Dutch*, 9 Mass. 427, is apparently the strongest case in favor of the plaintiff. The case was *replevin* against an officer who had attached goods as the property of Wellman & Ropes. The plaintiff had seventy-six bags of coffee, to which he became entitled as owner, upon an adjustment of accounts of a voyage he had performed for Wellman & Ropes, but the bags belonging to the plaintiff were in no way distinguished by marks, or separated from the other coffee of Wellman & Ropes. The plaintiff on his arrival at Salem, from his voyage, delivering the entire coffee to Wellman & Ropes, taking their receipt "for seventy-six bags of coffee, being his adventure on board schooner Liberty, and which we hold subject to his order at any time he may please to call for the same." The point taken in the case was that the plaintiff had not the sole property, but only an undivided interest, and so could not maintain *replevin*. The court ruled that the plaintiff was not a tenant in common, but might have taken the number of bags to which he was entitled, at his own selection, and might maintain his action.

This case, on the face of it, seems to go far to recognize the right of one having a definite number of barrels of any given articles mingled in a common mass, to select and take, to the number he is entitled, although no previous separation had taken place. It is, however, to be borne in mind in reference to this case, that it did not arise between vendor and vendee. The interest in the seventy-six bags of coffee did not originate by purchase from Wellman & Ropes. They became the specific property of the plaintiff in that action on an adjustment of an adventure, the whole proceeds of which were in his hands; and separated with the possession, only when he took their accountable receipts for seventy-six bags, held by them on his account. It did not raise the question, here so fully discussed, as to what is necessary to constitute a delivery, and how far it was necessary to have a separation from a mass of articles, to constitute a transfer of title. Perhaps the circumstances may well have warranted that decision, but we are not satisfied that the doctrine of it can be properly applied to a case where the party asserts his title, claiming only as a purchaser of a specific number of barrels, there having been no possession on his part, and no separation of the same from a larger mass of articles similar in kind, and no descriptive marks to designate them.

On the other hand, in support of the position that this sale was never perfected for want of such separation of the particular barrels on account of the plaintiff, or some designation of them from others of like kind, there will be found a strong weight of authority; and to some of the most prominent cases I will briefly refer. Thus, in the case of *Hutchinson v. Hunter*, 7 Barr. 140, which was an action of assumpsit to recover payment for 100 barrels of molasses sold to the defendant, the same being parcel of 125 barrels, and the whole destroyed by fire while on storage, and before separation or designation of

any particular barrels, it was held that the plaintiff could not recover, the sale never having been consummated. Rogers, J., says: "The fundamental rule which applies to this case is, that the parties must be agreed as to the specific goods on which the contract is to attach before there can be a bargain and sale. The goods must be ascertained, designated, and separated from the stock or quantity with which they are mixed, before the property can pass." He considers the case of *Pleasants v. Pendleton*, 6 Rand. 475, as decided on erroneous principles. The case of *Hutchinson v. Hunter* presented a case of a sub-contract or sale like the present, and it was urged that this differed the case from what it might otherwise have been, as respects the original vendor. But the court held that this did not vary the case in the matter of the necessity of a separation of the article sold from the greater mass. So in *Golder v. Ogden*, 15 Penn. St. (3 Harris,) 528, where a contract was made for the sale of 2000 pieces of wall paper, the purchaser giving his notes therefor to the vendor, and taking away with him 1000 pieces, and it was agreed that the other 1000 pieces should remain until called for by the purchaser, upon a question of property in the remaining 1000 pieces between the assignees of the vendor and the purchaser, it was held that these 1000 pieces not having been selected by the buyer, or separated, or set apart for him, but remaining mingled with other paper of same description, did not become the property of the alleged buyer, as against an assignment for the benefit of the creditors of the vendor. The principle advanced in that case seems to be the sound one: "That the property cannot pass until there be a specific identification in some way of the particular goods which the party bargains for. The law knows no such thing as a floating right of property, which may attach itself either to one parcel or the other, as may be found convenient afterwards." The case of *Waldo v. Belcher*, 11 Iredell, 609, was the case of a sale of corn by a vendor, having in his store 3100 bushels of corn, and selling 2800 bushels of the same, but the 2800 bushels were never separated from the 3100, and the whole was, after the sale, destroyed by fire; and it was held that the property in the 2800 bushels did not pass to the vendee, though it would have been otherwise had it been a sale of all the corn in the crib. The ground of the decision was, that there had been no separation, that it could not be ascertained which corn was the property of the vendee until it was separated. The purchaser could not bring detinue, because he could not describe the particular thing. This would be equally so as to replevin. The case of *Merrill v. Hunnewell*, 13 Pick. 213, bears strongly upon the question before us. It was a sale of nine arches of bricks in a kiln containing a larger number, but not separated from the residue, or specifically designated. After the vendor had,

by other sales, reduced the quantity on hand to less than nine arches, upon a question of property between the vendee and an attaching creditor of the vendor, it was held the purchaser took no property in the bricks, the sale being of part of a large mass, not delivered nor specifically designated.

Blackburn, in his *Treatise on Sales*, p. 20, presents the law on this subject thus: "Until the parties are agreed as to the specific identical goods, the contract can be no more than a contract to supply goods answering a particular description, and since the vendor would fulfil his part of the contract by furnishing any parcel of goods answering that description, it is clear there can be no intention to transfer the property in any particular lot of goods more than another, until it is ascertained which are the very goods sold."

Examining the facts in the case before us, and applying the principles of the cases last cited, and the approved elementary doctrine as to what is necessary to constitute a sale of property not separated from the mass of like kind, or designated by any descriptive marks, the court are clearly of opinion that the property in the specified 150 barrels of pork taken by the plaintiff, under his writ of replevin, had never passed from the vendors, and therefore this action cannot be maintained.

In the argument of this case on the part of the plaintiff, the case was put as a case of intermixture of goods, and it was argued that such intermixture having taken place, the plaintiff might, for that cause, hold the property as his. But, in fact, there was no such case of intermixture. The entire property was always in the defendants.

It was also urged that the defendants were estopped to deny that the 150 barrels of pork were the property of the plaintiff, having given a bill of sale of the same, and under the circumstances stated in the statement of facts. Had this been an action to recover damages for the value of 150 barrels of pork, this position might be tenable, and the defendants estopped to deny the property of the plaintiff in such 150 barrels. This would be so if an action had been brought against the defendants as bailees of 150 barrels of pork, and for not delivering the same.

But the distinction between the case of an action for damages for not delivering 150 barrels, and that of replevin, commanding the officer to take from the possession of the defendants 150 barrels, and deliver the same to plaintiff as his property, is an obvious one. To sustain the former, it is only necessary to show a right to 150 barrels generally, and not any specific 150 barrels; but to maintain replevin, the plaintiff must be the owner of some specific 150 barrels. If bought, they must be specifically set apart, or designated in some way as his, and not intermingled with a larger mass of like kind owned by the vendor.

Judgment for the defendants.

SEITZ v. BREWERS' REFRIGERATING MACH. CO.

(12 Sup. Ct. Rep. 46, 141 U. S. 510.)

Supreme Court of the United States. Nov. 9, 1891.

In error to the circuit court of the United States for the eastern district of New York.

Action by the Brewers' Refrigerating Machine Company against Michael Seitz. There was judgment for plaintiff on a verdict directed by the court, and defendant brings error. Judgment affirmed.

Statement by Fuller, C. J. This was an action brought by the Brewers' Refrigerating Machine Company against Michael Seitz upon the following contract: "This agreement, made this 11th day of January, A. D. 1879, between the Brewers' Refrigerating Machine Company of Alexandria, Va., party of the first part, and Michael Seitz, of Brooklyn, N. Y., party of the second part, witnesseth: That the party of the first part hereby agrees and contracts to supply the party of the second part with a No. 2 size refrigerating machine, as constructed by the said party of the first part, by the 15th day of March next, or as soon thereafter as possible, the machine to be delivered at the depot or wharf in Philadelphia, Penn., and to be put up and put in operation in the brewery of the said party of the second part at 258-264 Manjer street, at Brooklyn, E. D., N. Y., under the superintendence of a competent man furnished by the said party of the first part. The party of the second part hereby agrees and contracts to pay to the said party of the first part for said machine the sum of nine thousand four hundred and fifty dollars (\$9,450.00) in manner as follows, namely: Four thousand seven hundred and twenty-five dollars (\$4,725.00) on the day when the machine is put in operation at the brewery of the said party of the second part, and the balance of four thousand seven hundred and twenty-five dollars (\$4,725) in three equal installments; that is to say, one thousand five hundred and seventy-five dollars (\$1,575.00) for each installment, payable, respectively, in one, (1,) two, (2,) and three (3) months after the day when the machine is put in operation at the brewery of the said party of the second part, for which installments the said party of the second part agrees and contracts to give his notes on the day last mentioned."

The complaint, after setting forth the execution of the contract on the 11th of January, A. D. 1879, alleged compliance therewith in every respect by the plaintiff, and breach of the promise to pay the purchase price. The defendant stated in his answer, among other things, "that the machine placed in defendant's brewery was worthless, and incapable of operating to produce the results represented by plaintiff to this defendant as an inducement to enter into the aforesaid agreement; that said machine has not been accepted by this defendant, nor operated, or attempted to be operated, by defendant, his agents, employees, nor any other person acting by or under his authority, and did not pass out of the control of the plaintiff; nor has the said machine been used by him in his said brewery, because said

machine was worthless, and incapable of serving any useful purpose therein." And defendant also averred, by way of counter-claim, that he had sustained damages by reason of false and fraudulent representations by plaintiff as to what the machine would accomplish, in reliance upon which he had permitted his brewery to be subjected to the action of said machine, and suffered loss accordingly. Upon the trial before the circuit judge and a jury, plaintiff proved that a No. 2 size refrigerating machine, as constructed by the Brewers' Refrigerating Machine Company, was supplied defendant, and put up and put in operation in his brewery by it in accordance with the terms of the contract. Defendant thereupon asked to amend his answer, "to set up that defendant entered into that contract by reason of fraudulent representations on the part of this company." The amendment was allowed, and was in substance that plaintiff represented that the machine was capable of cooling certain rooms in the brewery which had been examined by plaintiff; but the machine, when set up and operated, was not so capable, and failed to perform the work for which, upon the representations of the plaintiff, the machine had been contracted for by defendant; that defendant contracted to purchase the machine upon the guaranty by plaintiff to defendant that it would cool certain rooms, and it was upon that guaranty alone that defendant entered into the contract; that defendant entered into the contract upon the representations of the plaintiff to the effect that the No. 2 machine referred to in the contract set forth in the complaint would cool and was capable of cooling a space of 150,000 cubic feet of air continuously to a temperature sufficiently low for the purpose of brewing or manufacturing beer in the defendant's brewery or premises, that is to say, to a temperature in the neighborhood of 40° Fahrenheit; and that the plaintiff knew, at and before the time when the contract was made, that the representations made to the defendant were false and unfounded, and knew that the said No. 2 machine was not capable of performing the work which plaintiff represented it as being capable of performing, and knew that the machine would be worthless to the defendant for the purposes for which defendant contracted for it and intended to use it.

Evidence on defendant's behalf was then admitted, tending to show that, prior to the execution of the contract, plaintiff's agents had represented that the machine would cool 150,000 cubic feet to 40° Fahrenheit; that defendant had been cooling his brewery with ice, and wished the machine to cool the rooms to about the same extent; and that the machine did not cool the rooms as desired. On cross-examination of the defendant's agent, it appeared that on January 13, 1879, he wrote to the secretary of the refrigerating company: "In speaking to Mr. M. Seitz to-day he said that your agreement was very unsatisfactory to him; in fact, that before he would get the machine that he wanted a written guaranty from you that you would cool his building, which you have seen, to 3½ R.,

and keep it at that all the time; otherwise he would not have the machine, as he would have no use for it, as he would have to put himself to great expense and great risk at the same time." To which plaintiff responded, January 20th: "I regret to hear that Mr. Seitz feels dissatisfaction with the contract made with him. The guaranty he now asks for in addition it would not be proper for us to give, as Mr. Seitz himself will see on further reflection, we think. The maintenance of a certain temperature in his rooms is not solely dependent upon our machines; in fact, there are a great many other things entirely beyond the control of the machine which influence this temperature. The mode of working the rooms, the water used for washing, the fermentation, and many other things might be mentioned in this connection as matters which we cannot control, and which nevertheless are most important considerations in the maintenance of a given temperature. We are confident, from the experience with the Portner machine during last summer and fall, that the machine sold to Mr. Seitz will not only give him the desired low temperature, but will, in addition, give him what he never before had in the warmer months, namely, pure and dry air. The machine we are building for him is in many respects far superior (aside from size) to the Portner machine, and when he has had it a year we believe he would not part with it for any money, if he could not replace it. That we must decline to guaranty what Mr. Seitz asks for is simply for the reasons stated. There are too many side considerations entirely beyond the control of the machines. We would add that we have not in any instance been asked for such a guaranty as a condition of sale, but that all the parties to whom we have sold bought on our representations, and what they have seen and heard of the working of the Portner machine." On January 21, 1879, defendant's agent telegraphed plaintiff: "Will you defend any infringement suits against Mr. Seitz for using your machine?" and on January 23, 1879, wrote: "The machine sold to Mr. M. Seitz is all right, and can be sent at any time that it is ready." On the 16th of March he again wrote plaintiff: "Mr. Seitz would like to have you to commence at once putting up his machine." The defendant having rested, the court, on motion, directed a verdict for the plaintiff for the amount claimed. The circuit judge remarked to the jury that the only defense worthy of consideration was that the machine was sold to the defendant under fraudulent representations by the plaintiff's agents, but that there was no evidence of fraud whatever in the case; that there was evidence to show that the machine did not work satisfactorily, and the jury were doubtless authorized to infer that it did not have the capacity of cooling 150,000 cubic feet to the degree stated, but that there was a written contract in the case, which contained no warranty, and, consequently, if the machine did not fulfill the expectations of the defendant, or if it did not fulfill verbal representations made at the time the contract was entered into, nevertheless

defendant had no defense; that there was no evidence that false or fraudulent representations had been made; that the machine had been built and put up pursuant to the written contract; and that the defendant could not be permitted, upon the general theory that the machine was not a satisfactory article, to defeat the plaintiff from recovery. The verdict having been rendered as directed, and judgment entered thereon, the cause was brought here on writ of error.

Esek Cowen, for plaintiff in error. *John H. V. Arnold*, for defendant in error.

FULLER, C. J. If the defense were solely that the defendant was induced by false and fraudulent representations to enter into the contract in question, it is conceded that the circuit court did not err in directing a verdict for the plaintiff, as there was no evidence of fraud in the case. It is earnestly contended, however, that, under the answer as amended, the defendant was entitled to avail himself of the breach of an alleged contract of warranty or guaranty collateral to the contract of purchase and sale; or of an implied warranty that the machine should be reasonably fit to accomplish a certain result. Assuming the sufficiency of the pleadings to enable the questions indicated to be raised, we are nevertheless of opinion that the direction of the circuit court was correct. The position of plaintiff in error is, in the first place, that the evidence on his behalf tended to show an agreement between himself and defendant in error, entered into prior to or contemporaneously with the written contract, independent of the latter and collateral to it, that the machine purchased should have a certain capacity, and should be capable of doing certain work; that the machine failed to come up to the requirements of such independent parol contract; that this evidence was competent; and that the case should therefore have been left to the jury. Undoubtedly, the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if, under the circumstances of the particular case, it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation, without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing. 1 Greenl. Ev. § 275.

There is no pretense here of any fraud, accident, or mistake. The written contract was in all respects unambiguous and definite. The machine which the compa-

ny sold, and which Seitz bought, was a No. 2 size refrigerating machine, as constructed by the company, and such was the machine which was delivered, put up, and operated in the brewery. A warranty or guaranty that that machine should reduce the temperature of the brewery to 40° Fahrenheit, while in itself collateral to the sale, which would be complete without it, would be part of the description, and essential to the identity of the thing sold; and to admit proof of such an engagement by parol would be to add another term to the written contract, contrary to the settled and salutary rule upon that subject. Whether the written contract fully expressed the terms of the agreement was a question for the court, and since it was in this instance complete and perfect on its face, without ambiguity, and embracing the whole subject-matter, it obviously could not be determined to be less comprehensive than it was. And this conclusion is unaffected by the fact that it did not allude to the capacity of the particular machine. To hold that mere silence opened the door to parol evidence in that regard would be to beg the whole question. We are clear that evidence tending to show the alleged independent collateral contract was inadmissible. *Martin v. Cole*, 101 U. S. 30; *Gilbert v. Plough Co.*, 119 U. S. 491, 7 Sup. Ct. Rep. 305; *The Delaware*, 14 Wall. 579; *Naumburg v. Young*, 44 N. J. Law, 331; *Conant v. Bank*, 121 Ind. 323, 22 N. E. Rep. 250; *Mast v. Pearce*, 58 Iowa, 579, 8 N. W. Rep. 632, and 12 N. W. Rep. 597; *Thompson v. Libby*, 34 Minn. 374, 26 N. W. Rep. 1; *Wilson v. Deen*, 74 N. Y. 531; *Robinson v. McNeill*, 51 Ill. 225.

Failing in respect of the alleged express warranty, plaintiff in error contends, secondly, that there was an implied warranty, arising from the nature of the transaction, that the machine should be reasonably fit to accomplish certain results, to effect which he insists the purchase was made. It is argued that the evidence tended to establish that the plaintiff knew that the defendant had been cooling his brewery with ice, and that the object of obtaining the machine was to render unnecessary the expense of purchasing ice for that purpose, and that unless the machine would cool it to the same extent, or about the same, as the ice did, it would be worthless, so far as he was concerned. It is not denied that the machine was constructed for refrigerating purposes, and that it worked and operated as a refrigerating machine should; but it is said that it did not so refrigerate as to reduce the temperature of the brewery to 40° Fahrenheit, or to a temperature which would enable defendant to dispense with the purchase of ice. The rule invoked is that where a manufacturer contracts to supply an article which he manufactures, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment of the manufacturer, the law implies a promise or undertaking on his part that the article so manufactured and sold by him for a specific purpose, and to be used in a particular way, is reasonably fit and proper for the purpose for which he professes to make it, and for which it is known to be required; but it is also the

rule, as expressed in the text-books and sustained by authority, that where a known, described, and definite article is ordered of a manufacturer, although it is stated by the purchaser to be required for a particular purpose, still, if the known, described, and definite thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. *Beij. Sales*, § 657; *Add. Cont.*, bk. 2, c. 7, p. 977; *Charter v. Hopkins*, 4 Mees. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288; *District of Columbia v. Telephone*, 110 U. S. 212, 3 Sup. Ct. Rep. 568; *Bridge Co. v. Hamilton*, 110 U. S. 198, 3 Sup. Ct. Rep. 537; *Hoe v. Sanborn*, 21 N. Y. 552; *Deming v. Foster*, 42 N. H. 165.

In the case at bar the machine purchased was specifically designated in the contract, and the machine so designated was delivered, put up, and put in operation in the brewery. The only implication in regard to it was that it would perform the work the described machine was made to do, and it is not contended that there was any failure in such performance. This is not the case of an alleged defect in the process of manufacture known to the vendor, but not to the purchaser, nor of presumptive and justifiable reliance by the buyer on the judgment of the vendor rather than his own, but of a purchase of a specific article, manufactured for a particular use, and fit, proper, and efficacious for that use, but in respect to the operation of which, in producing a desired result under particular circumstances, the buyer found himself disappointed. In short, there was no express warranty that the machine would cool 150,000 cubic feet of atmosphere to 40° Fahrenheit, or any other temperature, without reference to the construction of the particular brewery or other surrounding circumstances, and, if there were no actual warranty, none could be imputed. We may add that, in the light of all the evidence in the record, treated as competent, we think no verdict could be permitted to stand which proceeded upon the ground of the existence of such a warranty as is contended for. The alleged antecedent representations as to whether the machine possessed sufficient refrigerating power to cool this brewery were no more than expressions of opinion, confessedly honestly entertained, and dependent upon other elements than the machine itself, concerning which plaintiff in error could form an opinion as well as defendant; and the conduct of plaintiff in error in demanding, two days after the contract was executed, a written guaranty that the machine company would cool his building to 3½° Reaumur, (or 40° Fahrenheit,) and keep it at that all the time, and in acquiescing in the company's refusal to give the guaranty for reasons stated, and in thereupon afterwards ordering the company to go on with the work, as exhibited in the correspondence between the parties, seems to us to justify no other conclusion than that reached by the verdict. The judgment of the circuit court is affirmed.

BRADLEY and GRAY, J.J., were not present at the argument, and took no part in the decision of this case.

SEWELL et al. v. BURDICK et al.

(10 App. Cas. 74.)

English House of Lords. Dec. 5, 1884.

Appeal by the defendants from an order of the court of appeal¹ reversing a decision of Field J. The facts are fully set out in the judgment of Field J.² Briefly they were as follows:—

In September 1880 Nereessiantz shipped machinery on the respondent's ship to be carried from London to Poti in the Black sea, under bills of lading whereby the goods were made deliverable to the shipper or assignee, freight, primage, and disbursements to be paid at destination, in default the owners or agents to have an absolute lien on the goods and liberty to sell by auction and retain freight and all charges. The bills of lading indorsed in blank were in November 1880 deposited by Nereessiantz with the appellants, bankers in Manchester, as security for a loan of £300 advanced by them to Nereessiantz. The ship meanwhile had arrived at Poti in September, and the goods were landed and warehoused at the Russian custom-house in October. Nereessiantz disappeared, and after a year the goods in accordance with Russian law were sold to pay custom-house duty and charges, and realized no more than enough for that purpose. Meanwhile the appellants had indorsed the bills of lading to their agents at Tiflis with instructions to protect their interests, and had informed the shipowners that if the goods were sold to pay freight, etc., the appellants claimed all the proceeds over and above the amount due to the shipowners for freight etc., but the appellants never claimed delivery of the goods. The respondent having brought an action for £174 8s. 9d. for freight and charges, against the appellants as indorsees of the bills of lading, Field J. who tried the case without a jury gave judgment for the defendants.³ The court of appeal (Brett, M. R., and Baggallay, L. J., Bowen L. J. dissenting) set aside this judgment and gave judgment for the plaintiff for the amount claimed.⁴ The defendants appealed.

Sir F. Herschell, S. G., (Danckwerts, with him,) for appellants. C. Hall, Q. C., and Edwyn Jones, for respondent.

EARL OF SELBORNE, L. C.:—My lords, this appeal raises the question whether under the bills of lading act of 1855 (18 & 19 Viet. c. 111) every holder of a bill of lading, indorsed in blank, who has taken it by way of security for an advance of money (and has not afterwards parted with it) is liable, by reason of such indorsement only, to an action for freight by the shipowner; although he may not have obtained delivery of the goods or derived any other benefit from his security.

The goods in this case were, by the terms of the bill of lading, deliverable at

Poti, a Russian port on the Black sea, and had been landed and warehoused there in a public warehouse (no one appearing to claim or take charge of them) before the date of the indorsement. This was their position when the present action was brought by the respondent, the shipowner, against the appellants, who were bankers at Manchester, and who had advanced £300 to the shipper upon the security of the bill of lading. In his statement of claim the plaintiff alleged that the goods still remained at Poti under the care of the Russian authorities; that the plaintiff had under Russian law no power of selling them for the purpose of paying himself the amount claimed in the action (£174 8s. 9d. and interest); and that the Russian authorities were about to sell the same for a sum barely sufficient to cover the customs duties and government charges thereon. They were, in fact, sold by the Russian authorities, and did not realise more than the amount of those duties and charges.

Under these circumstances, Field J. (who tried the case without a jury) gave judgment for the defendants (the appellants here.) That judgment was reversed by a majority (Brett M. R. and Baggallay L. J.) of the judges in the court of appeal, Bowen L. J. dissenting.

The difference between those learned judges mainly (if not altogether) turned upon the question, whether, according to the authorities from *Lekbarrow v. Mason*⁵ downwards, the effect of an indorsement and deposit of a bill of lading, while the goods are in transitu, by way of security for a loan, is to pass the whole legal title to the goods, or only to pledge them, passing at law a "special property" and leaving the "general property" in the shipper. That question was much debated in *Glyn Mills & Co. v. East and West India Dock Company*,⁶ where Brett L. J. expressed the same opinion on which he acted in the present case, Bramwell L. J. taking the opposite view. My noble friend Lord Blackburn, in his opinion on that case, when it reached this house adverted to the point but thought it unnecessary to express any opinion upon it.⁷

In the present case the true question is whether "the property" in the goods "passed to the indorsee upon or by reason of the indorsement," within the meaning of those words, as used in the bills of lading act of 1855? It was considered by Brett M. R. and Baggallay L. J. that if the effect of the indorsement and deposit was (as they thought) to pass the whole legal title to the goods to the appellants as indorsees, leaving an equitable interest only in the shipper, it was a necessary consequence that "the property passed" to them within the meaning of the statute, and that the respondent, the shipowner, was entitled to recover under the statute in this action. They clearly used the words "legal" and "equitable" in that technical sense which they have acquired in English law.

¹ 13 Q. B. D. 159.² 10 Q. B. D. 363.³ 10 Q. B. D. 363.⁴ 13 Q. B. D. 159.⁵ 1 Sm. L. C. 753, 8th ed.⁶ 6 Q. B. D. 475.⁷ 7 App. Cas. 606.

I am not myself satisfied that this consequence is necessary; but I admit that there are difficulties in the way of the contrary view; as there are also difficulties (arising from the strong and unqualified language used by judges of great authority, from the time when *Lickbarrow v. Mason*⁸ was decided downwards) in the way of the opinion that an indorsement and deposit of a bill of lading in a case like the present operates by way of pledge, and not as an assignment of the whole legal title to the goods. The facts here are simply an indorsement in blank and deposit of the bills of lading, so indorsed, by way of security for money advanced. There are no special circumstances, except that the indorsee never did obtain, and that it was never possible for him (in fact) to obtain, delivery of the goods.

I should not feel greatly embarrassed (if there were no other authority) by the mere terms in which the custom of merchants was found in *Lickbarrow v. Mason*;⁸ namely, that "bills of lading are after the shipment, and before the voyage performed, negotiable and transferable by the shipper's indorsement and delivery, * * * and that by such indorsement and delivery the property in such goods is transferred." This, it may be said, is the language of the bills of lading act. But I do not understand it as necessarily meaning more than that "the property" which it might be the intent of the transaction to transfer, whether special or general, passes by such an indorsement, according to the custom of merchants. The finding must be reasonably understood; it cannot (for instance) mean that the property will be transferred when there is no consideration.

But, although the custom as found seems to me to be consistent with the view taken by Field J. and Bowen L. J. in the present case, I have more difficulty in saying that the language of Buller J. in the earlier stages of *Lickbarrow v. Mason*⁹ is so. And, in some later cases, other great judges have not only followed, but have even gone beyond that language. The court of queen's bench, in *Re Westzynthius*,¹⁰ held that a right of stoppage in transitu might be exercised against the interest remaining in the shipper subject to the security created by an indorsement and deposit of the bill of lading, but they did so on the ground, not that the shipper retained any legal title or interest, but that he had an equity of redemption, of which the form in which the question then arose enabled the court to take notice. And, although it is true that in *Harris v. Birch*¹¹ the court of exchequer, then composed of Barons Parke, Alderson, Gurney, and Rolfe, decided a question of stamp duty upon the ground that an indorsement and deposit of a bill of lading by way of security operated as a pledge, and Coleridge J. in *Jenkyns v. Brown*¹² considered it to pass a special property only to the indorsee, leaving the general

property in the shipper, and in *Meyerstein v. Barber*¹³ all the judges of the common pleas and in the exchequer chamber concurred in that view,—yet, on the other hand, when *Meyerstein v. Barber* came to the house of lords (where the judgments of those courts were affirmed), Lord Hatherley and Lord Westbury used strong language of an opposite kind. Lord Hatherley said: "If anything could be supposed to be settled in mercantile law, I apprehend it would be this, that, when goods are at sea the parting with the bill of lading is parting with the ownership of the goods;" and afterwards, "I apprehend that it would shake the course of proceeding between merchants, as sanctioned by decided cases, if we were to hold that the assignment of the bill of lading, the goods being at the time at sea, does not pass the whole and complete ownership of the goods, so that any person taking a subsequent bill of lading, be it the second or be it the third, must be content to submit to the loss which would arise from the state of facts." These words are hardly, if at all, qualified by the context, "so that," etc. although in a later sentence (as to which see the remarks of Lord Blackburn in 7 Appeal Cases page 604), the proposition is less absolute: "When the vessel is at sea, and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which for the purpose of conveying a right and interest in the property, is the property itself."¹⁴

Lord Westbury's language is similar, perhaps stronger: "No doubt" (he said) "the transfer of it" (the bill of lading) "for value passes the absolute property in the goods." He quoted some words of Erle C. J. to which I shall afterwards refer, as having the same sense; he spoke of the first holder for value of the bill of lading as having "the legal ownership of the goods," "the legal right in the property," "both the right of property and the right of possession passing by a symbol, the bill of lading, which is at once both the symbol of the property and the evidence of the right of possession."¹⁵

To reconcile these expressions with those used in the same case by the judges of the common pleas and in the exchequer chamber is scarcely possible, and yet no dissent from the views of those learned judges was expressed in this house; on the contrary their reasoning, and especially that of Willes J., was referred to with apparent approval, particularly by Lord Hatherley and Lord Chelmsford. In such a conflict, not of decisions but of judicial phraseology, if not doctrines, it becomes important to remember that it is often dangerous to infer, even from very strong words, when used *diverso intuitu*, conclusions on other subjects which if they had been present to the minds of the speakers, might perhaps have led to their being more guarded or qualified. None of the cases to which I have referred arose

⁸ 5 T. R. 683.

⁹ 1 Sm. L. C. 753, 8th ed.

¹⁰ 5 B. & Ad. 817.

¹¹ 9 M. & W. 591.

¹² 14 Q. B. 502.

¹³ Law Rep. 2 C. P. 38, 661.

¹⁴ Law Rep. 4 H. L. 325, 326.

¹⁵ Law Rep. 4 H. L. 335-337.

upon the statute with which your lordships have now to deal, they related, some to the right of stoppage in transitu, some to competing claims between holders for value of different parts of the same set of bills of lading. It may well be that, as against all such claims, and against parties setting up interests adverse to the title of the indorsee for value, such words as "the legal ownership," "the legal right," "the right of property in the goods," might be used, and the property which passed to the indorsee might be described as "absolute" in a sense substantially true, even though such property might, as between the indorsee receiving and the shipper depositing the bill of lading by way of security, be special only and not general; and though the most apt term for a scientific definition of the transaction as between the borrower and the lender, may be, not assignment or transfer, but pledge.

In such a state of authority it is important to see how the matter stands in principle.

In principle the custom of merchants as found in *Lickbarrow v. Mason* seems to be as much applicable and available to pass a special property at law by the indorsement (when that is the intent of the transaction) as to pass the general property when the transaction is, e. g., one of sale. In principle also there seems to be nothing in the nature of a contract to give security by the delivery of a bill of lading indorsed in blank, which requires more in order to give it full effect, than a pledge accompanied by a power to obtain delivery of the goods when they arrive, and (if necessary) to realize them for the purpose of the security. Whether the indorsee when he takes delivery to himself may not be entitled to assume, and may not be held to assume towards the shipowner, the position of full proprietor, is a different question. But, so long at all events as the goods are in transitu, there seems to be no reason why the shipper's title should be displaced any further than the nature and intent of the transaction requires. This is not inconsistent with what was said by Erle, C. J. in *Meyerstein v. Barber*,¹⁶ that "the indorsement and delivery of the bill of lading while the ship is at sea, operate exactly the same as the delivery of the goods themselves to the assignee after the ship's arrival would do." The learned judge cannot have meant that possession of the symbol is for every purpose the same thing as actual possession of the goods; what he did mean was, that the indorsement and delivery of the bill of lading by way of pledge (which he considered to be the effect of the transaction in that case) was equivalent, and not more than equivalent, to a delivery by way of pledge of the goods themselves. Lord Hardwicke¹⁷ thought that there was a difference between an indorsement of a bill of lading in blank and a personal indorsement, and (for some purposes) I think there is much reason for that opinion. If, from a personal indorse-

ment, the inference might properly be drawn that a title by assignment, as distinguished from pledge, was meant to pass to the indorsee, it would not, in my opinion, follow that the same inference ought to be drawn from an indorsement in blank. Part of the custom of merchants, found in *Lickbarrow v. Mason*,¹⁸ was that "indorsements of bills of lading in blank may be filled up by the person to whom they are delivered or transmitted, with words ordering the delivery of goods to be made to such person; and, according to the practice of merchants, the same when filled up have the same operation as if it had been done by the shipper." Whether it is or is not usual in practice to fill up the blank with any name before taking delivery, it is certainly not to be implied from the custom as thus found that the operation of the indorsement, while it remains in blank, is necessarily to all intents and purposes the same as if it were filled up with the holder's name. So long as it remains in blank it may pass from hand to hand by mere delivery, or it may be redelivered to the shipper without any new transfer or indorsement, which would not be the case if there were a personal indorsement. It would be strange if the bills of lading act has made a person whose name has never been upon the bill of lading, and who (as between himself and the shipowner) has never acted upon it, liable to an action by the shipowner upon a contract to which he was not a party.

I am not however sure, that, for the decision of the present appeal, it is really necessary to rely, either upon any difference between a personal indorsement and one in blank, or upon the distinction between such a form of security as (in English law) might be held to pass the whole legal title, and a simple pledge.

The statute with which your lordships have now to deal is introduced by a preamble, the material part of which is, that "by the custom of merchants a bill of lading of goods being transferable by indorsement the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property." The 1st section enacts, that "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." The 2nd section provides that "nothing herein contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee by reason or in consequence of his being such consignee or indorsee, or of his receipt of the

¹⁶ Law Rep. 2 C. P. 45.

¹⁷ See *v. Prescott*, 1 Atk. 249.

¹⁸ 5 T. R. 683.

goods by reason or in consequence of such consignment or indorsement." There is nothing else material in that act.

The statute contemplates the passing of "the property in the goods" by the indorsement of the bill of lading, as a thing which may, or may not, happen, according to the nature and intent of the contract or dealing, for the purpose of which that indorsement is made; and it seems to provide for those cases only in which the property so passes, as to make it just and convenient that all rights of suit under the contract contained in the bill of lading should be "transferred to" the indorsee, and should not any longer "continue in the original shipper or owner." One test of the application of the statute may perhaps be, whether, according to the true intent and operation of the contract between the shipper and the indorsee, the shipper still retains any such proprietary right in the goods, as to make it just and reasonable that he should also retain rights of suit (the word is suit, not action) against the shipowner, under the contract contained in the bill of lading. If he does, the statute can hardly be intended to take from him those rights, and transfer them to the indorsee. If they are not transferred to the indorsee, neither is the indorsee subjected to the shipper's liabilities.

It is very difficult to conceive that when the goods are still in transitu, when the substance of the contract is not sale and purchase, but borrowing and lending, and when the indorsement and deposit of the bill of lading is only by way of security for a loan, it can be the intention of either party thereby, without more, to divest the shipper of all proprietary right to the goods, and to take from him and transfer to the indorsee all rights of suit under the contract with the shipowner. That some proprietary right (his original right, subject only to the creditor's security) remains in him is indisputable. If that proposition needed illustration from authority it would be found in the cases of *Re Westzinthus*,¹⁹ *Spalding v. Ruding*,²⁰ and *Kemp v. Falk*.²¹ Can it be that he is by the statute deprived of all remedies, legal and equitable, under the bill of lading, as long as it remains in the hands of the secured creditor? The creditor, in the ordinary course of things, will do nothing until the time for payment or delivery of the goods arrives. Can it then be material whether the proprietary right, thus remaining in the shipper while the goods are in transitu, is legal or equitable? The statute relates to a subject of general mercantile law, in which not Englishmen only but foreigners also may be, and often are, concerned. Foreign as well as British indorsements of bills of lading by way of security for advances (which may be made abroad, perhaps in countries not governed by English laws) are liable to be affected by it, whenever recourse must be had to British courts. It seems to me to be inconceivable that the construction of the

words "the property in the goods," in such a statute can have been intended to depend upon any such technical distinction as that made in English law (but by no means in the laws of all other countries in which the customs of merchants prevail) between legal and equitable titles.

It is to be observed further that the statute contemplates *beneficium cum onere* and not *onus sine beneficio*. It may be reasonable if the indorsee has the benefit (as he would if he were a purchaser out and out, or if under his title as indorsee of the bill of lading he obtained delivery of the goods to himself), that he should take it with its corresponding burden, quoad the shipowner. But it would be the reverse of reasonable to impose upon him such a burden, when he has neither entered into any contract of which it might be the natural result, nor (having taken a mere security) has obtained any benefit from it. This observation is fortified by the fact that the statute does not appear to distinguish between indorsements subsequent and those anterior to its enactment.

On the other hand it seems impossible to suppose the legislature to have passed this statute without some reference to the custom proved in *Lickbarrow v. Mason*, and to the law (whatever may be the true view of it) established on the same subject by later authorities in the English courts. And if (as I think) it ought to be understood with some reference to that custom and to those authorities, I cannot persuade myself that its operation is altogether restricted to cases of out and out sale, or that an indorsee of a bill of lading by way of security, who converts his symbolical into real possession by obtaining delivery of the goods, ought never to derive any benefit from it. The authorities decided upon the statute itself appear to me to be most easily reconciled with its apparent objects, and with each other, by a view which, if hardly consistent with expressions to be found in some other cases, nevertheless seems to me to have a real and substantial foundation in reason and good sense; viz. that the indorsee by way of security, though not having "the property" passed to him absolutely and for all purposes by the mere indorsement and delivery of the bill of lading while the goods are at sea, has a title by means of which he is enabled to take the position of full proprietor upon himself, with its corresponding burdens, if he thinks fit; and that he actually does so as between himself and the shipowner, if and when he claims and takes delivery of the goods by virtue of that title. The authorities decided upon the statute are *Fox v. Nott*,²² *Smurthwaite v. Wilkins*,²³ *The Figlia Maggiore*,²⁴ and *The Freedom*.²⁵ Another case, *Sherr v. Simpson*,²⁶ was also cited during the argument at your lordships' bar.

In *Fox v. Nott* (A. D. 1861) the only

²² 6 H. & N. 637.

²³ 11 C. B. (N. S.) 847.

²⁴ Law Rep. 2 A. & E. 103.

²⁵ Law Rep. 3 P. C. 594.

²⁶ Law Rep. 1 C. P. 243.

¹⁹ 5 B. & Ad. 817.

²⁰ 6 Beav. 376.

²¹ 7 App. Cas. 573.

question determined was, that the shipowner retained his remedy by action against the shipper, after the indorsement of the bill of lading (a case provided for by the 2nd section); but some of the learned judges expressed opinions bearing upon the general construction of the statute. Pollock C. B. said, "The indorsee of the bill of lading may be sued under the statute, because by taking the goods he also takes the liability to the freight." Martin B. said, "The statute means an actual vesting of the property as by bargain and sale;" and Wilde B. said, "I agree with my Brother Martin that the act applies only to an absolute transfer of the goods, and was never intended to deprive a person who made advances on the security of the bill of lading of the benefit of the original contract of the shipper to pay the freight."

In *Smurthwaite v. Wilkins* (A. D. 1862) the indorsee of a bill of lading, who had indorsed it over to a third party, was held not to be liable to the shipowner. Erle C. J. said, "The contention on the part of the plaintiff is, that, the property in the goods passing to the defendants by the assignment of the bill of lading, under the act, they are liable for the freight, although they never received the goods."

* * * The contention is, that the consignee or assignee shall always remain liable, like the consignor, although he has parted with all interest and property in the goods by assigning the bill of lading to a third party, before the arrival of the goods. The consequences which this would lead to are so monstrous, so manifestly unjust, that I should pause before I consented to adopt this construction of the act of parliament. The person who received the goods was always considered liable for the freight; but that was not by virtue of an original liability as a contracting party, but on a contract implied from his acceptance of the goods. Looking at the whole statute, it seems to me that the obvious meaning is, that the assignee who receives the cargo" (the italics are in the report) "shall have all the rights and liabilities of a contracting party; but that, if he passes on the bill of lading by indorsement to another, he passes on all the rights and liabilities which the bill of lading carries with it." Sir E. Vaughan Williams agreed. "Looking" (he said) "at the preamble, and at the general scope and intention of the statute, I can entertain no doubt that the view presented by my lord is the true one;" and he explained the effect of "the general scope" of the act to be, "that, where the right of property leaves the party, the rights and liabilities under the contract leave him also." A case like the present, of a security on an indorsed bill of lading, not acted upon (and which, in fact, never could be acted upon) by taking delivery of the goods, but at the same time not transferred to any other person, differs (in specie) from that of a man who has transferred the bill of lading by indorsing it over to another. But I cannot see that it would be more reasonable to make the holder of such a security, which he has never realized, and never can

realize, liable under the statute, than if he had parted with the bill of lading to somebody else.

The cases of *The Figlia Maggiore* and *The Freedom* were determined in the court of admiralty under another statute, which (as Dr. Lushington and his successor, in my opinion, rightly held) gave that court jurisdiction when, and only when, there was, independently of that statute, a right of action or suit; and, in those particular cases, it appears to have been held, that there was no such right of action or suit, unless it was given by the bills of lading act. In both of them the plaintiffs, indorsees by way of security of bills of lading, had claimed and obtained delivery of the goods, and then had brought actions against the shipowners for damages which they had sustained through breaches of the contracts contained in the bills of lading; and they were held entitled to recover. This was right if an indorsee under such circumstances may rightly be held entitled to the benefit of the statute, as having elected to complete his potential and inchoate title by taking possession of the goods, and so placing himself towards the shipowner in the position of proprietor. May it not be said that "the property in the goods" then (if not before) "passes" to him "by reason of the indorsement"? The principle of the liability, which under some circumstances was held, even before the statute, to attach to the indorsee taking delivery, was regarded by Erle C. J. in *Smurthwaite v. Wilkins* as elucidating the policy and the objects of the statute itself; and both he, and Pollock C. B. in *Fox v. Nott* spoke of "taking the goods," and "receiving the cargo," as the test of its application. The authorities on that subject (*Jesson v. Solly*; ²⁷ *Stindt v. Roberts*; ²⁸ *Wegener v. Smith*; ²⁹ *Chappel v. Comfort*)³⁰ seem from this point of view to deserve consideration.

The decision in the court of admiralty in the case of *The Freedom* was affirmed by her majesty in council, upon the advice of the judicial committee, and although it was on a point as to which the admiralty had only a statutory jurisdiction concurrent with the courts of common law, and though in all English admiralty cases the appeal now lies to this house, still this, as the decision of a court of final appeal, ought not, in any later case, to be lightly departed from.

The case of *Short v. Simpson*³¹ did not really require anything to be decided as to the effect of the statute, and nothing was in fact so decided. It was there held that, *quocunque modo*, whether under the statute or independently of the statute, the shipper, to whom a bill of lading which he had indorsed and delivered to his creditor by way of security was reindorsed and redelivered upon payment of the loan, was remitted to his original rights.

²⁷ 4 Taunt. 52.

²⁸ 17 L. J. (Q. B.) 166.

²⁹ 15 C. B. 285.

³⁰ 10 C. B. (N. S.) 832.

³¹ Law Rep. 1 C. P. 243.

Upon the whole I cannot dissemble that this case appears to me to be attended with some considerable difficulties. But those difficulties are mainly technical, arising out of a comparison of the language of the statute with various and not always consistent forms of expression found in authorities not decided with a view to any such consequences as those which the statute would produce. They deal with questions between unpaid vendors of goods comprised in bills of lading and bona fide indorsees of the same bills of lading for value, or between competing and adverse claimants to priority as bona fide holders for value of the bills of lading themselves. The statute, on the other hand, deals with questions between shippers and indorsees of bills of lading claiming under them, and between indorsees and shipowners. The preponderance of principle and reason appears to me to be against the proposition, that, as between those parties, it can have been intended by, or can be the effect of, the statute to make the creditor of the shipper liable (in effect) as his surety to the shipowner (with whom he was never brought in contact), by reason only of the deposit with him, by way of security, of a bill of lading indorsed in blank; his right under that deposit, being (whether at law or in equity) special and not general, and the shipper retaining (whether at law or in equity) the real and substantial property in the goods, subject to the security. It had not, until the present case, been directly or indirectly determined by any authority that such is the effect of the statute.

My conclusion is, that the appellants ought to be exonerated by your lordships' judgment from the respondent's action; and that the order of the court of appeal ought to be reversed, with costs.

LORD BLACKBURN:—My lords, the judgment of Field J. was reversed by the order now under appeal. The case was tried before him without a jury, and I think it is necessary to see what he had to determine. There was no question between vendor and vendee, nor of stoppage in transitu, raised, for there was neither a vendor nor a stoppage. The law and decisions as to stoppage in transitu might be relevant in construing the statute 18 & 19 Vict. c. 111, but did not otherwise affect the rights of the parties.

It will be seen by reference to the statement of claim and of defence that it was not suggested that the defendants were, at the time the goods were shipped, in any way interested in the goods; nor that they were, either as undisclosed principals or otherwise, parties to the contract in the bill of lading until it was delivered to them, after the ship had sailed and the goods were in the hand of the shipowners to be carried under the bill of lading and were not yet delivered, with an indorsement in blank by Necessiantz, the consignee named in the bill of lading.

I do not think that, either at the trial or on the argument, it was at all disputed that at common law the remedy of the shipowner under a bill of lading was by en-

forcing his lien upon the goods, or by bringing an action on the contract against any one who, at the time when the goods were shipped, was a party to the bill of lading, either as being on the face of it a contracting party, or as being an undisclosed principal of such a party. In either of these cases he might be sued as having been from the beginning a party to the contract.

Some attempts had been made to say that the contract in a bill of lading might, under some circumstances at least, be transferred to an assignee in a manner analogous to that in which the contract in a bill of exchange was transferred by the indorsement of the bill of exchange; but I think since the decision in *Thompson v. Dominy*³² in 1845, it has been undisputed law that under no circumstances could any one not a party to the contract from the beginning sue on it in his own name. Any action on the contract at common law must be brought in the name of an original contractor, and no action could be brought on the contract against one who was not liable to be sued as an original contractor.

But ten years later the 18 & 19 Vict. c. 111, was passed. The preamble states this as one of the objects which the legislature had in view, "Whereas by the custom of merchants a bill of lading being transferable by indorsement the property in the goods may thereby pass to the indorsee" (which I think for a long time before the 18 & 19 Vict. A. D. 1855 was undisputed), "but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner" (this, it is to my mind clear, refers to *Thompson v. Dominy*)³², "and it is expedient that such rights should pass with the property."

The mode in which the legislature carry out the object thus expressed in the preamble is by sect. 1: Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

The case made on the statement of claim was that "the" property had passed upon or by reason of the indorsement to the defendants. Not that they were before that a party to the contract in the bill of lading, but that by virtue of the act 18 & 19 Vict. when the property passed they became subject to the same liabilities as if the contract contained in the bill of lading had been made with themselves.

It is not disputed that the delivery of the bill of lading to the defendants with the indorsement of the consignee on it in blank was an indorsement, nor that whatever interest then passed to them still remained in them. What was in issue was whether upon or by reason of that indorsement "the" property passed.

³² 14 M. & W. 403.

The first and most important question to be decided in this case is, what is the true construction of 18 & 19 Vict. c. 111? Does "the property" in the goods there mean any legal property in the goods; so as to be satisfied by proof that a legal property passed accompanied by a right of possession so as to entitle the transferee to maintain trover, though it was intended by the parties, and was as between them, to be by way of security only, the transferor retaining a right of redemption either by way of a common law retention of the general property, though the pledgee had a right to the possession and a property as pledgee, a right exceeding a lien; or the whole property at law having passed by way of mortgage the transferor retaining an equity of redemption, which in 1855 was an equitable right, enforceable only in a court of equity?

I think that all the judges below were of opinion that if the right reserved was the general right to the property at law, what was transferred being only a pledge (conveying no doubt a right of property and an immediate right to the possession, so that the transferee would be entitled to bring an action at law against any one who wrongfully interfered with his right), though "a" property, and "a" property against the indorser, passed "upon and by reason of the indorsement," yet the property did not pass. And I agree with them. I do not at all proceed on the ground that this being an indorsement in blank followed by a delivery of the bill of lading so indorsed, had any different effect from what would have been the effect if it had been an indorsement to the appellants by name.

The case of *The Freedom* was cited, and I think there are expressions used in the judgment delivered in that case by Sir Joseph Napier which indicate that the judicial committee were not of that opinion. It is said (Law Rep. 3 P. C. p. 599), "The plaintiffs were consignees for sale; but as part of the transaction a bill of exchange was drawn by the consignors for nearly the full value of the goods, the bills of lading were indorsed by them and forwarded to the plaintiffs, by whom the draft of the consignors was accepted and paid in due course." If that was the transaction (and whether it was so or not, the judicial committee proceeded on the assumption that such was the transaction), the plaintiffs in *The Freedom* were in exactly the position of Church, in the case of *Newson v. Thornton*²³, the case to which I shall have to refer afterwards. Church had the bill of lading indorsed to him as a factor, or consignee for sale, and had therefore a right to hold the goods as against the indorser as a security for all his advances, and he had authority at common law to sell the goods, and before the arrival of the ship to transfer the bill of lading in furtherance of a sale, but he had no authority to pledge either the goods or the bill of lading. It is true that by the factors' acts

the plaintiffs in *The Freedom* would have had a power, which Church had not, to pledge the bill of lading, but as they did not exercise that power it could make no difference.

The judgment then proceeds: "The legal title to the property in the goods specified in the bills of lading was thus transferred to and vested in the plaintiffs; the right of suing upon the contract in the bills of lading was transferred to them by force of the statute 18 & 19 Vict. c. 111." The judgment then proceeds to shew, I think correctly, that the dictum of Martin B., reported in *Fox v. Nott* was not necessary for the decision in *Fox v. Nott*, and goes on: "Their lordships are satisfied that it was intended by this act that the right of suing upon the contract under a bill of lading should follow the property in the goods therein specified; that is to say, the legal title to the goods as against the indorser." It certainly seems to me that their lordships thought that "the" property passed within the meaning of 18 & 19 Vict. c. 111, if any legal right to hold as against the indorser passed.

The statute which their lordships had to construe was the 24 Vict. c. 10 s. 6, which is in these terms, "The high court of admiralty shall have jurisdiction over any claim by the owner" (i. e. of the goods) "or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shewn to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales." It is not necessary to put a construction on 24 Vict. c. 10 s. 6.

I think there are very good reasons for contending that a person who has possession of an indorsed bill of lading without any right at all to hold it against the indorser, without being owner of any interest in the goods, is not an "assignee" within the meaning of this enactment, and consequently that what I understand to be the actual decision of Dr. Lushington in *The St. Cloud*²⁴, that such a person could not sue under the admiralty act, may have been right enough. It is not necessary to decide that. But I agree with what was said in *The Nepoter*²⁵, that it is contrary to all rules of construction to interpolate any reference to the bill of lading act into the admiralty act. I think, therefore, that the actual point decided in *The Freedom*²⁶ might be quite right, for the plaintiff in that action had a property, and a very substantial property, in the goods, as against the indorsers, and every one else, and was in every sense an assignee of the bill of lading. The opinion expressed on the construction of the 18 & 19 Vict. c. 111, that in that act the

²³ Brow. & Lush. 4.

²⁴ Law Rep. 2 A. & E. 376.

²⁵ Law Rep. 3 P. C. 594.

²⁶ 6 East, 17.

property meant a legal title as against the indorser, was perhaps unnecessary, and, I think, not sound.

The words used in the statute are not such as *prima facie* to express such an intention. No one, in ordinary language, would say that when goods are pawned, or money is raised by mortgage on an estate, the property, either in the goods or land, passes to the pledgee or mortgagee, and I cannot think that the object of the enactment was to enact that no security for a loan should be taken on the transfer of bills of lading unless the lender incurred all the liabilities of his borrower on the contract. That would greatly, and I think unnecessarily, hamper the business of advancing money on such securities which the legislature has, by the factors acts, shewn it thinks ought rather to be encouraged.

It is not uncommon to reduce into writing the agreement between the banker and his customers as to the terms on which the bills of lading deposited by them as securities are to be held. Such was the case in *Glyn v. East and West India Dock Company*³⁷, as to which I shall have more to say hereafter. When there is such a writing, it is, in the absence of fraud, conclusive as between the parties as to what they intended. And I do not in the least question that such a writing may be so expressed as to shew that between the parties the transfer was a mortgage, though of goods, in the manner with which everyone is familiar with regard to lands. The equity of redemption in such a case was an equitable estate only, and in 1855 enforceable in equity, not at law.

Where there is neither a symbolical delivery by a transfer of a bill of lading, nor an actual delivery of the goods themselves, there may be (though there seldom is) a substantial difference in the rights of the lender according as the transaction is of the one kind or the other.

In *Howes v. Ball*³⁸, Ball sold and delivered a coach to John Howes (since deceased) under an agreement in writing, in which there was this clause, "And further I, John Howes, do agree that Thomas Ball do have and hold a claim upon the coach until the debt be duly paid." John Howes died without having paid the debt. Ball, after his death, seized the coach, for which seizure the action was brought by the executor. Had that agreement amounted to a mortgage by John Howes to Ball, I take it there could have been no doubt that the mortgagee would have had as much right against the executor of John Howes as he would have had against John Howes himself. But it was held that it did not amount to a mortgage, but only to an agreement that Ball should have a right of hypothec, and, there having been no delivery by Howes to Ball, the decision was that though so long as John Howes lived and held the property in the coach Ball might have justified the seizure, as against him,

he could not justify a seizure as against the representatives. In *Flory v. Denny*³⁹ where the agreement was "as an additional security for a loan to assign all the debtor's right and interest in a chattel," it was held to be a mortgage, and to operate so as to transfer the property, without any delivery, as a bargain and sale out and out of the goods would, though an agreement to create a pledge would, according to *Howes v. Ball*, have conveyed no property of any kind in the goods without a delivery.

But where the goods are at sea, and there is a transfer of the bill of lading, there is a delivery of possession, symbolical, it is true, but all that can be given. The question whether there was a mortgage or only a common law pledge, or hypothec, it being accompanied by delivery, might affect the question what was the court in which those rights were to be enforced, but does not affect the substance of the rights. The borrower if ready and willing to pay the money, might in the one case be able to bring an action at law against the lender who refused to allow him to redeem, and in the other have to sue in equity, but as it would equally be a pledge his rights would be the same in substance. I am therefore strongly inclined to hold that even if this was a mortgage there would not have been a transfer of "the" property within the meaning of 18 & 19 Vict. c. 111. This is contrary to the opinions not only of Brett M. R. and Baggallay L. J., but of Field J. also.

Bowen L. J. who agreed with Field J. in thinking that this was not a mortgage but only a pledge, did not express any opinion as to what would have been the law if it had been a mortgage. I believe all the noble and learned lords who heard the argument are agreed with him in thinking that in this case it was only a pledge. I do not therefore intend to express a final decision that an assignee of a bill of lading by way of mortgage is not as such liable to be sued under 18 & 19 Vict. c. 111; but only to guard against its being supposed that even if Brett M. R. and Baggallay L. J. were right in holding this a mortgage, I, as at present advised, should agree in their conclusion that the defendants could be sued.

I now proceed to consider the question on which the court of appeal were divided in opinion, but the majority made the order now appealed against. The question is stated by Brett M. R. to be "Does the indorsement of a bill of lading as a security for an advance, by a necessary implication which cannot be disproved, pass the legal property in the goods named in the bill of lading to the indorsee with an equity in the indorser, the borrower, to redeem the bill of lading by payment, or to receive the balance, if any, on a sale?"⁴⁰

Field J. had held, and Bowen L. J. agreed with him, that it might so operate, if so intended by the parties at the

³⁷ 5 Q. B. D. 129; 6 Q. B. D. 475; 7 App. Cas. 591.

³⁸ 7 B. & C. 481.

³⁹ 7 Ex. 581.

⁴⁰ 13 Q. B. D. 161.

time, but did not so operate if it was intended to be no more than a pledge as distinguished from a mortgage.

I do not understand that any one of the judges below disputed that if it was a question of intention depending on the evidence, the finding of Field J. was right; but the majority in the court of appeal proceeded on the principles laid down by Brett L. J. in *Glyn v. East and West India Dock Company*.⁴¹ In that case the terms on which the bill of lading was delivered to Glyn & Co. were reduced to writing, and the question therefore whether it was intended to deliver it by way of pledge only, or by way of a mortgage, depended on the construction of that writing. Whether Brett L. J. thought that on the construction of the written instrument it was intended to be a mortgage I do not know; I do not think he proceeded on that ground. He said it was a mortgage, and that the effect of the statute 18 & 19 Vict. c. 111 was to transfer the right to sue and the liability to be sued to Glyn & Co.

Lord Bramwell, then Bramwell L. J., was of an opposite opinion on both points. He thought that Glyn & Co. had a special property and a right of possession and no more.

In the house of lords I said, "I do not think it necessary to express any opinion on a question much discussed by Brett L. J., I mean whether the property which the bankers were to have was the whole legal property in the goods, Cotton & Co.'s interest being equitable only, or whether the bankers were only to have a special property as pawnees, Cotton & Co. having the legal general property. Either way the bankers had a legal property, and at law the right to the possession, subject to the shipowner's lien, and were entitled to maintain an action against any one who, without justification or legal excuse, deprived them of that right."⁴² All the noble and learned lords agreed in this. I think therefore the decision of this house is a strong authority in support of the position which I have before advanced, that the rights of a mortgagee having taken a bill of lading, and the rights of a pawnee having taken a bill of lading, are in substance the same.

I did not think it necessary to point out that the question which the house in *Glyn v. East and West India Dock Company* had to decide, and did decide, would have been just the same if 18 & 19 Vict. c. 111 had never been passed or had been repealed, and consequently that it was unnecessary to express any opinion on the construction of that act, but it obviously was so.

Before proceeding farther I wish to point out what in my opinion is a great misapprehension as to the effect of the decision of this house in *Lickbarrow v. Mason*⁴³, and as to the weight to be given to the opinion of Buller J. delivered in this house and reported in a note to *G. East*.

I have already said that in this case there is no sale, no vendor, and no vendee, and no stoppage in transitu, so that this misapprehension, as I think it is, is not so material as it might be in some other cases.

A demurrer on evidence, as is pointed out by Eyre C. J. in delivering the unanimous opinion of the judges in *Gibson v. Hunter*,⁴⁴ not *Gibson v. Mnet*, as is by mistake said in the note in *G. East*, though not familiar in practice, was a proceeding known to the law. He explains it, and states his very confident expectations (which have been justified by the result) that no demurrer on evidence would again be brought before the house.

It may be well to point out the dates. The demurrer to evidence in *Lickbarrow v. Mason*⁴⁵ was in 1787. The only case of a demurrer on evidence in what were then recent times, was *Cocksedge v. Fanshaw*,⁴⁶ on which judgment had been given in this house in 1783. Neither in the king's bench nor in the exchequer chamber was any question raised in *Lickbarrow v. Mason* as to the mode in which the questions discussed were raised. In 1790 the writ of error from the decision of the exchequer chamber was brought before the house of lords. The law peers at that time were Lord Thurlow, Lord Loughborough, and Lord Kenyon. When it was argued does not appear, but it was argued, and the same question as had been asked of the judges in *Cocksedge v. Fanshaw* was asked of the judges. Six judges (including all the survivors of those who had joined in Lord Loughborough's judgment in the exchequer chamber) answered in favour of the respondent. The three judges who had given judgment in the king's bench answered in favour of the appellant. This house delayed giving its opinion till 1793. In the meantime, in 1791, there was a demurrer to evidence in *Gibson v. Hunter*, which was brought before this house. The case in this house is reported, 2 H. Bl. 187. On the 7th of February 1793 this house gave judgment awarding a venire de novo. One week afterwards, on the 14th of February 1793, this house delivered judgment in the long pending case of *Lickbarrow v. Mason*, awarding in that case also a venire de novo. Lord Loughborough was himself at that time lord chancellor.

I should have thought, if anything was clear, it was that this house did not decide anything, except that on that demurrer to the evidence no judgment could be given; certainly the last conclusion that I should draw is that stated by Field J., that the house in which Lord Loughborough was chancellor decided "presumably" on the opinion delivered by Buller J. against the judgment of Lord Loughborough, which six judges to three had thought right. Neither can I at all agree in the opinion expressed by Field J. that the opinion of Buller J. has always been taken as the law, and been adopted and followed as the law up to the present day.

⁴¹ 6 Q. B. D. 475.

⁴² 7 App. Cas. 591, 606.

⁴³ 6 East, 20, n.

⁴⁴ 2 H. Bl. 205, 206.

⁴⁵ 5 T. R. 683.

⁴⁶ 1 Doug. 118, 134.

It never was published till 1805 in a note to 6 East 20. I have for many years been of opinion, and still remain of opinion, that much of what Buller J. expresses in that opinion as to stoppage in transitu was peculiar to himself, and was never adopted by any other judge, and is not law at the present day. But it is not necessary to pursue the subject further, as I agree with Bowen L. J. that neither the statement of the custom of merchants in the special verdict in *Lickbarrow v. Mason*, nor the opinion of Buller J., justifies the inference that the indorsement of a bill of lading for a valuable consideration must pass the entire legal property, whatever was the intention of the parties.

In *Lickbarrow v. Mason*, Turing was an unpaid vendor to Freeman. He had indorsed the bill of lading to Freeman, and had not therefore any right, except that of stopping the goods while in transitu if Freeman became insolvent without having paid for the goods, and that right he had, though the indorsed bill of lading had been sent on to the vendee, so long as that bill of lading remained in the vendee's hands. But before any such stoppage Freeman, for valuable consideration, indorsed the bill of lading to Lickbarrow, who whether as mortgagee or pledgee, had a legal property accompanied by a right of possession. The point which I understand to have been decided in *Lickbarrow v. Mason* was, that on the transfer of the bill of lading to Lickbarrow the goods ceased to be in transitu, the shipowner from that time no longer holding them as a middleman to carry the goods from the unpaid vendor, Turing, to Freeman his vendee, but holding them as agent for Lickbarrow. It was held, first in *Re Westzintus*⁴⁷ and then in *Spalding v. Ruding*,⁴⁸ that where the transitu was thus put an end to by what was in reality only a pledge, the stoppage might be made available in equity so far as the rights of the pledgee did not extend. I thought, and still think, that the reason why the stoppage could not be made available at law was because the shipowner no longer held the goods as a middleman, as the transferee of the bill of lading for valuable consideration and bona fide so as to give him a security whether by way of mortgage or by way of pledge, had a legal property in the goods which he could enforce as against the shipowner. Such being my view of the law, whether it was right or wrong, I expressed myself accordingly in *Kemp v. Falk*,⁴⁹ so as to shew that I thought so; but there was nothing in that case to call for a decision on the point now before this house.

In *Newsom v. Thornton*⁵⁰ Lord Ellenborough says: "I should be very sorry if anything fell from the court which weakened the authority of *Lickbarrow v. Mason* as to the right of a vendee to pass the property of goods in transitu by indorsement of the bill of lading to a bona fide holder for a valuable consideration and

without notice. For as to *Wright v. Campbell*,⁵¹ though that was the case of an indorsement of a factor, it was an outright assignment of the property for value. Scott, the indorsee, was to sell the goods and indemnify himself out of the produce the amount of the debt for which he had made himself answerable. The factor, at least, purported to make a sale of the goods transferred by the bill of lading, and not a pledge. Now this was a direct pledge of the bill of lading, and not intended by the parties as a sale. A bill of lading, indeed, shall pass the property upon a bona fide indorsement and delivery where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do if so intended. But it cannot operate further."

Lawrence J., at page 43, says, speaking of *Lickbarrow v. Mason*: "All that that case seems to have decided is, that where the property in the goods passed to a vendee, subject only to be divested by the vendor's right to stop them while in transitu, such right must be exercised, if at all, before the vendee has parted with the property to another for a valuable consideration and bona fide, and by indorsement of the bill of lading given him a right to recover them." And Le Blanc J. says that what they then determine "will not break in at all on the doctrine of *Lickbarrow v. Mason* that the indorsement of a bill of lading upon the sale of the goods will pass the property to a bona fide indorsee, the property being intended to pass by such indorsement."

In *Glyn v. East and West India Dock Co.*,⁵² Brett L. J. says (speaking of an opinion of Willes J.), "To say that an indorsement of a bill of lading for an advance is only a pledge, seems to me to be inconsistent with what has always been considered to be the result of *Lickbarrow v. Mason*, namely, that such an indorsement passes the legal property," by which I understand him to mean the whole legal property. But neither in that case nor in the case now at bar does he refer to any authority to that effect. Expressions used by judges have been cited which, I think, only shew that they did not carefully consider their language, where no question of the kind before us was under discussion. And, as far as I know, there is no decision subsequent to *Lickbarrow v. Mason* which proceeds on such a ground, whilst *Newsom v. Thornton*⁵³ proceeds expressly on the ground that the indorsement of a bill of lading, when intended to be a pledge only, is not valid if made by one who has no authority to make a pledge. I do not know that I am justified in saying that it is a decision that, if it was made by one who had authority to make a pledge, it would be good as such, though I think that appears to have been Lord Ellenborough's opinion, and I do not think any authority was cited on the argument at the bar to shew that such is not the law. No case was cited at the bar nor am I aware of

⁴⁷ 5 B. & Ad. 517.

⁴⁸ 6 Beav. 381.

⁴⁹ 7 App. Cas. 573.

⁵⁰ 6 East, 40.

⁵¹ 4 Burr. 2047.

⁵² 6 Q. B. D. 480.

⁵³ 6 East, 17.

any in which it has been held that a transfer of the bill of lading for value necessarily, whatever might be the intention, passed the whole legal property. The master of the roll says:—"If the general understanding of merchants had not been in accordance with the verdict of the jury in *Lickbarrow v. Mason*,⁶⁴ accepted in its largest sense, there would, one would think, have been cases in the books raising the question."⁶⁵ With submission to the master of the rolls, I think no weight can be given to this absence of authority until it is shewn that there have been cases in which it became material to consider whether an indorsement intended to be and operating as a pledge at law had a less effect than an indorsement operating against the intention as a mortgage. I have already given my reasons for thinking that in substance the rights would be the same. Without, therefore, deciding the question whether a mortgage would render the mortgagee liable under 18 & 19 Vict. c. 111, I decide that, mainly for the reasons given by Bowen L. J., this transfer did not operate as a mortgage.

I therefore am clearly of opinion that the order made by the court of appeal should be reversed with costs, and the judgment of Field J. restored.

LORD BRAMWELL:—My lords, I concur. This action would not have been maintainable at common law. Is it maintainable under 18 & 19 Vict. c. 111? That depends upon whether the appellants are indorsees of the bill of lading "to whom the property in the goods therein mentioned has passed upon or by reason of such indorsement." It is found as a fact, and rightly found, as is admitted, that all that was intended in the transaction was a pledge. This would give the appellants a property, but, as put by Bowen L. J., not "the" property. As I understand the master of the rolls, if this could be, then the appellants are right; but he thinks it could not be—that *Lickbarrow v. Mason*, or rather the opinion of Buller J., shews that when a bill of lading is indorsed to give any title to the transferee the entire property is passed, and that in such a case as this nothing but an equitable right to redeem remains in the transferor. It is for those who assert this to prove it. I cannot prove the negative that it is not so; and logically and reasonably I might content myself with saying that it is not proved to me; that I see no reason and no authority in support of it. But I go further: I think that authority and reason are against it. The cases do not, in my opinion, justify the contention. I will not discuss or examine them in detail; that has been done by the lord chancellor. I understand his conclusion to be that the expressions of learned judges which have been relied upon should be read and interpreted secundum subjectam materiam. I agree. In no case has the present matter been under consideration. As to the reason and principle which should govern, I ask why

should the transfer of the bill of lading have a greater effect, contrary to the parties' intention, than the handing over of the chattels themselves? They could be pledged if on shore, but being at sea no actual delivery, which is necessary to a common law pledge, can take place. There can, however, be a symbolical delivery by transferring the bill of lading. Why should the effect be different?

Then consider the inconvenience of holding that the pledgor has only an equitable right: that he may repay the loan at the day appointed, but thereby acquire no legal title to the possession of the goods: that the pledgee may sell and pass the entire property to one not having notice of the equitable title. Consider what difficulties would be put on those who lend on such securities if this action was maintainable. The banker who lent money on a bill of lading for goods which arrived in specie, but damaged by perils of the seas so as to be worthless, might lose the money lent and the freight. Another consequence would be that the transferee of the bill of lading, though only interested to the amount of the loan on it, would be the person to bring actions on the contract to carry. It is true that unless he can do so in all cases, he can in none, even where his interest is to the extent of the full value of the goods. Either this was not thought of by the legislature, or, if it was, they thought that no case could be included unless all were, and that it was better to include none than all. It is to be observed that the statute in its preamble says that by indorsement the property "may" pass. It is to be remembered also, as pointed out by my lord chancellor, that this law bears upon foreigners out of the kingdom.

I am the more surprised at this contention on the part of the master of the rolls, as he has always so ably and powerfully contended that mercantile laws, contracts, and usages should be free as possible from technicality. I am of opinion that the appeal should be allowed. I cannot truly say that I have any doubt on the matter.

I take this opportunity of saying that I think there is some inaccuracy of expression in the statute. It recites that, "by the custom of merchants a bill of lading being transferable by indorsement the property in the goods may thereby pass to the indorsee." Now the truth is that the property does not pass by the indorsement, but by the contract in pursuance of which the indorsement is made. If a cargo aboard is sold, the property would pass to the vendee, even though the bill of lading was not indorsed. I do not say that the vendor might not retain a lien, nor that the non-indorsement and non-handing over of the bill of lading would not have certain other consequences. My concern is to shew that the property passes by the contract. So if the contract was one of security—what would be a pledge if the property was handed over—a contract of hypothecation, the property would be bound by the contract, at least as to all who had notice of it, though the bill of lading was not handed over.

There is, I think, another inaccuracy in

⁶⁴ 1 Sm. L. C. 753, 8th ed.

⁶⁵ 13 Q. B. D. 163.

the statute, which indeed is universal. It speaks of the contract contained in the bill of lading. To my mind there is no contract in it. It is a receipt for the goods, stating the terms on which they were delivered to and received by the ship, and therefore excellent evidence of those terms, but it is not a contract. That has been made before the bill of lading was given. Take for instance goods shipped under a charterparty, and a bill of lading differing from the charterparty; as between ship-owner and shipper at least the charterparty is binding: *Gledstanes v. Allen*.⁵⁶

These distinctions are of a verbal character, and not perhaps of much consequence; but I am strongly of opinion that precision of expression is very desirable, and had it existed in such cases as the present there would not have been the contradictory opinions which have been given.

Lord FITZGERALD:—My lords, Field J. in the court below came to the conclusion that the transaction under investigation was intended by the parties to operate as a pledge only. There can be no doubt that the inference thus drawn by

the learned judge was correct in fact. It seems to follow that the pledgees acquired a special property in the goods with a right to take actual possession, should it be necessary to do so for their protection or for the realisation of their security. They acquired no more, and subject thereto the general property remained in the pledgor.

I am of opinion that the delivery of the indorsed bill of lading to the defendants as a security for their advance did not by necessary implication transfer the property in the goods to the defendants. They were not therefore "indorsees of a bill of lading to whom the property in the goods passed by reason of the indorsement," so as to make them without more "subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with them."

The judgments which have been just delivered are so very full, and so able and satisfactory, that it would be mere affectation on my part to attempt to do more than express my concurrence.

Order appealed from reversed. Order of Field J. restored. Respondent to pay the costs in the court below and in this house. Cause remitted to the queen's bench division.

⁵⁶ 12 C. B. 202.

SHAWHAN v. VAN NEST.

(25 Ohio St. 490.)

Supreme Court of Ohio. December Term, 1874

Motion for leave to file a petition in error.

Action by Peter Van Nest against Reasin W. Shawhan to recover on a contract by which he agreed to make for Shawhan a carriage in accordance with his directions for \$700, and have the same ready for delivery at his shop October 1, 1871, in consideration whereof Shawhan agreed to accept the carriage at the shop and pay the agreed price. He alleged the tender of the carriage October 1st, and the refusal of Shawhan to accept or pay for it. The evidence established the allegations of the complaint. The court instructed the jury that, if they found the issues for the plaintiff, they should give him a verdict for the contract price of the carriage, with interest from the time the money should have been paid. Shawhan requested the court to give to the jury the following special instructions: (1) "If, in this case, the evidence shows that the defendant ordered the plaintiff to make for him a carriage, and agreed to take or receive it, when finished, at the plaintiff's shop, and to pay a reasonable price therefor, and the plaintiff did, in pursuance of such order and agreement, make such carriage, of the value of seven hundred dollars, and have the same in readiness for delivery at his shop, of which the defendant had notice, and the defendant then failed, neglected, and refused to take, receive, or pay for said carriage, though requested so to do by the plaintiff, these will not authorize you to render a verdict for the plaintiff for the price or value of the carriage." (2) "If the plaintiff has proved the making of the carriage for the defendant, and the refusal of the latter to receive and pay for it, as alleged in the petition, then he can only recover for the damages or losses he has actually sustained by reason of this refusal of the defendant, which is the difference between the agreed price and the actual value." These instructions the court refused to give, and Shawhan excepted. The jury found for Van Nest, and gave him the contract price of the carriage, with interest.

W. P. Noble, for plaintiff in error. G. E. Seney, for defendant in error.

GILMORE, J. The only question to be determined in this case is: Did the court err in refusing to give to the jury the special instructions requested by the defendant on the trial below? The authorities cited by counsel for the parties respectively, are not in harmony with each other on this question. Some of those cited by the plaintiff in error (defendant below) show clearly that under the pleadings and practice at common law, there could be no recovery under the common counts in assumpsit, for goods sold and delivered, or for goods bargained and sold, where no delivery sufficient to pass the title from the vendor to the vendee had been made. And further, that in this form of action,

proof of a tender of the goods by the vendor to the vendee, or leaving them with him against his remonstrance, would not constitute such a delivery as would pass the title and enable the vendor to recover. While these may be regarded as settling the rules of pleading and evidence on the trial of particular cases, and therefore not decisive of the question when raised under issues so formed as to present it freed from the technicalities of pleading, still there are other cases cited on the same side, which declare the rule to be as follows: Where an action is brought by the vendor against the vendee, for refusing to receive and pay for goods purchased, the measure of damages is the actual loss sustained by the vendor in consequence of the vendee refusing to take and pay for the goods, or, in other words, the difference between the contract price and the market price at the time and place of delivery. In the authorities cited by the plaintiff in error, no distinction is drawn, or attempted to be drawn, between the sale of goods and chattels already in existence, and an agreement to furnish materials and manufacture a specific article in a particular way, and according to order, which is not yet in existence; the theory being, that in neither case would the title pass, or property vest in the purchaser, until there had been an actual delivery, and that until the title had passed, the vendor's remedy was limited to the damages he had suffered by reason of the breach of the contract by the vendee, which were to be measured by the rule above stated. In this case it is not necessary to determine whether or not a distinction, resting upon principles of law, can be drawn between ordinary sales of goods in existence and on the market, and goods made to order in a particular way, in pursuance of a contract between the vendor and vendee. The case here is of the latter kind, and the question is, whether the plaintiff below was entitled to recover the contract price of the carriage, on proving that he had furnished the materials, and made and tendered it in pursuance of the terms of the contract.

Counsel for the defendant in error (plaintiff below) has cited a number of authorities, in which the questions presented and decided arose upon facts similar to those in this case, and upon issues presenting the question in the same way; and as the conclusions we have arrived at, are based upon this class of authorities, some of them may be particularly noticed.

In *Bement v. Smith*, 15 Wend. 493, the defendant employed the plaintiff, a carriage-maker, to build a sulky for him, for which he promised to pay eighty dollars. The plaintiff made the sulky according to contract, and took it to the residence of the defendant, and told him he delivered it to him, and demanded payment, in pursuance of the terms of the contract. The defendant refused to receive it. Whereupon the plaintiff told him he would leave it with Mr. De Wolf, who lived near, which he did, and commenced suit. On the trial it was proved the sulky was worth eighty dollars, the contract price. The court charged the jury, that the tender of the

carriage was substantially a fulfillment of the contract on the part of the plaintiff, and that he was entitled to sustain his action for the price agreed upon between the parties. The defendant's counsel requested the court to charge the jury that the measure of damages was not the sulky, but only the expense of taking it to the residence of the defendant, delay, loss of sale, etc. The judge declined to so charge, and reiterated the instruction that the value of the article was the measure of damages. The jury found for the plaintiff, with eighty-three dollars and twenty-six cents damages, being the contract price with interest. The charge to the jury was sustained by the supreme court of New York.

In *Ballentine et al. v. Robinson et al.*, 46 Penn. St. 177, an agreement was made between the plaintiffs and defendants, whereby the plaintiffs were to provide materials, and construct for the defendants a six-inch steam-engine, with boiler and Gifford injector and heater, in consideration whereof the defendants were to pay plaintiffs five hundred and thirty-five dollars in cash on the completion thereof. The plaintiffs complied with and completed the contract in all respects on their part, but the defendants refused to pay according to contract. On the trial, the plaintiffs proved the contract, and the performance of it on their part, and that the engine was still in their hands.

The defendants' counsel asked the court to instruct the jury "that the proper measure of damages in this case is the difference between the price contracted to be paid for the engine and the market price at the time the contract was broken." The court declined to charge as requested, and instructed the jury that the measure of damages was the contract price of the engine, with interest. There was a verdict for the plaintiffs for the contract price. The case was taken to the supreme court, and the error assigned was the refusal of the court to give the instructions requested by the defendant.

The supreme court affirmed the judgment in the case below. It will be seen that these cases are very similar, and presented the same question, and in the same manner that the question is presented in this case. *Graham v. Jackson*, 14 East, 498, decides the point in the same way. Mr. Sedgwick, in his work on Damages, side page 280, in speaking on this subject, says: "Where a vendee is sued for non-performance of the contract on his part, in not paying the contract price, if the goods have been delivered, the measure of damages is of course the price named in the agreement; but if their possession has not been changed, it has been doubted whether the rule of damages is the price itself, or only the difference between the contract price and the value of the article at the time fixed for its delivery. It seems to be well settled in such cases that the vendor can resell them, if he sees fit, and charge the vendee with the difference between the contract price and that realized at the sale. Though perhaps more prudent it is not necessary that the sale should be at auction; it is only requisite

to show that the property was sold for a fair price. But if the vendor does not pursue this course, and, without reselling the goods, sues the vendee for his breach of contract, the question arises which we have already stated, whether the vendor can recover the contract price, or only the difference between that price and the value of the goods which remain in the vendor's hands; and the rule appears to be that the vendor can recover the contract price in full."

In *Hadly v. Pugh et al.*, *Wright*, 554, the action was "assumpsit on a written agreement between the parties, for the defendants to take all the salt the plaintiff manufactured between the 2d of June, 1831, and the 1st of January, 1832, to be delivered at the landing in Cincinnati, from time to time, as the navigation of the Muskingum and Ohio should permit, and to pay forty-five cents a bushel." The plaintiff proved the agreement, and the offer to deliver to the defendants three hundred and fifty barrels of salt, which the defendants refused to receive. There was an issue in the case, as to whether the contract had been previously fulfilled and abandoned by the parties. The court (Lane, J.) charged the jury that if the contract had not been "fulfilled or abandoned, and the plaintiff tendered the salt under the contract, which was refused, he had a right to leave it for the defendants and recover the value."

The only case I have examined in which the authorities on this point are reviewed, is that of *Gordon v. Norris*, 49 N. H. 376. The case is too lengthy and complicated to attempt to give an abstract of it here, but the point under consideration was involved; and although the learned judge criticises the law as laid down by Mr. Sedgwick, and even shows that the authorities he quotes in support of his position do not sustain him, for the reason pointed out, yet he says that there is a distinction between the case of *Bement v. Smith*, and the ordinary cases of goods sold and delivered—viz., "the distinction between a contract to sell goods then in existence, and an agreement to furnish materials and manufacture an article in a particular way and according to order, which is not yet in existence." He recognizes *Bement's Case* and others of the same class as exceptions to the general rule which is to be applied in the sale of ordinary goods and merchandise which have a fixed market value; and in the syllabus of the case, the distinction is kept up and stated as follows:

"When the vendee refuses to receive and pay for ordinary goods, wares, and merchandise, which he has contracted to purchase, the measure of damages which the vendor is entitled to recover is not ordinarily the contract price for the goods, but the difference between the contract price and the market price or value of the same goods at the time when the contract was broken.

"But when an artist prepares a statue or picture of a particular person to order, or a mechanic makes a specific article in his line to order, and after a particular measure, pattern, or style, or for a partic-

ular use or purpose—when he has fully performed his part of the contract, and tendered or offered to deliver the article thus manufactured according to contract, and the vendee refuses to receive and pay for the same, he may recover as damages. In an action against the vendee for breach of the contract, the full contract price of the manufactured article."

As has been said, we are not called upon now to determine whether the distinction as drawn in the clauses quoted, is sound on principle or not; but be that as it may, we recognize the law applicable to the case before us as being correctly stated in the clause last quoted.

Judge Swan, in his excellent "Treatise," (10th ed. 780), in speaking of the effects of a tender upon the rights of the buyer and seller, and of the damages in such case, says. "The general rule in relation to the rights of a seller, under a contract of sale, where he has tendered the property, and the buyer refuses to receive it, is this: The seller may leave the property at some secure place, at or near the place where the tender ought to be and is made, and recover the contract price; or he may keep it at the buyer's risk, using reasonable diligence to preserve it, and recover the contract price and expenses of preserving and keeping it; or he may sell it, and recover from the buyer the difference between the contract price and the price at which it fairly sold." The rule as thus laid down was first published in 1836, two years after the decision in Hadly's Case, above referred to, which was substantially followed by Judge Swan in laying it down. It does not appear that either the decision

or the rule as laid down has ever been questioned in Ohio. It will be perceived that Judge Swan lays down the rule generally as applicable to all sales of chattels in the ordinary course of trade, without intimating any such distinction as that drawn in *Gordon v. Norris*. We sanction and apply the rule in the determination of the particular case before us. When the plaintiff below had completed and tendered the carriage in strict performance of the contract on his part, if the defendant below had accepted it, as he agreed to do, there is no question but that he would have been liable to pay the full contract price for it, and he can not be permitted to place the plaintiff in a worse condition by breaking than by performing the contract according to its terms on his part. When the plaintiff had completed and tendered the carriage in full performance of the contract on his part, and the defendant refused to accept it, he had the right to keep it at the defendant's risk, using reasonable diligence to preserve it, and recover the contract price, with interest, as damages for the breach of the contract by the defendant. Or, at his election, he could have sold the carriage for what it would have brought at a fair sale, and have recovered from the defendant the difference between the contract price and what it sold for.

The court below did not err in refusing to give to the jury the special instructions requested by the defendant below.

Motion overruled.

McILVAINE, C. J., and WELCH, WHITE, and REX, JJ., concurred.



SHELDON et al. v. CAPRON.

(3 R. I. 171.)

Supreme Court of Rhode Island. Sept. Term,
1855.

Replevin by Sheldon & Barton against Charles S. Capron. Verdict for plaintiffs, and defendant excepts. Exceptions overruled.

Plaintiffs were auctioneers, and in December, 1853, sold at auction a large quantity of jewelry, arranged for sale in boxes and packages numbered from 1 to 317. Printed catalogues were distributed, and the packages and boxes, as successively offered for sale by number, were exhibited. Box No. 24, containing 14 1-6 dozen hard solder rings, worth \$3.25 per dozen, were struck off to Mathewson & Allen; and No. 25, containing 8 1-6 dozen soft solder rings, was struck off at \$2.87 per dozen, to defendant. After the sale, plaintiffs' clerk, by mistake, delivered to defendant box No. 24, which defendant paid for as being the box on which he bid, and there was some evidence that the box passed around at the sale as No. 25 was that which plaintiffs claimed to have been No. 24, struck off to Mathewson & Allen. Plaintiffs brought this action on defendant's refusal to return No. 24 and its contents, they tendering him No. 25. The court charged the jury that if they were satisfied that, through a mistake at the sale or in the delivery, defendant obtained the wrong box, and thus got more than he paid for, or a superior article, and that he, on demand for box No. 24 and a tender of box 25 being made, had refused to correct the mistake, plaintiffs were entitled to recover.

Lapham, for plaintiffs. James Tillinghast, for defendant.

STAPLES, C. J.—We see no error in the charge of the court which will justify us in directing a new trial to be had in this case.

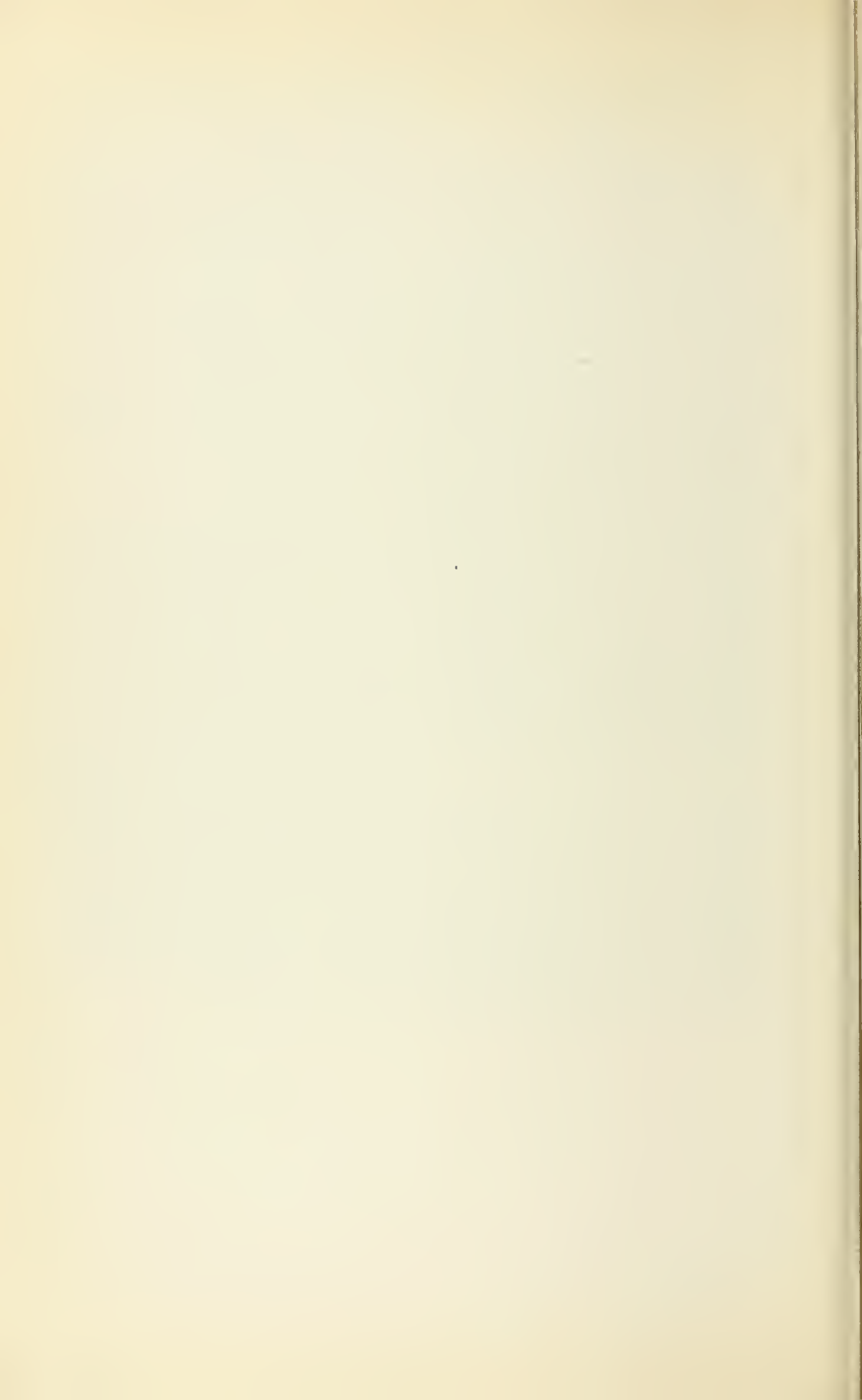
If the plaintiffs handed out box No. 25, which did contain 8 1-6 doz. filled and chased soft solder rings, and put it up at auction calling it No. 24 which did contain 14 1-6 dozens filled and chased hard solder rings, and it was bid upon and finally struck off by them to Mathewson & Allen, it cannot be pretended that the purchasers would be required to take it as their bid. The minds of the parties never met. No

contract was made between them. The plaintiffs were selling one thing and Mathewson & Allen purchasing or rather bidding upon another.

No, too, if plaintiffs did set up box No. 25 and strike it off to Mathewson & Allen at their bid for it, they could not compel M. & A. to take box No. 24, and that simply because M. & A. never bought it, and never bid anything for it. The supposed purchasers in both instances, would deem it very hard to be compelled to take what they did not purchase nor bid for, nor want, an article of inferior quality and value to that contained in box No. 24. If that supposed purchaser could not be compelled to fulfil his supposed bargain under these circumstances, neither could the plaintiffs, where box No. 24, the box of greater value, was by mistake substituted for box No. 25, one of less value. The same reason would govern both cases, and that is one named in the charge excepted to by the defendant, the mistake of the parties.

When the plaintiffs set up box No. 24, it was box No. 24 on their catalogue, the sale being by catalogue and the number having reference to it. It was No. 24 with the contents described in No. 24 on the catalogue. If box No. 25 on the same catalogue were exhibited as box No. 24 and so bid upon and purchased, still the purchaser would have a right to box No. 24, and no other. That was the box which the plaintiffs set up at auction, and that the one the purchasers bid upon and bought. If any other box should afterward be delivered or offered to the purchaser, he would of right turn to his catalogue and require the box No. 24 of the catalogue with its contents, as he would not be bound to take as box No. 24, one which was of less value and contained different articles from the catalogue No. 24. So he could not legally keep them, if they proved of greater value. If on calling for his purchase the plaintiffs should offer him the true box No. 24, which they sold, but which in fact was not the box which they exhibited, and which he bid for and bought as box No. 24, he could refuse to receive it on the ground of mistake, as he supposed he bought one and the plaintiffs supposed they had sold another. Neither the one nor the other was sold, but the title to each remained unchanged.

New trial refused.



SHERWOOD v. WALKER et al.

(33 N. W. Rep. 919, 66 Mich. 505.)

Supreme Court of Michigan. July 7, 1887.

Error to circuit court, Wayne county; Jennison, Judge.

C. J. Reilly, for plaintiff. Wm. Alkman Jr., (D. C. Holbrook, of counsel,) for defendants and appellants.

MORSE, J. Replevin for a cow. Suit commenced in justice's court; judgment for plaintiff; appealed to circuit court of Wayne county, and verdict and judgment for plaintiff in that court. The defendants bring error, and set out 25 assignments of the same.

The main controversy depends upon the construction of a contract for the sale of the cow. The plaintiff claims that the title passed, and bases his action upon such claim. The defendants contend that the contract was executory, and by its terms no title to the animal was acquired by plaintiff. The defendants reside at Detroit, but are in business at Walkerville, Ontario, and have a farm at Greenfield, in Wayne county, upon which were some blooded cattle supposed to be barren as breeders. The Walkers are importers and breeders of polled Angus cattle. The plaintiff is a banker living at Plymouth, in Wayne county. He called upon the defendants at Walkerville for the purchase of some of their stock, but found none there that suited him. Meeting one of the defendants afterwards, he was informed that they had a few head upon this Greenfield farm. He was asked to go out and look at them, with the statement at the time that they were probably barren, and would not breed. May 5, 1886, plaintiff went out to Greenfield, and saw the cattle. A few days thereafter, he called upon one of the defendants with the view of purchasing a cow, known as "Rose 2d of Aberlone." After considerable talk, it was agreed that defendants would telephone Sherwood at his home in Plymouth in reference to the price. The second morning after this talk he was called up by telephone, and the terms of the sale were finally agreed upon. He was to pay five and one-half cents per pound, live weight, fifty pounds shrinkage. He was asked how he intended to take the cow home, and replied that he might ship her from King's cattle-yard. He requested defendants to confirm the sale in writing, which they did by sending him the following letter: "Walkerville, May 15, 1886. T. C. Sherwood, President, etc.—Dear Sir: We confirm sale to you of the cow Rose 2d of Aberlone, lot 56 of our catalogue, at five and a half cents per pound, less fifty pounds shrink. We inclose herewith order on Mr. Graham for the cow. You might leave check with him, or mail to us here, as you prefer. Yours, truly, Hiram Walker & Sons." The order upon Graham inclosed in the letter read as follows: "Walkerville, May 15, 1886. George Graham: You will please deliver at King's cattle-yard to Mr. T. C. Sherwood, Plym-

outh, the cow Rose 2d of Aberlone, lot 56 of our catalogue. Send latter with the cow, and have her weighed. Yours truly, Hiram Walker & Sons." On the twenty-first of the same month the plaintiff went to defendants' farm at Greenfield, and presented the order and letter to Graham, who informed him that the defendants had instructed him not to deliver the cow. Soon after, the plaintiff tendered to Hiram Walker, one of the defendants, \$80, and demanded the cow. Walker refused to take the money or deliver the cow. The plaintiff then instituted this suit. After he had secured possession of the cow under the writ of replevin, the plaintiff caused her to be weighed by the constable who served the writ, at a place other than King's cattle-yard. She weighed 1,420 pounds.

When the plaintiff, upon the trial in the circuit court, had submitted his proofs showing the above transaction, defendants moved to strike out and exclude the testimony from the case, for the reason that it was irrelevant and did not tend to show that the title to the cow passed, and that it showed that the contract of sale was merely executory. The court refused the motion, and an exception was taken. The defendants then introduced evidence tending to show that at the time of the alleged sale it was believed by both the plaintiff and themselves that the cow was barren and would not breed; that she cost \$850, and if not barren would be worth from \$750 to \$1,000; that after the date of the letter, and the order to Graham, the defendants were informed by said Graham that in his judgment the cow was with calf, and therefore they instructed him not to deliver her to plaintiff, and on the twentieth of May, 1886, telegraphed to the plaintiff what Graham thought about the cow being with calf, and that consequently they could not sell her. The cow had a calf in the month of October following. On the nineteenth of May, the plaintiff wrote Graham as follows: "Plymouth, May 19, 1886. Mr. George Graham, Greenfield—Dear Sir: I have bought Rose or Lucy from Mr. Walker, and will be there for her Friday morning, nine or ten o'clock. Do not water her in the morning. Yours, etc., T. C. Sherwood." Plaintiff explained the mention of the two cows in this letter by testifying that, when he wrote this letter, the order and letter of defendants were at his house, and, writing in a hurry, and being uncertain as to the name of the cow, and not wishing his cow watered, he thought it would do no harm to name them both, as his bill of sale would show which one he had purchased. Plaintiff also testified that he asked defendants to give him a price on the balance of their herd at Greenfield, as a friend thought of buying some, and received a letter dated May 17, 1886, in which they named the price of five cattle, including Lucy, at \$90, and Rose 2d at \$80. When he received the letter he called defendants up by telephone, and asked them why they put Rose 2d in the list, as he had already purchased her. They replied that they knew he had,

but thought it would make no difference if plaintiff and his friend concluded to take the whole herd.

The foregoing is the substance of all the testimony in the case.

The circuit judge instructed the jury that if they believed the defendants, when they sent the order and letter to plaintiff, meant to pass the title to the cow, and that the cow was intended to be delivered to plaintiff, it did not matter whether the cow was weighed at any particular place, or by any particular person; and if the cow was weighed afterwards, as Sherwood testified, such weighing would be a sufficient compliance with the order. If they believed that defendants intended to pass the title by the writing, it did not matter whether the cow was weighed before or after suit brought, and the plaintiff would be entitled to recover. The defendants submitted a number of requests which were refused. The substance of them was that the cow was never delivered to plaintiff, and the title to her did not pass by the letter and order; and that under the contract, as evidenced by these writings, the title did not pass until the cow was weighed and her price thereby determined; and that, if the defendants only agreed to sell a cow that would not breed, then the barrenness of the cow was a condition precedent to passing title, and plaintiff cannot recover. The court also charged the jury that it was immaterial whether the cow was with calf or not. It will therefore be seen that the defendants claim that, as a matter of law, the title to this cow did not pass, and that the circuit judge erred in submitting the case to the jury, to be determined by them, upon the intent of the parties as to whether or not the title passed with the sending of the letter and order by the defendants to the plaintiff.

This question as to the passing of title is fraught with difficulties, and not always easy of solution. An examination of the multitude of cases bearing upon this subject, with their infinite variety of facts, and at least apparent conflict of law, oftentimes tends to confuse rather than to enlighten the mind of the inquirer. It is best, therefore, to consider always, in cases of this kind, the general principles of the law, and then apply them as best we may to the facts of the case in hand.

The cow being worth over \$50, the contract of sale, in order to be valid, must be one where the purchaser has received or accepted a part of the goods, or given something in earnest, or in part payment, or where the seller has signed some note or memorandum in writing. How. St. § 6186. Here there was no actual delivery, nor anything given in payment or in earnest, but there was a sufficient memorandum signed by the defendants to take the case out of the statute, if the matter contained in such memorandum is sufficient to constitute a completed sale. It is evident from the letter that the payment of the purchase price was not intended as a condition precedent to the passing of the title. Mr. Sherwood is given his choice to pay the money to Graham at King's cattle-yards, or to send check by mail.

Nor can there be any trouble about the delivery. The order instructed Graham to deliver the cow, upon presentation of the order, at such cattle-yards. But the price of the cow was not determined upon to a certainty. Before this could be ascertained, from the terms of the contract, the cow had to be weighed; and, by the order inclosed with the letter, Graham was instructed to have her weighed. If the cow had been weighed, and this letter had stated, upon such weight, the express and exact price of the animal, there can be no doubt but the cow would have passed with the sending and receipt of the letter and order by the plaintiff. Payment was not to be a concurrent act with the delivery, and therein this case differs from *Case v. Dewey*, 55 Mich. 116, 20 N. W. Rep. 817, and 21 N. W. Rep. 911. Also, in that case, there was no written memorandum of the sale, and a delivery was necessary to pass the title of the sheep; and it was held that such delivery could only be made by a surrender of the possession to the vendee, and an acceptance by him. Delivery by an actual transfer of the property from the vendor to the vendee, in a case like the present, where the article can easily be so transferred by a manual act, is usually the most significant fact in the transaction to show the intent of the parties to pass the title, but it never has been held conclusive. Neither the actual delivery, nor the absence of such delivery, will control the case, where the intent of the parties is clear and manifest that the matter of delivery was not a condition precedent to the passing of the title, or that the delivery did not carry with it the absolute title. The title may pass, if the parties so agree, where the statute of frauds does not interpose without delivery, and property may be delivered with the understanding that the title shall not pass until some condition is performed.

And whether the parties intended the title should pass before delivery or not is generally a question of fact to be determined by the jury. In the case at bar the question of the intent of the parties was submitted to the jury. This submission was right, unless from the reading of the letter and the order, and all the facts of the oral bargaining of the parties, it is perfectly clear, as a matter of law, that the intent of the parties was that the cow should be weighed, and the price thereby accurately determined, before she should become the property of the plaintiff. I do not think that the intent of the parties in this case is a matter of law, but one of fact. The weighing of the cow was not a matter that needed the presence or any act of the defendants, or any agent of theirs, to be well or accurately done. It could make no difference where or when she was weighed, if the same was done upon correct scales, and by a competent person. There is no pretense but what her weight was fairly ascertained by the plaintiff. The cow was specifically designated by this writing, and her delivery ordered, and it cannot be said, in my opinion, that the defendants intended that the weighing of the animal should be

done before the delivery even, or the passing of the title. The order to Graham is to deliver her, and then follows the instruction, not that he shall weigh her himself, or weigh her, or even have her weighed, before delivery, but simply, "Send halter with the cow, and have her weighed."

It is evident to my mind that they had perfect confidence in the integrity and responsibility of the plaintiff, and that they considered the sale perfected and completed when they mailed the letter and order to plaintiff. They did not intend to place any conditions precedent in the way, either of payment of the price, or the weighing of the cow, before the passing of the title. They cared not whether the money was paid to Graham, or sent to them afterwards, or whether the cow was weighed before or after she passed into the actual manual grasp of the plaintiff. The refusal to deliver the cow grew entirely out of the fact that, before the plaintiff called upon Graham for her, they discovered she was not barren, and therefore of greater value than they had sold her for.

The following cases in this court support the instruction of the court below as to the intent of the parties governing and controlling the question of a completed sale, and the passing of title: *Lingham v. Eggleston*, 27 Mich. 324; *Wilkinson v. Holiday*, 33 Mich. 386; *Grant v. Merchants' & Manufacturers' Bank*, 35 Mich. 527; *Carpenter v. Graham*, 42 Mich. 194, 3 N. W. Rep. 974; *Brewer v. Salt Ass'n*, 47 Mich. 534, 11 N. W. Rep. 370; *Whitcomb v. Whitney*, 24 Mich. 486; *Byles v. Collier*, 54 Mich. 1, 19 N. W. Rep. 565; *Scotten v. Sutter*, 37 Mich. 527, 532; *Dacey Lumber Co. v. Lane*, 58 Mich. 520, 525, 25 N. W. Rep. 568; *Jenkinson v. Monroe*, 61 Mich. 454, 28 N. W. Rep. 663.

It appears from the record that both parties supposed this cow was barren and would not breed, and she was sold by the pound for an insignificant sum as compared with her real value if a breeder. She was evidently sold and purchased on the relation of her value for beef, unless the plaintiff had learned of her true condition, and concealed such knowledge from the defendants. Before the plaintiff secured possession of the animal, the defendants learned that she was with calf, and therefore of great value, and undertook to rescind the sale by refusing to deliver her. The question arises whether they had a right to do so. The circuit judge ruled that this fact did not avoid the sale and it made no difference whether she was barren or not. I am of the opinion that the court erred in this holding. I know that this is a close question, and the dividing line between the adjudicated cases is not easily discerned. But it must be considered as well settled that a party who has given an apparent consent to a contract of sale may refuse to execute it, or he may avoid it after it has been completed, if the assent was founded, or the contract made, upon the mistake of a material fact,—such as the subject-matter of the sale, the price, or some collateral fact

materially including the agreement; and this can be done when the mistake is mutual. 1 Benj. Sales, § 605, 606; *Leake, Cont.* 339; *Story, Sales*, (4th Ed.) § 377, 148. See, also, *Cutts v. Guild*, 57 N. Y. 229; *Harvey v. Harris*, 112 Mass. 32; *Gardner v. Lane*, 9 Allen, 492, 12 Allen, 41; *Luthmeyer v. Harris' Adm'rs*, 38 Pa. St. 491; *Byers v. Chapin*, 28 Ohio St. 509; *Gibson v. Peckie*, 37 Mich. 389, and cases cited; *Allen v. Hammond*, 11 Pet. 63-71.

If there is a difference or misapprehension as to the substance of the thing bargained for; if the thing actually delivered or received is different in substance from the thing bargained for, and intended to be sold,—then there is no contract; but if it be only a difference in some quality or accident, even though the mistake may have been the actuating motive to the purchaser or seller, or both of them, yet the contract remains binding. "The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole contract, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." *Kennedy v. Panama, etc., Mail Co.*, L. R. 2 Q. B. 580, 587. It has been held, in accordance with the principles above stated, that where a horse is bought under the belief that he is sound, and both vendor and vendee honestly believe him to be sound, the purchaser must stand by his bargain, and pay the full price, unless there was a warranty.

It seems to me, however, in the case made by this record, that the mistake or misapprehension of the parties went to the whole substance of the agreement. If the cow was a breeder, she was worth at least \$750; if barren, she was worth not over \$50. The parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding, and of no use as a cow. It is true she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. There is as much difference between them for all purposes of use as there is between an ox and a cow that is capable of breeding and giving milk. If the mutual mistake had simply related to the fact whether she was with calf or not for one season, then it might have been a good sale, but the mistake affected the character of the animal for all time, and for her present and ultimate use. She was not in fact the animal, or the kind of animal, the defendants intended to sell or the plaintiff to buy. She was not a barren cow, and, if this fact had been known, there would have been no contract. The mistake affected the substance of the whole consideration, and it must be considered that there was no contract to sell or sale of the cow as she actually was. The thing sold and bought had in fact no

existence. She was sold as a beef creature would be sold; she is in fact a breeding cow, and a valuable one. The court should have instructed the jury that if they found that the cow was sold, or contracted to be sold, upon the understanding of both parties that she was barren, and useless for the purpose of breeding, and that in fact she was not barren, but capable of breeding, then the defendants had a right to rescind, and to refuse to de-

liver, and the verdict should be in their favor.

The judgment of the court below must be reversed, and a new trial granted, with costs of this court to defendants.

CAMPBELL, C. J., and CHAMPLIN, J., concurred.

SHERWOOD, J., delivered a dissenting opinion.



SHIELDS et al. v. PETTIE et al.

(4 N. Y. 122.)

Court of Appeals of New York, 1850.

Assumpsit to recover a quantity of pig iron. The contract between the parties was in these words:

"New York, July 19, 1847. Sold for Messrs. George W. Shields & Co., to Messrs. Pettie & Mann, one hundred and fifty tons Gartscherrie pig iron, No. 1, at \$29 per ton, one-half at six months, one-half cash, less four per cent., on board Siddons.

"Thomas Ingham, Broker."

On the arrival of the "Siddons" the defendants received sixty or seventy tons of the iron, but on ascertaining its inferior quality, declined to accept and pay for it, or the residue, as of the quality required by the contract. The plaintiffs offered to deliver the residue, which was declined, and then demanded payment for the portion delivered at the contract price, which was also refused, as was a demand for the return of the iron delivered. The price of No. 1 iron had by this time advanced about \$3.50 per ton above the contract price. The defendants had parted with a portion of the iron before its return was demanded.

The jury were instructed that under the circumstances the defendants were liable by an implied contract to pay for the iron received at its then market value. The plaintiffs had judgment on a verdict for \$2,197.39. The defendants brought this appeal.

W. Hall, for appellants. N. Hill, Jr., for respondents.

HURLBUT, J. In my judgment the contract was not a sale but an agreement to sell, which was not executed, and which could only be required to be executed upon the arrival of the ship with the iron on board. The arrival of the vessel without the iron would have put an end to the contract, which was conditional as a sale, to arrive. The vessel was at sea at the time, this was known to both parties, and neither could be certain, either of her arrival or of her bringing the iron. If a part only had arrived, the plaintiffs would not have been bound to deliver nor the defendants to accept it. There was no warranty, express or implied, either that any iron should arrive, or that arriving, it should be of a particular quality. One hundred and fifty tons of Gartscherrie pig iron of the quality denominated No. 1 was expected to arrive by the "Siddons," and the contract was to the effect, that if that quantity and quality of iron did so arrive, one party should sell and the other should receive it at a certain price per ton. The iron called for by the contract did not arrive, but iron of a different quality, and I think the contract was at an end. (*Boyd v. Siffkin*, 2 Camp. N. P. 326; *Alewyn v. Pryor*, 1 Ryan & Moody, 406; *Lovatt v. Hamilton*, 5 Mees. & Wels. 639; *Johnson v. Macdonald*, 9 Id. 600; *Russell v. Nicoll*, 3 Wend. 112.)

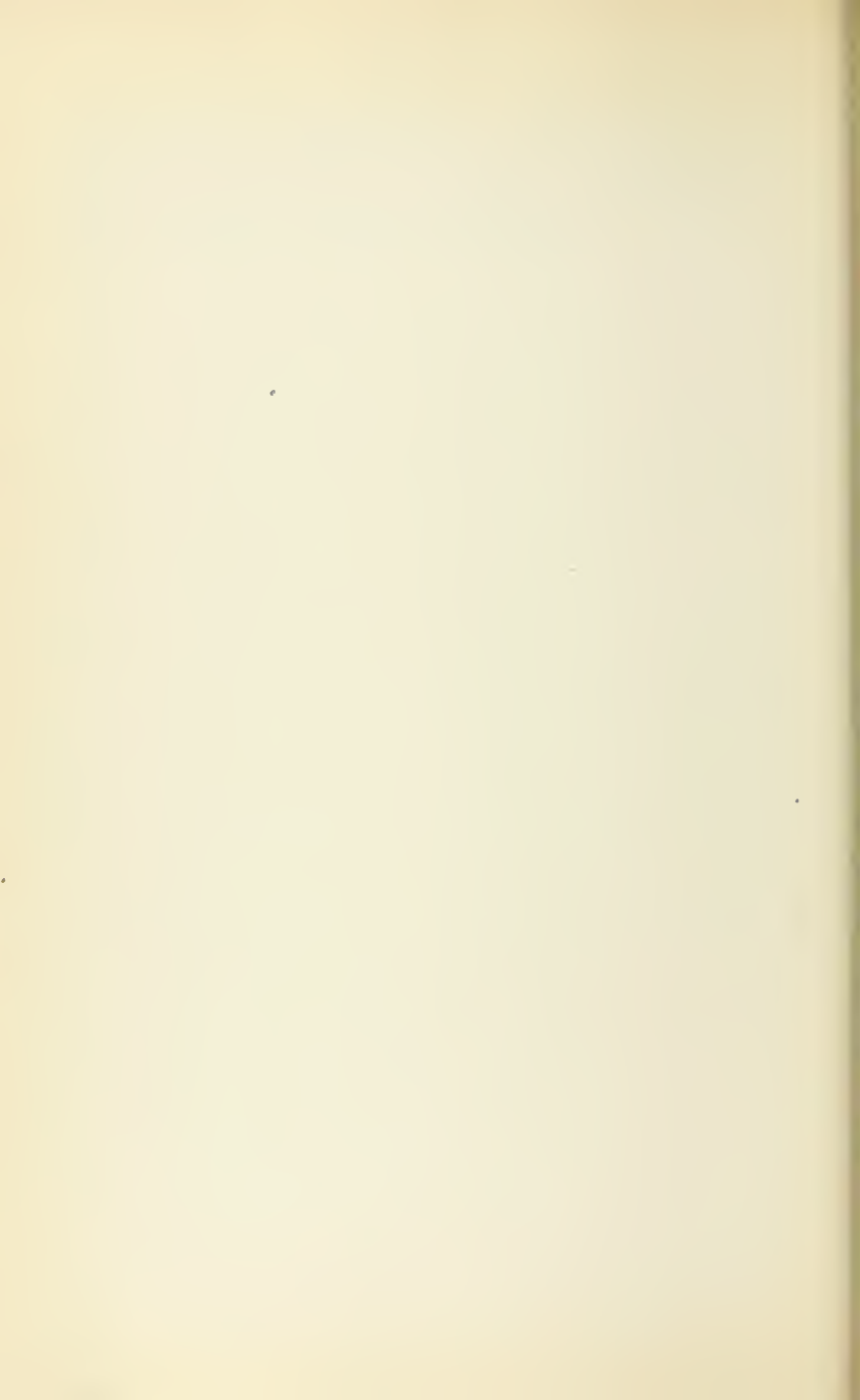
The jury were instructed that, under the

circumstances of the case, the law implied a contract on the part of the defendants to pay for the iron which they received at the then value of the same in the market, and they found accordingly; which, in effect compelled the defendants to pay for an inferior article a greater price than that stipulated for in the contract. This arose from the circumstance of a rise in the market, intermediate the contract and the time of delivery. But this ought not to affect the rule of damages which cannot bend to an accident of this nature, but must remain the same in a case like the present, whether the commodity rise or fall, or remain stationary in the market. Where, upon a sale of goods, there is no agreement as to the price, the law implies a contract on the part of the buyer to pay for them at the market value. The present case cannot be excepted from the operation of this rule. There was no error in the charge of the learned judge, provided the law implied a promise on the part of the defendants to pay any thing whatever for the iron which they received. This they had taken in good faith, supposing that it answered the contract, and intending to pay for it accordingly; but finding it to be of an inferior quality, they declined to pay the contract price, and upon a demand of the iron were not in a condition to restore it, as they had parted with a portion of it. They, however, had received the iron rightfully, in the character of vendees, and up to the time of the demand by the plaintiffs, the case exhibits nothing in the nature of a tort, but savors altogether of contract. After the demand and refusal, the case was so far modified as to assume, technically at least, the complexion of a tort, so that trover might have been maintained by the plaintiffs. But although they might have done so, were they bound to bring their action in that form, or were they at liberty to disregard the tort and to treat the defendants as still retaining their original characters of purchasers of the iron and to charge them accordingly? I perceive no reason why they may not be permitted to do so. The goods were neither wrongfully taken, nor do the defendants claim title to them. The case rested originally in contract, and the only difference between the parties related to the price of the article delivered. If the plaintiffs had brought trover, the rule of damages would not have been more favorable to the defendants than the one laid down at the trial, and I am unable to perceive in what respect they can be injured by the present form of action. In general it would be the most favorable to the defendant. In *Young v. Marshall* (3 Bing. 43). Tindal, Ch. J., declared that no party was bound to sue in tort, when by converting the action into one of contract he does not prejudice the defendant. It is not necessary to go this length, nor as far as the court went in *Hill v. Davis* (3 N. H. 381), for the purpose of determining the question before us; nor is the point presented in the last case of much importance, since the distinctions which obtained at common law in the forms of action have been abrogated in this state. I, therefore, ab-

stain from expressing any opinion upon it. It is enough for our present purpose, that, in the case before us, the cause of action arose out of an imperfect sale and delivery of goods, and not out of a wrongful taking of them by the defendants; that the tortious feature in the case is scarcely one of substance, but is rather of a technical character; that in effect the parties must be deemed to have agreed as

to every thing except the price of the goods; and that this being so, the plaintiffs were at liberty to disregard whatever might savor of tort, and require the defendants to respond in their substantial characters as purchasers of the iron for what it was worth in the market.

The judgment of the superior court ought to be affirmed.
Judgment affirmed.



SHUFELDT v. PEASE et al.

(16 Wis. 639.)

Supreme Court of Wisconsin. January Term, 1893.

Appeal from the circuit court for Rock county.

Action against Pease & Ballou for the recovery of personal property unlawfully detained. A verdict was rendered for the plaintiff, and the defendants appealed. It was claimed on the part of the plaintiff that the defendant Ballou, being insolvent, fraudulently purchased the goods with the intention of not paying for them, and that he sold and delivered them to the defendant Pease in payment of a pre-existing debt which he owed Pease, and that Pease therefore was not a purchaser in good faith. The circuit court instructed the jury, among other things, "that a person who receives goods in payment of a precedent debt from a fraudulent vendee who has purchased them with a preconceived design of not paying for them, being insolvent at the time, could not hold them as against the vendor of such fraudulent vendee, and that a person who takes such goods in payment of a prior indebtedness is not a bona fide purchaser."

B. B. Eldridge, for appellants. Bennett, Cassoday & Gibbs, for respondent.

PAINE, J. The court instructed the jury, among other things, "that a person who receives goods in payment of a precedent debt, from a fraudulent vendee, that is, from a vendee who has purchased them with a preconceived design of not paying for them, being insolvent at the time, cannot hold them as against the vendor of such fraudulent vendee; that a person who takes such goods in payment of a prior indebtedness is not a bona fide purchaser."

Assuming that the fraudulent vendee who obtained the goods in the manner specified in the instruction, would be guilty of a fraud that the sale might be avoided as between him and his vendor, we still think the instruction erroneous in holding that a purchaser in good faith from such fraudulent vendee, who took the goods in payment of a pre-existing debt, was not a purchaser for value, within the rule entitling such to protection. This court has held that where negotiable paper was taken in good faith in payment of a pre-existing debt, and the purchaser surrendered a prior security, he

was a purchaser for a value within the rule; *Stevens vs. Campbell*, 13 Wis., 375. There is, however, a distinction between a case where the purchaser surrenders a former security, and a case where he merely receives the property on a verbal agreement that it shall be in payment of a prior debt. In the former case, he changes his position, and gives up something of value to him on the strength of the property he receives. In the latter case he does not, that is, assuming that if his title should fail by reason of his vendor's fraud in getting the goods, his debt would still remain unsatisfied. If therefore the rule protecting bona fide purchasers for value could be said to rest upon the fact that the purchaser has actually parted with the value which constitutes the consideration, solely on the faith of the goods received, there is a distinction between cases where the goods are taken merely in payment of a pre-existing debt, and those where the purchaser advances the consideration at the time of the sale, or surrenders prior securities. There are several cases that have urged with great force, that in the former case, the purchaser is not within the reason of the rule. *Coddington vs. Ray*, 20 Johns, 637; opinion of Walworth, Chancellor, in *Stalker vs. McDonald*, 6 Hill, 93.

But the authorities seem to have rejected the distinction and to have settled down by a decided preponderance on the conclusion that such a purchaser is within the rule. *Youngs vs. Lee*, 2 Kern., 551; *Marbled Iron Works vs. Smith*, 4 Duer, 376; *Gould vs. Segee*, 5 Duer, 260; *Roxborough vs. Messick et al.*, 6 Ohio St., 452; *Payne vs. Bensley*, 8 Cal., 260; *McCasky vs. Sherman*, 24 Conn., 605; *Blanchard vs. Stevens*, 3 Cush., 162.

These cases relate mostly to purchases of promissory notes.

But the question whether one is a bona fide purchaser for value must be decided in the same way, upon the same facts, whether he purchases one thing or another. And it is not disputed that a bona fide purchaser for value from a fraudulent vendee, who acquired the goods through a note not void, but voidable only by reason of his fraud, will hold them against the original owner. The court having erred in holding that one taking such goods in payment of a pre-existing debt, was not such a purchaser, the judgment is reversed, and a new trial ordered.

SINCLAIR v. HATHAWAY.

(23 N. W. Rep. 459, 57 Mich. 60.)

Supreme Court of Michigan. May 13, 1885.

Error to Wayne; Jennison, Judge.

Chapman & Smith, for appellant. Robert Laidlaw, for appellee.

CAMPBELL, J. Plaintiff sued defendant for a balance claimed to be due for bread. Defendant claimed that the account had been balanced by bad bread returned, and by a sum of \$10 paid in settlement of accounts. Plaintiff was a baker, and defendant's business was to supply bread to customers about the city. It appears that for a period defendant was employed by plaintiff to sell his bread, and make returns and pay for the bread furnished daily. Defendant claims that on several occasions the bread furnished was bad and unwholesome, and that he returned it to a sufficient extent to overbalance his payments, and that there was an understanding to that effect. The parties are directly at variance on the facts. There was a good deal of testimony showing that bread was often made unfit for use, and that plaintiff had to sell it for feeding animals. He swore there was never any such thing. The court below rightly excluded evidence of a Sunday contract before the business was entered into. But there was testimony of subsequent dealings tending to prove the theory of the defense.

The case being an appeal from a justice, it was shown and seems to have been admitted that in the justice's court plaintiff swore that the amount due him was only \$65, while in the circuit he swore to \$103.79, and recovered it. The court was asked to charge the jury that if plaintiff so swore below, and so changed his testimony without explaining why, that circumstance should weigh with the jury against the good faith of the claim. The court refused so to charge, but in the charge the court made this remark: "Defendant also states that the complainant only claimed \$65 in justice court, but the complainant undertakes to explain it by saying that he made a mistake, as he did

not have his books of account with him at the time." This had a decided tendency to induce the jury to regard the point as of no consequence. But it is not a small matter for a person who goes into court to swear to his claim, to pay so little regard to his oath as to take no pains to find out what is due. And beyond this, there is nothing in the plaintiff's testimony to show any such explanation given by him on oath. The error was material.

The court also refused to charge that plaintiff was subject by law to an implied warranty that the bread was wholesome, and in the charge stated the defendant's objections to apply chiefly to its marketable quality, and to its being soiled externally by getting dirty on the floor. There was, however, testimony from several sources that the bread was unfit for food, apart from its external appearance. It was held in *Hoover v. Peters*, 18 Mich. 51, that there is an implied warranty of wholesomeness in the sale of provisions for direct consumption. This question is not discussed in plaintiff's brief, and was left entirely out of view by the court, and the only reference to it was in connection with an express contract.

In this case defendant was, as plaintiff claims, in his employ as a peddler, bound to pay for his bread, at a discount, and his connection with the sales brings the case within the same principle. Defendant cannot be treated as a purchaser from a wholesale dealer of articles sold in the market for purposes of commerce. Bread is an article sold for immediate consumption, and never enters into commerce, and as one of the prime necessities of life is of no use unless it is good for food. Defendant, as a mere middle-man between the baker and the consumer, and acting in his employment, had a right to expect bad bread to be made good, and the court should have so held. Mere externals he could see for himself, but bad quality would not always be detected without such a minute examination as the circumstances of such a business would render it difficult to make.

The judgment must be reversed, and a new trial granted.

The other justices concurred.

SMITH v. FERGUSON.

(90 Ind. 229.)

Supreme Court of Indiana. May Term, 1883.

J. M. La Rue, F. B. Everett, W. C. Wilson, and J. H. Adams, for appellant. B. W. Langdon, for appellee.

HOWK, J.—In his complaint in this action, the appellant, the plaintiff below, alleged in substance, that, as the administrator of the estate of Mahala T. Shaw, deceased, he was the owner and entitled to the possession of eight promissory notes, each particularly described, and all of the value of \$2,500; and that the appellee had possession of said notes without right, and unlawfully detained the same from the appellant, at Tippecanoe county; wherefore, etc. The cause was put at issue and tried by the court, and a finding was made for the appellee, the defendant below; and over the appellant's motion for a new trial, and his exception saved, the court rendered judgment on its finding.

In this court the appellant has assigned as errors the following decisions of the trial court:

1. In overruling his demurrer to the third paragraph of appellee's answer; and,

2. In overruling his motion for a new trial.

In the third paragraph of his answer, the appellee alleged in substance, that Mahala T. Shaw, the appellant's decedent, on and before the ——— day of July, 1875, was the owner and holder of eight promissory notes, particularly describing them; that on said last named day the said Mahala T. Shaw delivered and entrusted all of said notes into the hands and possession of the appellee; that contemporaneously with her delivery of said notes to him, the said Mahala declared to and directed the appellee to take the said notes and do the best he could with them, and furnish her, the said Mahala, with what means she needed to live on, and, after her death, pay what debts he knew she owed, and erect a monument for her like the one that had been ordered for her brother, Solomon, and what was left was Clarinda V. Ferguson's, who was then and since the wife of the appellee, and that the appellee should give what was left to her, the said Clarinda.

The appellee said that he then and there received and took possession of said notes from said Mahala, under the said declaration and terms; that afterwards, in March, 1876, the appellee exchanged one of the notes for five other notes particularly described; and that, in January, 1877, appellee surrendered Carr's note for \$90 to said Carr on account of a debt due him from said Mahala.

The appellee further said that the notes described in the complaint were the notes described in his answer; that afterwards, on the 7th day of October, 1877, the appellee was holding, and in the possession of, the notes described in the complaint, and the said Mahala T. Shaw being then dan-

gerously sick and ailing, and in the apprehension of her death, said to and charged the appellee to do with what was left of the notes, or the proceeds thereof, as she had told him when she delivered the notes to him as aforesaid, on the ——— day of July, 1875, as thereinbefore alleged, and the appellee then and there promised the said Mahala that he would do so; that afterwards, on the 8th day of October, 1877, the said Mahala died of said sickness. The appellee charged, that, by reason of the premises, he was entitled to said notes to deal with them as best he could, to pay the decedent's lawful debts, and after building the monument, as thereinbefore described, to give and deliver what might be left of such notes, or their proceeds, to the said Clarinda. The appellee said that the note first described in the complaint, he did not have or hold at the commencement of this action, nor at any time since; and that the estate of said Mahala T. Shaw, deceased, was solvent. Wherefore the appellee said that the appellant was not entitled to said notes, and he prayed judgment for his costs herein.

We are of opinion that the facts stated in this paragraph of answer are not sufficient to constitute a cause of defence to the appellants' action. It is admitted in the paragraph that the notes in controversy were, on the ——— day of July, 1875, the notes of Mahala T. Shaw, at the time she delivered and entrusted them to the appellee; and it is not shown by any averment therein, that she ever parted with her title to any of the notes during her natural life. She made him her agent, with directions to do the best he could for her with the notes, and to furnish her with what means she needed to live on during her life. Her declaration and direction to the appellee, which must be assumed to have been verbal or oral, because they were not alleged to have been in writing, went farther and provided that after her death he was to pay what debts he knew she owed, and erect a monument for her like the one that had been ordered for her brother Solomon, and what was left was Clarinda V. Ferguson's, the wife of the appellee, and that he should give what was left to his wife, the said Clarinda. This is the substance of what transpired between the appellee and Mahala T. Shaw, her declaration and direction, in relation to the notes in controversy, on the ——— day of July, 1875. It is not shown thereby, as it seems to us, that on that day there was any gift, by or on the part of Mahala T. Shaw, during her life, of the notes or any part thereof to the appellee, or his wife or to any one else. There was no gift inter vivos of any of the notes or of any part of the proceeds thereof. The declaration and directions of Mahala T. Shaw to the appellee in July, 1875, as stated in the answer, did not constitute or show a gift in present, or during her life, of the notes in controversy; but they were testamentary in their terms, and, without the form of solemnity of a will, attempted to make a gift of whatever might be left, after certain things had been done, to take effect as a gift only after her death.

In *Smith v. Dorsey*, 38 Ind. 451, this

court said: "To constitute a valid gift *inter vivos* it is essential that the article given should be delivered absolutely and unconditionally. The gift must take effect at once and completely, and when it is made perfect and complete by delivery and acceptance, it then becomes irrevocable by the donor. Gifts *inter vivos* have no reference to the future, but go into immediate and absolute effect. A court of equity will not interfere and give effect to a gift that is inchoate and incomplete." In *Sessions v. Moseley*, 4 Cush. 87, the supreme court of Massachusetts held that a gift *inter vivos* must be delivered in the lifetime of the donor, because, if delivered to a third person, with instructions to deliver to the donee, the authority to deliver may be revoked, and until delivery the donor retains dominion. 1 Pars. Con. 234; 2 Kent Com. 438; Bouv. Law Dict., Tit. Gifts *inter vivos*; *Bedell v. Carr*, 33 N. Y. 581; *Irish v. Nutting*, 47 Barb. 370; *Dexheimer v. Gautier*, 34 How. Pr. 472.

It follows from what we have said, that the averment of appellee's answer in reference to what was said and done by and between him and Mahala T. Shaw on the ——— day of July, 1875, of and concerning the notes in controversy, utterly fail to show a valid gift *inter vivos* of the notes, or of any of them, or of any part of the proceeds thereof, to the appellee's wife or to any other person. They fail to show that she parted or intended to part during her life with her title to or ownership of any such notes. If the title to the notes remained in her, if she continued to be the owner thereof, and if she might have asserted and maintained against the appellee or the appellee's wife, her right to the possession thereof during her natural life, it must be that upon her death her title to and ownership of the notes, and her right to the possession thereof, passed to and vested in the appellant, as the administrator of her estate. We have hitherto considered only the averments of the answer in regard to what transpired between the appellee and Mahala T. Shaw, concerning the notes in controversy in July, 1875. At that time, it must be assumed, as nothing was alleged to the contrary, Mahala T. Shaw was in good health, and we have reached the conclusion that the allegations of the answer did not show that she then made a valid gift *inter vivos* of the notes to appellee's wife or to any one else.

The question remaining for consideration is this: Do the averments of the answer show a valid gift *causa mortis* of the notes in controversy? A gift *causa mortis* is thus defined: A *donatio causa mortis* is a gift of a chattel made by a person in his last illness, or in *periculo mortis*, subject to the implied conditions that if the donor recovers, or if the donee die first, the gift shall be void. 2 Schoul. Pers. Prop. p. 122, note 1. In 3 Redf. Wills, 326, it is said, *inter alia*, that there must be an actual delivery of the chattel to the donee, so as to transfer the possession to him, in order to constitute a good gift *causa mortis*. In the third paragraph of appellee's answer in the case in hand, it was not alleged that on October 7th, 1876,

there was any actual delivery of the notes to the donee, or any transfer of the possession thereof. In the close of his answer, the appellee alleged that on the 7th day of October, 1877, the said Mahala T. Shaw being then dangerously sick, and in the apprehension of her death, charged the appellee to do with what was left of the notes, or the proceeds thereof, as she had told him when she delivered the notes to him in July, 1875, which notes he was still holding and in the possession of, and the appellee then and there promised the said Mahala that he would do so. We do not think that these allegations were sufficient to show a gift then made, *causa mortis*, of what was left of the notes or of the proceeds thereof. They show rather, as it seems to us, an unwritten will, whereby she attempted to dispose of whatever might be left after her death of the notes or the proceeds thereof.

The charge of Mahala T. Shaw to the appellee on October 7th, 1877, in her last illness and in apprehension of her death, did not constitute a gift, either *inter vivos* or *causa mortis*, of the notes or of what might be left of the proceeds thereof, to the appellee's wife. It was simply an injunction or direction that, after her death, the appellee, as her agent and the custodian of her notes, should carry out her wishes in relation thereto and dispose of the same, as she had directed in July, 1875; that is, he should pay whatever debts he knew she owed and erect a monument for her like the one ordered for her brother Solomon, and then he should give whatever might be left of the notes, or of their proceeds, to his wife, Clarinda V. Ferguson. In 2 Schouler on Personal Property, p. 82, it is said: "An agency is revoked by the principal's death: therefore, the agent of one who intends a gift *inter vivos* must have performed what was incumbent upon him to make the transfer complete during the donor's lifetime; otherwise the gift fails, as though the donor himself had failed to make a reasonable delivery. Nor can a gift *inter vivos* be sustained which contemplates a postponement of delivery by the agent or trustee until the donor's decease; for a gift of personalty made after this fashion must stand, if at all, as a gift *causa mortis*, or else on the footing of a testamentary disposition, with all the formalities of a will." *Sessions v. Moseley*, *supra*; *Allen v. Polereczky*, 31 Me. 338; *Phipps v. Hope*, 16 Ohio St. 586.

Constructing together all the allegations of the third paragraph of appellee's answer, we are of opinion they wholly fail to show that Mahala T. Shaw parted, or intended to part, during her lifetime, by gift *inter vivos* or *causa mortis*, with her title to or right to the possession of the notes in controversy or the proceeds thereof. Notwithstanding all that was said or done by or between her and the appellee, of and concerning such notes or their proceeds, they remained her property and estate, we think, until and at the moment of her death, and as such the title thereto and the right to the possession thereof passed to the appellant as the administrator of her estate, to be administered according to law. The alleged

solvency of her estate furnishes no reason whatever for the appellee's detention of the notes as against her administrator. It seems to us, therefore, that the court erred in overruling the demurrer to the third paragraph of the appellee's answer.

This conclusion renders it unnecessary for us to consider or decide any of the questions arising under the alleged error of the court in overruling the appellant's motion for a new trial. We may properly remark, however, that the evidence in the record does not, in our opinion, sustain the averments and theory of the third paragraph of appellee's answer. The appellant gave in evidence a written receipt, executed by the appellee to Mahala T. Shaw, in substance as follows:

"Battle Ground, Ind., March 22d, 1876. Received of Mahala T. Shaw the following notes, to be held in trust for her:" (Here follows a description of the notes in controversy in this action.) (Signed) "W. R. Ferguson."

It will be observed that this receipt, from its date, was executed by appellee to Mahala T. Shaw, about eight months after her declaration and direction to him, in July, 1875, upon which the appellee

founded the third paragraph of his answer. If, by this receipt, the appellee became the trustee of Mahala T. Shaw, and so held the notes, by the terms of the receipt he held them "in trust for her," as the sole cestui que trust, from and after the date thereof, and any prior parol trust, in relation to the notes, was thereby abrogated. It was shown by the evidence that this receipt was in the pocket-book of Mahala T. Shaw, which pocket-book was found under her pillow immediately after her death. It may be assumed, therefore, as it seems to us, that the notes were held by the appellee under such receipt, at the time of the death of Mahala T. Shaw, and the consequent determination of the trust thereby created. This being so, the appellant as her administrator was entitled to the notes and the possession thereof, as against the appellee.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the demurrer to the third paragraph of appellee's answer, and for further proceedings not inconsistent with this opinion.

Petition for rehearing overruled.

SMITH v. LYNES et al.

(5 N. Y. 41.)

Court of Appeals of New York. July, 1851.

This was an action of replevin to recover certain pieces of carpeting claimed by the plaintiff as his property. The following facts were proved on the trial:

The defendant Lynes had contracted to purchase all the carpets manufactured by the plaintiff with a certain number of looms during a specified time, and to pay for the same, except \$2,000 worth, with his notes indorsed by Thompson & Co.

The carpets were manufactured and delivered accordingly, and notes for a part were duly given. On the 7th of March, 1848, Lynes' clerk gave the plaintiff a receipt for nine pieces of carpeting, upon which a memorandum was indorsed by Lynes as follows: "Messrs. Thompson & Co. are up to Thompsonville, but expect to be down on Wednesday or Thursday, and I will have them ready. B. L." Meaning, as he testified, that he would have the notes ready.

By an agreement between Lynes and Thompson & Co., the latter agreed to take the carpets purchased from the plaintiff, and a part of those delivered to Lynes were by him delivered to Thompson & Co. On the 15th of March, 1848, the plaintiff called upon Lynes and demanded of him the goods, or payment of his notes, which was refused. He also demanded of Thompson & Co. the goods in their possession received from Lynes, which was also refused. Thompson & Co. admitted that \$500 or \$600 worth of the goods had not been paid for. A balance of over \$2,800 was then due the plaintiff.

On motion of the defendant a nonsuit was granted on the following grounds: 1. That the delivery to Lynes was absolute and vested the title in him. 2. That there had been no proper demand or refusal of the notes. 3. That the sale to Thompson & Co. vested the absolute title in them of such goods as were sold by Lynes to them.

An application to set aside the nonsuit having been denied the plaintiff brought this appeal.

C. W. Sandford, for appellant. B. W. Bonney, for respondents.

PAIGE, J. Where goods are sold on condition of being paid for on delivery in cash or commercial paper, or on condition of receiving on delivery security for payment, an absolute and unconditional delivery of the goods by the vendor without exacting at the time of delivery a performance of the condition, or attaching any other condition to the delivery, is a waiver of the condition of the sale, and a complete title passes to the purchaser, if there is no fraudulent contrivance on the part of the latter to obtain possession. Where there is a condition precedent attached to a contract of sale and delivery, the property does not vest in the vendee on delivery, until he performs the condition, or the seller waives it. An absolute and unconditional delivery is regarded as a waiver of the condition. By an absolute delivery

without exacting the performance of the condition, the vendor is presumed to have abandoned the security he had provided for the payment of the purchase-money, and to have elected to trust to the personal security of the vendee. (2 Kent's Com. 496-97; Chapman v. Lathrop, 6 Cow. 110, and 115, note a; Lupin v. Marie, 6 Wend. 80, in error, Marcy, J.; Furniss v. Hone, 8 Wend. 247, in error; Carleton v. Sumner, 4 Pick. 516; Hussey v. Thornton, 4 Mass. 405; Smith v. Denile, 6 Pick. 262; People v. Haynes, 14 Wend. 562; in error, per Chancellor, 566, per Tracy, Senator; Shindler v. Houston, 1 Denio, 51, Jewett, J.; Buck v. Grimshaw, 1 Edw. Ch. 141.) The vendor, to avoid a waiver of the condition of the sale, must either refuse to deliver the goods without a performance of the condition, or he must make the delivery at the time qualified and conditional. (Lupin v. Marie, 6 Wend. 81, in error, Marcy, J.; Hussey v. Thornton, 4 Mass. 405; 14 Wend. 566, Tracy, Senator.) Justice Nelson in *Furniss v. Hone* (8 Wend. 256), says, whether the delivery is absolute or conditional must depend upon the intent of the parties at the time the goods are delivered. And in *Smith v. Denile* (6 Pick. 266), Parker, Ch. J., held, that this was a question of fact for the jury. He says, "We do not think after a conditional bargain has been made and a delivery immediately takes place upon the expectation that the contemplated security shall be produced, without an express declaration that the delivery is also conditional, that the sale, ipso facto, becomes absolute, because there is an implied understanding that the vendee," etc., will furnish the security," etc., "as soon as he shall have an opportunity to procure it." In that case the sale was on the express condition that the vendee should give an indorsed note for the price, and the goods were delivered by the clerk of the vendor to the vendee without any express reference to the condition, and remained in the possession of the vendee for eight days, during which time no claim was made by the vendor for the notes or the goods; and it was held that there was a waiver of the condition, and a verdict to the contrary was set aside by the court as against evidence. Parker, Ch. J., in giving the opinion of the court, says, "There is nothing in the case from which an intention to hold on upon the condition can be inferred, no declaration at the time, which though not necessary is important, and no call for security until it was forgotten or abandoned, and perhaps never would have been recurred to if the goods had not been attached." According to this decision as well as the intimation of Justice Nelson in *Furniss v. Hone*, and the language of Chancellor Kent in his Commentaries (2 Kent, 496), it does not seem to be necessary to a qualified or conditional delivery, that the qualification or condition intended to be annexed to the delivery, should at the time be declared by the vendor in express terms. The delivery will be conditional, if the intent of the parties that it should be so can be inferred from their acts and the circumstances of the case. The learned judge who tried this cause

was evidently mistaken in the proposition advanced by him, that to make a delivery conditional it must be declared to be so in express terms. Where the delivery is absolute without any contemporaneous declaration qualifying it, the onus of the proof of the condition rests upon the vendor. If no such proof is offered, the delivery will be deemed absolute, and the title to the goods will pass to the vendee. (8 Wend. 256, *Nelson, J.*; *Buck v. Grimshaw*, 1 Edw. Ch. 140.) Every absolute delivery of goods sold on condition is presumptive evidence of a waiver of the condition by the vendor, and of an intention on his part to rely wholly on the personal security of the vendee for the payment of the price of the goods. The cases cited by the counsel of the appellant do not conflict with the foregoing propositions. In the cases of *Russell v. Minor* (22 Wend. 659), and of *Keeler v. Field* (1 Paige, 312), express conditions were annexed to the delivery of the goods. In *Palmer v. Haad* (13 Johns. 434), the delivery of the timber was not complete before payment was demanded. In *Haggerty v. Palmer* (6 Johns. Ch. 437), the delivery was held to be conditional in accordance with a usage of the city of New York, known to the purchaser, and the validity of which was not called in question by the parties to the suit.

In the case now under review, the goods were sold on condition of being paid for (excepting \$2,000 worth), on delivery, by indorsed notes. The goods were delivered in parcels at the purchaser's store on several days in January, February and March. There is no evidence to show that the delivery of any of these parcels was in express terms made subject to any condition. The delivery being shown, it belonged to the plaintiff to prove that it was conditional. No question can arise as to any of the parcels except the one delivered on the 7th of March. Several parcels had been delivered previous to that day without exacting the delivery of the indorsed notes stipulated in the contract. As to these parcels the delivery must be deemed to be absolute, and the condition regarded as waived. The memorandum indorsed on the receipt given for the goods delivered on the 7th of March, in which Lynes declares in substance, that on Wednesday or Thursday he will "have them ready" (which Lynes swears referred to the notes), tends to show a promise on the part of Lynes to procure the indorsed notes and deliver them to the plaintiff, and that the goods delivered on the 7th of March were delivered on the condition of the subsequent delivery by Lynes to the plaintiff of such notes. If the goods were delivered on the faith of that promise, and in expectation that it would be performed, this case resembles that of *Russell v. Minor* (22 Wend. 662).

In that case the seller delivered a por-

tion of the goods sold to the purchaser, and asked the latter for his note for the quantity delivered, and the purchaser replied that he would give his note for the whole when the remainder was delivered, and that the parcel then delivered could remain till that time. The court of errors held that the delivery of the parcel was conditional. Senator Edwards, with whom the majority of the court concurred, put the question of waiver of the condition of the sale on the intention of the parties at the time of the delivery; and from the facts of that case, he came to the conclusion that neither party intended that the condition of the sale should be waived. Senator Wager took a similar view of the question. If the memorandum indorsed on the receipt of the 7th of March tends to show a state of facts which will bring this case within the principle of the case of *Russell v. Minor* (which I think quite clear), the nonsuit of the plaintiff was erroneous so far as relates to the goods delivered on the 7th of March; and the judge who tried the cause erred in not submitting it to the jury to determine whether the goods delivered on that day were delivered absolutely or conditionally; that is, whether the plaintiff intended to deliver them absolutely and thereby to waive the condition on which the sale was made. (6 Pick. 266-7.)

There is no evidence in the case to show that the goods found in the possession of Thompson & Co., and replevied by the sheriff, were a part of the goods delivered on the 7th of March. These goods they purchased from B. Lynes, without any notice, for aught the case shows, of the nature of the contract of sale between him and the plaintiff. As to all the goods, therefore, purchased by Thompson & Co. from B. Lynes, and paid for by them, they are entitled to the protection of bona fide purchasers without notice, even if the delivery to Lynes was conditional. (6 Johns. Ch. 437; 1 Paige, 312, 1 Edw. Ch. 146.) As it does not appear that any part of the goods taken by the sheriff from the possession of Thompson & Co. were a part of the goods delivered on the 7th of March, although a part of these goods should not have been paid for by Thompson & Co. to Lynes, they can, nevertheless, justify under Lynes, whose title to all the parcels delivered previous to the 7th March is undoubtedly perfect, in consequence of the absolute and unconditional delivery to him by the plaintiff of all such parcels. The nonsuit was, therefore, beyond all question correct as to the defendants Thompson, Schoonmaker and Dean, the members of the firm of Thompson & Co. But, for the reasons before assigned, it was erroneous as to Benjamin Lynes.

It must, therefore, be set aside, and the judgment of the superior court must be reversed.

Ordered accordingly.

SMITH v. SMITH.

(2 Strange, 955.)

Court of King's Bench. At Nisi Prius. Michaelmas Term, 7 Geo. 2.

The plaintiff's intestate lodged at the defendant's house, and had furniture and plate there, and was proved to have said, that whatever he brought into those lodgings he never intended to take away, but gave directly to the defendant's wife. And now in trover for the goods which were there at the intestate's death, it was

ruled, that a parol gift, without some act of delivery, would not alter the property, and that such an act was necessary to establish a *donatio causa mortis*. Upon this opinion it came to the question, whether there was any delivery. And to prove one, the defendant shewed, that the intestate, when he went out of town, used to leave the key of his rooms with the defendant: and that was insisted to be such a mixed possession, that the law will adjudge the possession to be in him who has the right. And the chief justice ruled it so, and the jury found for the defendant.

SPOONER v. CUMMINGS.

(23 N. E. Rep. 839, 151 Mass. 313.)

Supreme Judicial Court of Massachusetts.
Middlesex. March 11, 1890.

Exceptions from superior court, Middlesex county; P. EMORY ALDRICH, Judge.

Replevin of a horse. Answer, general denial. Plaintiff proved ownership prior to May 26, 1888, and identified the horse as the one described as "one black horse called 'Jenks horse,' delivered to D. F. Pope, but never paid for, under the following contract: 'Hudson, May 26, 1888. Received of L. R. Spooner, this day, one gray mare, called 'Horton mare;' one gray horse, called 'Jenks horse;' one black horse, called 'Jenks horse;' one white-nose horse, called 'Boston horse;' for which I promise to pay said L. R. Spooner or order five hundred seventy-five dollars, one month from date, at City National Bank, with interest at 7 per cent. Said horses and mare to be and remain the entire and absolute property of said Spooner until paid in full by me. And I hereby agree to keep said horses and mare in good order and condition, as the same now are. And should said horses and mare die before said sum is fully paid, I hereby agree to pay all sums due thereon. And should said horses or mare be returned to or taken back by said Spooner, I agree that all payments made thereon may be retained by said Spooner for the use of said horses and mare. DANIEL F. POPE." Plaintiff kept a livery and sale stable in Worcester, and had sold horses to Pope largely within the past three or four years. Plaintiff asked the court to rule that under the answer defendant could only show that the contract relied on was not made, or that the horse had been paid for; but the court ruled that defendant might show, also, that plaintiff gave Pope authority, express or implied, by the course of dealing, to sell the horse before he paid for it. Against his objection, plaintiff was required to answer, in cross-examination, the following question: "What was the course of dealing between you and Pope in the year 1888, about May 26th, and extending back a little and forward a little?" and the following evidence from plaintiff, in cross-examination, was admitted: "I sold Pope fifty horses, perhaps, in the year 1888. I supposed that Pope wouldn't use fifty horses in his livery stable unless he sold some. He usually kept from twenty-five to thirty. Naturally he would want to sell some that he had, or some other ones, to make room. I didn't expect he would sell any of mine until he paid for them. I would have made objections to his selling one of my horses, even if he sent me the money the next day." Pope was permitted to testify that "the course of dealing between plaintiff and me was I'd buy horses and give these contracts, and I'd send him money, and he'd apply it where he saw fit, on any of these contracts.

He used to urge me to sell, that he had a barn full. Sometimes I'd tell him I wanted a horse for a particular person. I told him this time I wanted a horse for a teamster." J. A. Trull was permitted to testify that about the middle of June, 1888, Spooner told him to tell Pope that he had a carload coming, and to sell as many as he could. Defendant bought this horse of Pope, June 2, 1888, and paid cash at the time.

C. W. Wood and F. A. Gaskill, for plaintiff. J. W. McDonald, for defendant.

KNOWLTON, J. Under the answer of the defendant, any evidence was competent which tended to contradict the contention of the plaintiff that the title to the horse and the right of possession were in him. *Verry v. Small*, 16 Gray, 122; *Whitcheer v. Shattuck*, 3 Allen, 319. The defendant was not a party to the written contract between the plaintiff and Pope, but claimed outside of it, and in support of his own title he might show by parol what was the real arrangement between them, even if it differed from that contained in the writing. *Kellogg v. Thompson*, 142 Mass. 76, 6 N. E. Rep. 860. If the plaintiff expressly or impliedly authorized the sale by Pope to him, he, having bought in good faith from the apparent owner, acquired a good title. It is immaterial whether his right depends upon an actual authority to make the sale, or upon facts which estop the plaintiff from denying the validity of the sale. *Burbank v. Crooker*, 7 Gray, 159; *Haskins v. Warren*, 115 Mass. 514, 538; *Tracy v. Lincoln*, 145 Mass. 357, 14 N. E. Rep. 122; *Bank v. Bullinton*, 97 Mass. 498; *Fowler v. Parsons*, 143 Mass. 401, 9 N. E. Rep. 799.

The testimony as to the course of dealing between the plaintiff and Pope, involving a long series of transactions, all of the same kind, and conducted generally in the same way, was competent, as tending to show an expectation and understanding on the part of both that Pope would sell the horses which he bought of the plaintiff as he had opportunity, and that he was impliedly authorized to sell this horse to the defendant. *Hubbell v. Flint*, 13 Gray, 277; *Bank v. Goodsell*, 107 Mass. 149; *Lynde v. McGregor*, 13 Allen, 172; *Bragg v. Railroad Corp.*, 9 Allen, 54. The testimony of Trull, as to the message sent to Pope by the plaintiff about the middle of June, was of a conversation so soon after the sale of June 2d to the defendant that the judge might well admit it in his discretion. It related to the general course of dealing, of which the sale to Pope of the horse replevied was a part. The jury were rightly permitted to find that the plaintiff impliedly authorized the sale by Pope to the defendant, and that he was estopped to deny the validity of the title which the defendant acquired, relying on Pope's possession and apparent ownership. Exceptions overruled.

SPOONER v. HOLMES.

(102 Mass. 503.)

Supreme Judicial Court of Massachusetts. Pymouth. Oct. Term, 1893.

Tort to recover the value of certain interest coupons of United States bonds, payable to bearer in gold, and alleged to have been converted by the defendant to his own use. The bill of exceptions states the case as follows: "The plaintiff's evidence tended to show that the coupons in question were stolen from the plaintiff by a servant in his employ, and by that servant given to her sister, who was a servant in the family of the cashier of one of the national banks in Plymouth; and that the defendant purchased the coupons of the servant in the cashier's family, and under circumstances which would naturally excite suspicion that they were stolen. The defendant's evidence tended to show that they were handed to him merely to get them changed, that there was no suspicious or unusual circumstances attending the transaction, and that he was simply the agent of the servant. Among the evidence introduced by the defendant was a letter received by him from Nova Scotia, purporting to be from the said servant of the cashier, she having, before that time, gone thither. In said letter were inclosed two of the coupons in question, which were sold by the defendant. The plaintiff objected to the introduction of this letter in evidence without proof of the handwriting; but the judge ruled it to be admissible without such proof, for the purpose of showing the manner and circumstances of the defendant's receiving the two coupons which it contained. Some of the coupons were sold by the defendant to the Plymouth National Bank, some were sold to brokers in Boston, and one was sold to a person from Lynn, with whom the defendant traded, and who happened to be at his shop in Plymouth, at the same price which he had received for others from the bank. The evidence tended to show that the defendant received pay for his coupon in goods from the Lynn man, and paid the servant the price thereof in money. The judge instructed the jury, among other things, as to the rules of law applicable in cases of goods and merchandise stolen or otherwise lost, and coming into the possession of persons other than the true owners, in terms not objected to; but then ruled and instructed the jury that the same rules did not apply to money or the currency of the country, and did not apply to such coupons as those in question, which to some extent formed a part of the currency; that the jury were to consider whether the defendant purchased the coupons in question or whether he merely received them to sell for the servant, and acted in regard to them as her agent; that, if they found the former to be true, and that the defendant purchased them under such circumstances as would have put a person of ordinary prudence on his guard, and would have led such a person to refuse them, they should find for the plaintiff; that, if they found that the de-

fendant was acting as agent merely, to get the coupons turned into money for the servant, then the plaintiff could not recover, unless he satisfied the jury that the defendant either knew that the servant had come dishonestly by them, or might so have known except for his gross negligence; and that gross negligence was the carelessness of a very careless person. The plaintiff requested the judge to instruct the jury that paying out the coupons in his business, or exchanging them for goods, was inconsistent with agency, unless the articles received in exchange were delivered to the principal; and that, to entitle the defendant to the benefit of the defence of agency, if there were any suspicious facts or circumstances which came to his knowledge, he must have disclosed them or disclosed his agency. The judge declined to give either of these instructions. The verdict was for the defendant, and the jury, in reply to a question of the judge, said they found the defendant to have been acting as agent."

P. Simmons, for plaintiff. L. W. Howes, for defendant.

GRAY, J. This is an action of tort, in the nature of trover, for certain coupons of United States bonds, alleged in the declaration to be the property of the plaintiff and to have been converted by the defendant to his own use. The undisputed evidence at the trial showed that the bonds had belonged to the plaintiff, and had been stolen from him, and delivered by one who received them from the thief to the defendant, and by him sold and turned into money, which he admitted to have paid over to his principal. But the jury have found that in so doing the defendant acted only as agent of the person from whom he received them, and did not know, and was not guilty of gross negligence in not knowing, that that person had come dishonestly by them. It does not appear that the plaintiff ever demanded of the defendant personally either the coupons or their proceeds, or that the defendant personally derived any benefit from his acts. The principal question in the case is, whether, under these circumstances, he is liable in this action. This is an important question, and has received great consideration from the court.

An action of tort for the conversion of personal property, under our present system of pleading, requires such evidence to support it as would have proved a conversion in an action of trover at common law; and cannot be maintained without proof that the defendant either did some positive wrongful act with the intention to appropriate the property to himself or to deprive the rightful owner of it, or destroyed the property. *Fouldes v. Willoughby*, 8 M. & W. 510. *Hend v. Carey*, 11 C. B. 977. *Gen. Sts. c. 129, § 81*. *Robinson v. Austin*, 2 Gray, 561. *Loring v. Mulenby*, 3 Allen, 575. *Parker v. Lombard*, 100 Mass. 405. In the last case, Mr. Justice Hoar says that if a bailee, being intrusted with the possession merely, transfers the possession according to the

directions of the person from he received it, without notice of any better title, and without undertaking to convey any title, this does not appear to have been held any evidence of a conversion; and cites *Strickland v. Barrett*, 20 Pick. 415, and *Leonard v. Tidd*, 3 Met. 6. So where chattels were delivered by the owner to a bailee, with the right to purchase them by paying a certain price, so that he had the actual legal and rightful possession, although he had not performed the condition on which he was to have the absolute title, and he sold them to a third person, who resold them before any demand made upon him and without notice of the agreement between his vendor and the original owner, he was held not to be liable to the latter in trover. *Vincent v. Cornell*, 13 Pick. 294. See, also, *Day v. Bassett*, 102 Mass. 445. And trover will not lie against a servant for taking goods by his master's command and for his master's use, when the command is not to do an apparent wrong, and the servant's possession is lawful. *Bul. N. P. 47*. *Powell v. Hoyland*, 6 Exch. 67.

In the case of a sale of goods, indeed, the purchaser is bound to look to his title, and, if he obtains them from one who is not the lawful owner or his authorized agent, cannot hold them against him. 2 Kent, Com. (6th Ed.) 324. If the goods have been stolen, the property does not pass by delivery and a person who derives his title from the thief gains no rights as against the lawful owner, and if he either refuses upon demand to deliver them up, or sells them and turns them into money, or otherwise converts them to his own use, he is liable to the lawful owner in trover. *Dame v. Baldwin*, 8 Mass. 518. *Heckle v. Lurvey*, 101 Mass. 314. Upon this principle, it is held that an auctioneer, who receives and sells stolen goods, not knowing nor having reason to believe that they were stolen; or a person who in good faith buys a stolen horse, and afterwards exercises dominion over him by letting him to a third person; is liable to the rightful owner in trover, without a previous demand. *Hoffman v. Carow*, 22 Wend. 285. *Coles v. Clark*, 3 Cush. 399. *Gilmore v. Newton*, 9 Allen, 171. Yet even in the case of stolen goods, a mere naked bailee, who does no act, and has no intent, to convert them to his own use, or withhold them from the owner, and, before any demand upon him, delivers them back to the person from whom he received them, is not guilty of a conversion, although he knew that they were stolen. *Loring v. Mulcahy*, 3 Allen, 575.

But, in the opinion of a majority of the court, the coupons in question do not stand upon the same ground as chattels. They were negotiable promises for the payment of money, issued by the govern-

ment, payable to bearer and transferable by mere delivery, without assignment or indorsement. They are therefore not to be considered as goods, but as representatives of money, and subject to the same rules as bank bills or other negotiable instruments payable in money to bearer. *Wooley v. Pole*, 4 B. & Ald. 1. *Gorgier v. Mievile*, 4 D. & R. 641; *S. C.* 3 B. & C. 45. *Commonwealth v. Emigrant Industrial Savings Bank*, 98 Mass. 12. The rule of caveat emptor does not apply to them. It is now well settled that the bearer of a bank bill which has been stolen from the bank may recover the amount from the bank, unless it is proved that he did not take it in good faith and for valuable consideration; and that his knowledge of suspicious circumstances is immaterial, unless amounting to proof of want of good faith. *Worcester County Bank v. Dorchester & Milton Bank*, 10 Cush. 488. *Wyer v. Dorchester & Milton Bank*, 11 Cush. 51. *Raphael v. Bank of England*, 17 C. B. 161. And, according to the great weight of authority, the same rule applies to bills of exchange or promissory notes payable to bearer. *Goodman v. Simonds*, 20 How. 343.

The jury have found that the defendant took these coupons in good faith, without gross negligence, and as agent of his employer. He thus acquired a lawful possession of them, which was no evidence of a conversion. He then, before any demand or notice from the rightful owner, transferred them by delivery, and exchanged them for money, the amount of which he paid over to his employer. This case does not present the question whether the defendant could have been held liable to the rightful owner for the coupons or the proceeds while in his own hands, nor whether he could be held to have paid value for them. The single question is, whether he has been guilty of a wrongful conversion, and, considering the nature of the instruments, and the fact that the defendant was acting in good faith, without gross negligence, as agent only, without himself receiving any benefit from the transaction, a majority of the court is of opinion that neither taking the coupons by delivery, transferring them by delivery, nor paying over the proceeds to his employer, constituted a conversion for which he can be held liable in an action of tort in the nature of trover. *Addison on Torts*, (3d Ed.) 317. The instructions to the jury were therefore quite favorable enough to the plaintiff.

The letter admitted against the objection of the plaintiff was competent evidence of the manner in which and the circumstances under which the defendant received the coupons, although it did not of itself prove that it was written by his employer.

Exceptions overruled.

SPRAIGHTS v. HAWLEY.

(39 N. Y. 441.)

Court of Appeals of New York. June Term,
1868.

Action to recover damages caused by a sale of certain jewelry by defendant as agent of the owners, who had mortgaged the jewelry to plaintiff.

Geo. F. Comstock, for appellant. R. Woodworth, for respondent.

WOODRUFF, J. The facts in this case show title in the plaintiff to the property in question, and a disposition thereof by the defendant avowedly and solely as agent for Eugenia Ashby, the former owner and one of the mortgagors.

The defendant's answer avers that he acted as such agent, without any interest or claim of interest in the same, or its proceeds. The referee finds as a fact that he acted simply as the agent of Charles Ashby, or of Charles Ashby and his said wife.

The title of the plaintiff was valid, both upon the facts found, and upon the legal conclusions stated by the referee.

It follows that the disposition of the property by Ashby and wife was a tortious conversion thereof, and so the referee finds.

No question of fraud in the mortgage to the plaintiff or otherwise, nor any failure to place his mortgage on file pursuant to the statute, was deemed by the referee or by the supreme court, nor by the counsel for the appellant, to arise in the case; because as against the mortgagors and their mere agent, the bona fides of the mortgage and the filing thereof were regarded as wholly immaterial, and as against them the mortgage was held valid, even though made to defraud creditors, and whether filed or not. It is however more satisfactory to say that both good faith and due filing, and renewal of the mortgage, are facts in the case duly proved and found.

The case therefore raises the single question, whether the possession of the mortgagors is such evidence of ownership or of authority to make sale of the property, that the defendant, acting in good faith as their agent, in the belief that they were owners, is protected thereby against the claim of the plaintiff to recover for a sale and disposition thereof. Some stress was laid upon the fact that this transaction was more than a year after the mortgage debt became payable, and the continued possession of the mortgagors during that time is claimed to be laches on the part of the plaintiff, warranting the defendant in trusting to their apparent ownership and executing their direction to sell the property.

This reasoning, sought to be applied to this case, seems to me to overlook the fact found by the referee, that for more than a year of that period the plaintiff had been in the actual prosecution of an action to enforce his rights against the mortgagors; and the further circumstance that the defendant is in no wise shown to

have been affected by or to have had any knowledge whether the mortgagors had been in the possession of the property one year or one day. He was not misled into any trusting to a long-continued possession, for it does not appear that he ever saw or heard of the property until the day on which it was brought to him for sale.

I do not however attach importance to this, for I am not aware of any principle or any authority which makes such mere possession, in the absence of fraud, amount to a justification to the agent in a fraudulent disposition of the property.

It is placed by the appellants upon some general idea, that because the mortgagors had possession, and the defendant honestly believed they were owners, and in that belief, innocent of any wrongful intent, sold the property and paid over the proceeds, it is not just that he should be held responsible. In other words, it is as to the defendant a hard case.

Now all this would be very well if it were true that mere possession of personal property was such evidence of ownership or of authority to dispose thereof, that all persons were at liberty to assume such ownership or authority, and act in reliance thereon. Unfortunately for the appellant, this is not so. Indeed, the cases in which possession imports such authority are very few, and the mere fact of possession, unaccompanied by other circumstances, giving it a specific character, indicative of authority, never does.

Indeed, every consideration which is urged for the protection of the defendant would have appealed as strongly in his behalf if it had appeared that Ashby had stolen the property from the plaintiff. Ashby's possession would have borne the same aspect of apparent ownership, and the defendant's sincere good faith and innocence of wrong would have been equally deserving of consideration.

True, in such case, the possession of Ashby would have been against the will of the plaintiffs; but even then, why should it not be said that the plaintiff should have taken care that his property be not stolen and not suffer the innocent defendant to become a sufferer?

But take a stronger case; suppose the property had been loaned by the plaintiff to Ashby; it would not in that case be claimed, any more than if stolen by the latter, that Ashby's possession would protect the defendant, and yet the hardship of holding him responsible would be in all respects the same as in this case.

I consider that it is hard in one sense that the defendant should be compelled to indemnify the plaintiff. It is so, because it is not easy always to be perfectly safe in one's dealing.

But chattels are not negotiable. Possession is not, as in the case of mercantile paper and money, assurance of title or of authority to dispose of. The servant intrusted with the possession of his master's property, does not thereby give authority to sell it or to authorize another to sell it. The borrower of a chattel or the ordinary bailee does not by his possession

gain any such power. And in short, the rule that no one can be deprived of his title without his own consent has no such exception as is thought to be created in this case. And the converse rule, that he who assumes to deal or intermeddle with personal property which is not his own, must see to it that he has a warrant therefor from some one who is authorized to give it, has no such application. *Anderson v. Nicholas*, 5 Bosw. 130, and cases cited. If he buys from or consents to act by direction of another, he must see to it that in the responsibility of such other he can find indemnity if his confidence is misplaced.

All there is therefore of hardship to the defendant is that he has undertaken to execute a commission for Ashby or Ashby and wife, and if, in consequence of acting upon the fraud or misrepresentation, he is subjected to liability to the plaintiff, he will have to look to them for indemnity. Perhaps the finding of the referee indicates that Ashby is insolvent; if so, that makes the hardship. But even that is not a peculiar case; it is most common in the affairs of business; and having, as the referee finds, heard that Ashby was insolvent when he undertook the commission, he might have known that his recourse to him for indemnity might fail.

The doctrine of the cases cited in the prevailing opinion in the supreme court does not appear to be controverted by the counsel for the appellant, and yet they seem to me decisive in this case of the principle that the agent, in a tortious conversion of another's property, is liable when his principal is guilty of the tort; and even though the agent act innocently in good faith, relying on the possession and apparent authority (if possession be deemed such) of his principal. *Perkins v. Smith*, 1 Wils. 328. An innocent clerk sold goods for the use of his master (*Stephens v. Elwall*, 4 M. & S. 259); an innocent clerk received goods from his master's agent and sent them to his master abroad. In this case the observation of Lord Ellenborough covers this whole case: "The only question is, whether this is a conversion in the clerk which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master, but nevertheless his acts may amount to a conversion, for a person is guilty of a conversion who intermeddles with any property and disposes of it, and it is no answer that he acted under the authority of another who had himself no authority to dispose of it." *McCombie v. Davies*, 6 East, 538; *Baldwin v. Cole*, 6 Mod. 212; *Thorpe v. Burling*, 11 Johns. 285; *Farrar v. Chaufetete*, 5 Den. 527; *Pearson v. Graham*, 33 E. C. L. 468; *Everett v. Coffin*, 4 Wend. 609; 22 Am. Dec. 551; *Spencer v. Blackman*, 9 Wend. 167; *Williams v. Verle*, 11 Id. 80; 25 Am. Dec. 604.

And these cases recognize and affirm the more general rule above stated, that he who intermeddles with personal property not his own must see to it that he is protected by the authority of one who is himself by ownership or otherwise, clothed

with the authority he attempts to confer.

Recurring again to the able and ingenious argument in support of the appeal, and to the point that the plaintiff was guilty of laches, and that by supposing the mortgagors to be in possession he enabled them to deceive the defendant and produce the result. This assumes that it is negligence in the owner of personal property to permit it to be in the possession of another. I am not aware of any warrant for such assumption. So long as it is true that a mortgage given in good faith and for sufficient consideration is valid, notwithstanding possession may be in the mortgagor, so long such possession no more involves culpable negligence or laches in the mortgage, than the possession of a servant, hirer, or other bailee, imports negligence in the owner. In truth so long as mere possession does not import authority to sell the negligence, if any, is on the part of him who relies upon it, and not on the owner who permits it.

And the suggestion gains no strength from the observation that if the plaintiff had not supposed the mortgagors to be in possession it would not have been in their power to deceive the defendant, and where one of two innocent persons must suffer by the wrong of another, the one who enables such other to commit the wrong must bear the consequences. How did the mere possession of the mortgagors enable them to commit the wrong? Only by giving them physical power to deliver the property. The maxim is not true in the sense in which it is sought to be here applied. If it were, then as in the other cases above referred to, whenever an owner suffers his property to go out of his manual keeping or presence, he is liable to lose it by the same means employed here, and is exposed to the maxim here invoked for the defendant's protection. It is only when the owner has parted with the legal title upon some secret trust or condition, or has done something calculated to mislead, upon which a third person has a right to rely, and on which he does rely as evidence of authority, that such maxim could have any application. And the attempt to apply it here begs the whole question. See *Cowen, J., in Ash v. Putnam*, 1 Hill, 307. Mere possession of another's property is not such evidence of ownership or authority to sell, that third persons have a right as against the true owner, to rely thereon.

They may act in faith thereof if they please, but they must rely upon the party with whom they deal, and look to him for indemnity if the title fails, or they be deceived or defrauded into a condition of responsibility.

This is the defendant's situation; he has trusted the representations of Ashby. He has been deceived thereby, and he must look to him for indemnity.

The order of the general term of the supreme court granting a new trial should be affirmed, and in pursuance of the defendant's stipulation judgment absolute for the plaintiff must be rendered.

All concur.

STANTON et al. v. EAGER.

(16 Pick. 467.)

Supreme Judicial Court of Massachusetts. Suffolk and Nantucket. June 2, 1835.

Trover to recover damages for the taking and conversion of a quantity of tobacco pipes.

The parties stated a case.

Williams, Putnam & Co., of Boston, in October 1833, wrote to C. Morrall & Son, a house in Liverpool, requesting them to ship the pipes in question to Williams, Putnam & Co. and on their account, by the ship Morea. In compliance with this order, Morrall & Son, on December 4, 1833, shipped the pipes on board the Morea, for the account of Williams, Putnam & Co., and the master signed four bills of lading, in which he agreed to deliver the pipes to Williams, Putnam & Co. or their assigns. Morrall & Son addressed a letter to Williams, Putnam & Co., dated December 7, 1833, in which they stated that they enclosed an invoice and bill of lading of the pipes "at their debit," but in fact the bill of lading only was enclosed. This letter was retained and afterwards sent under cover of a letter to the defendant, dated December 23, 1833, hereafter mentioned.

On the 21st of the same December, Morrall & Son again wrote to Williams, Putnam & Co., but without mentioning the pipes.

On December 23d, Morrall & Son wrote to the defendant as follows: "In consequence of a very unfriendly letter just received from Messrs. Williams, Putnam & Co., we have withheld the invoice of pipes from them, and now enclose it with the bill of lading, to be delivered up however on their paying you the amount by a bill on England; but should they decline to receive the pipes on this condition, you will please to sell them on our account, and remit us the proceeds. We have written to Messrs. Williams, Putnam & Co. to the above effect. At the same time it is due to them to mention, that in the course thus adopted, we are solely influenced by the very natural desire of self protection against hostile parties." In a postscript, dated on the 24th, the defendant was requested to insure the pipes, in case Williams, Putnam & Co. had not done so, and to add the cost to the invoice in settling with them. In this letter was enclosed the letter of Morrall & Son to Williams, Putnam & Co., dated December 7, 1833.

It appeared, that in the letter of Williams, Putnam & Co. which was referred to in the above letter, and which was dated November 21, 1833, they stated, that they should hold Morrall & Son responsible for the difference between the net proceeds of the sale of a quantity of cotton consigned by them to Morrall & Son, and its value a short time after such sale, the sale having been made contrary to their orders. The defendant objected to the admission of this letter in evidence.

On January 3, 1834, Williams, Putnam & Co. became insolvent, and assigned their property to the plaintiffs for the benefit

of such of their creditors as should, by becoming parties to the indenture of assignment, release their demands. The indenture declared the insolvency of the assignors, but provided that they should be consulted in the disposition of the property. The pipes were described in a schedule which was annexed to the assignment and which purported to convey all balances in the hands of divers persons, naming Morrall & Son, subject to all such liens as they might have for advances, &c. The defendant executed the assignment, as the attorney of Morrall & Son. The letter of Morrall & Son to Williams, Putnam & Co., dated December 7, 1833, and covering the bill of lading, was handed by the defendant to Williams, Putnam & Co. with a copy of the envelope, on or about February 21, 1834, at which time the pipes had not arrived. This bill of lading was immediately handed by Williams, Putnam & Co. to the plaintiffs, but was not endorsed until after the commencement of this action. In the assignment, the assignors covenanted to execute further assurances, and to deliver all documents relating to the property assigned, as soon as they should receive them.

The Morea arrived on or about March 3, 1834, and was entered by the defendant, who was the sole owner and consignee of the ship, and also the agent of Morrall & Son. The pipes were insured by the defendant, and were entered at the custom-house by him, it being agreed that this should be done without prejudice to the rights of the plaintiffs, and were taken to the defendant's store. The defendant refused to deliver them to the plaintiffs when demanded; and they were afterwards sold by agreement, without prejudice to the rights of any persons; but the plaintiffs never paid to the defendant, nor tendered payment of their value. At that time Williams, Putnam & Co. were indebted to Morrall & Son in a much larger sum than the value of the pipes.

On April 16, 1834, Morrall & Son wrote to the defendant, confirming his doings.

The defendant could prove, if the court should deem the facts admissible in evidence, that when he handed to Williams, Putnam & Co. the letter of December 7th, he informed them that he should retain the bill of lading and invoice, and should not deliver the pipes until the purchase money was paid; that he subsequently offered to deliver to them the pipes if they would pay the purchase money, which they agreed to do, but the plaintiffs objected, claiming the pipes as their own by virtue of the assignment and bill of lading; and that the defendant subsequently wrote to the plaintiffs, saying that he should not deliver the pipes until the amount of the invoice and expenses was paid. The plaintiffs objected to the admission of these facts in evidence. If the court should be of opinion, that the plaintiffs were entitled to recover judgment was to be rendered in their favor for the value of the pipes at the time of their arrival, with interest; otherwise the defendant was to have judgment for his costs.

The case was argued in writing.

C. G. Loring and F. C. Loring, for plaintiffs. Cooke, for defendant.

SHAW, C. J. Both the parties to this suit are creditors, or representatives of the creditors, of an insolvent mercantile house, and the question is, which shall have the benefit of the small amount of merchandise, which is the subject of this action; and this question depends upon another, which party can establish the better legal title. It seems to have been thought by Williams, Putnam & Co., at the time of their assignment, that Morrall & Son were indebted to them; yet it is now found as a fact in the case, that at that time a considerable balance, independent of the cost of the pipes, was due to Morrall & Son.

The facts appear sufficiently in the agreed statement, and it will not be necessary to recapitulate them. It was contended, on the part of the defendant, that by the shipment of the pipes in Liverpool, the bill of lading having never been delivered or forwarded to the consignees, but retained by the consignors and forwarded enclosed to their own agent, the property never legally vested in the vendee. But the court are strongly inclined to the opinion, that the orders of Williams, Putnam & Co. to ship the pipes for their account, and the actual shipment of the goods, pursuant to such order, on board of a vessel designated by the vendees for that purpose, and for their account, and obtaining from the master a bill of lading for the goods, making them deliverable to the vendees, constituted a good contract of sale, and a good constructive delivery, so as to vest the property in the goods, in the vendees, and place them at their risk. This conclusion is founded, not upon the supposed specific effect of executing or delivering a bill of lading, or the peculiar character supposed to be attached to a bill of lading as a quasi negotiable instrument, but upon the general principle of the common law, applicable to the sale of personal property.

We are to understand, that the *Morea* was for this purpose a general freighting ship, and the master was acting in regard to goods on freight, as a common carrier; and this being the case, the fact, if it were so, that the vessel was for some purposes consigned by the defendant, the owner, to the house of Morrall & Son, made no difference in regard to these goods. It then appears that the delivery of the goods on board the vessel was not conditional, and nothing was then done by the consignors, to prevent the general property in the goods from vesting in the consignees. The withholding of the bill of lading, and enclosing it to their own agent to be delivered only in case the vendees should pay for the goods, could not convert the absolute delivery into a conditional one, or divest the property in the goods, which had vested by the delivery of them on board the vessel designated, pursuant to the order of the consignees.

But though by these proceedings the property vested in the consignees, it was subject to the well established right of the vendors, to stop the goods in tran-

situ, in case the goods are sold on credit, and the consignees become insolvent; and this right may be exercised at any time before the goods reach their ultimate destination and come to the possession of the consignees. And the consignors have a right to judge for themselves of the danger of such insolvency, and to take measures to guard against it by stopping the goods in transitu, should the insolvency occur before the goods come to the possession of the consignees. The effect of such stoppage in transitu is not to rescind the contract, or to revert the general property in the vendors, but to reinstate them in their lien and right to hold the goods in security for the price.

The consignors might have exercised this right at Liverpool, if they had ground to apprehend the insolvency of the consignees before the arrival of the goods, and such insolvency had occurred accordingly; and perhaps the change of the destination of the goods, after the shipment, by enclosing the bill of lading to their own agent, with directions not to deliver the goods to the vendee, without receiving payment or security, might amount to such a stoppage. But it is not necessary to consider this point, because the court are of opinion, that the acts done by the defendant here, under the express authority and direction of the shippers, especially as the defendant was the ship-owner and obtained actual possession of the goods before they could reach the hands of the vendees, or their assignees, was an effectual exercise of the right to stop in transitu, if it existed as against the plaintiffs.

And the court are of opinion, that the plaintiffs, in this respect, stand precisely in the place of the original vendees, and not in the place of bona fide purchasers, claiming under a bill of lading, without notice of any lien, set-off, or adverse claim. The plaintiffs were assignees, with full notice of the insolvency of the assignors. Had there been a balance due on general account from Morrall & Son, to Williams, Putnam & Co., at the time of the execution of the order, as it is said the assignees supposed there was, it would have presented a very different question. In that case, shipping the goods, pursuant to the order of the vendees, and charging them in account, would have been no more than an appropriation of their own funds, according to their own order, and not a sale upon credit, and the right to stop in transitu would not have existed. But although the assignees so supposed and believed, and were entirely without any imputation of blame in taking a conveyance of the goods, yet when it turns out, as upon the facts it appears to have been done in this case, that Morrall & Son were already creditors of Williams, Putnam & Co., that the goods were ordered and put on board ship solely on the personal credit of the vendees, the right to stop in transitu is shown to be complete, against the vendees. And that right is equally perfect against all others, except a purchaser taking bona fide, by indorsement of the bill of lading, in the usual course of trade, without notice of

the consignor's right to stop the goods in transitu. In the present case these conditions are all wanting. The plaintiffs did not take under an indorsement of the bill of lading, the bill of lading not having been indorsed until after the action was commenced. It is said in answer, that at the time of the assignment, the consignees had not received a bill of lading, but they stipulated to indorse and deliver the bill of lading as soon as they should receive it, and that they did it accordingly. This is all very true, but it does not answer the objection. It shows that the insolvent house, in making their assignment for the benefit of creditors, intended to make as good a title as they could make to these goods, with the rest of their property, and entered into stipulations accordingly. But it leaves the case as it was before, that the assignees took as assignees all the interest which the assignors had in the goods, subject to all claims of lien and set-off, and not as indorsees of a bill of lading in the usual course of trade, or as purchasers, advancing money or giving credit upon the faith of such bill of lading. Indeed the consignors had taken effectual care to prevent them from thus transferring the bill of lading by indorsement to a bona fide purchaser, by enclosing the bill of lading to their own agent, to be delivered to the consignees only on payment made or security given. Nor can the plaintiffs be considered purchasers without notice. No money was paid for the goods, no new credit given, no new dealings had upon the faith of this shipment of goods. The plaintiffs knew that the consignees were insolvent; this is admitted, and indeed the whole proceedings were founded upon that assumption,

and they took the conveyance, as that of a party declared to be insolvent; they knew that the consignors were described as creditors, in the same instrument under which they claimed; they knew that by the general mercantile law, if these goods had been shipped on credit, the vendors had a right to stop them in transitu. This was quite sufficient to put them fully on inquiry, and to bind them to the state of facts, as it should ultimately turn out. The effect is, that they took all the title which the assignors had, and no more; that is, a title to the goods subject to the right of the vendors to stop the goods in transitu. And yet it was highly proper that these goods should be included in the assignment. It might turn out, that there was a balance due from Morrall & Son, and that the goods were not shipped on credit, within the meaning of the rule, or that the consignors would not attempt to exercise their right of stoppage, or might not have an opportunity to do so, or might obtain security for the purchase money in some other way. In any of these cases, these goods would properly have gone into the general fund, provided for the vendees' creditors. But in the events that have happened, it appears, that the vendors had the right of stoppage, and did reasonably and legally exercise it; that under the circumstances, it was equally available against the assignees as against the original consignees; and therefore that the plaintiffs, without tendering payment for the price of the goods, could not take them out of the custody of the defendant, rightfully holding them for the consignors.

Plaintiffs nonsuit.



STATE OF VERMONT v. O'NEIL, (two cases.)

SAME v. FOUR JUGS OF INTOXICATING LIQUOR, (NATIONAL EXPRESS CO., Claimant.)

SAME v. SIXTY-EIGHT JUGS OF INTOXICATING LIQUOR, (NATIONAL EXPRESS CO., Claimant.)

(2 Atl. Rep. 556, 55 Vt. 140.)

Supreme Court of Vermont. Rutland. Feb. 5, 1886.

Exceptions from Rutland county.

These four cases were heard together. The first two were proceedings, commenced before a justice of the peace, for the confiscation of intoxicating liquors shipped from several towns in New York to Rutland parties, who had ordered them, and were marked "C. O. D.," and which were seized at the offices of the National Express Company, in Rutland, and in Center Rutland, by the sheriff of the county and one of his deputies, under the authority of No. 43 of the Acts of 1882, section 2 of which is as follows: "In all cases where now, by any of the provisions of said chapter, [169, Rev. Laws.] an officer is authorized to seize intoxicating liquors, or the casks or vessels containing the same, by virtue of a warrant therefor, he may seize the same without a warrant, and keep the liquors, casks, or vessels so seized in some safe place, and shall forthwith procure such warrant, and he shall thereupon make return of his doings under said warrant in the same manner as he would have done had the issuing of the warrant preceded such seizure." The National Express Company appeared before the justice of the peace, and made claim to the several packages of liquor, claiming that the sales in question were made in New York, where such sales were lawful, and that the seizure in question was a violation of section 8 of the United States constitution; and several other claims, as appear in the opinion. Judgment having been rendered against the express company, upon their claim to the liquors, and the same having been ordered to be confiscated, both before the justice and the county court, the express company took these cases to this court for determination. The other two cases were criminal prosecutions begun before a justice of the peace,—one for keeping intoxicating liquors in Vermont with intent to sell and furnish the same contrary to law, and the other for selling and furnishing intoxicating liquors in Vermont contrary to law. The respondent is a wholesale liquor dealer in Whitehall, New York. The sales complained of were all upon orders received by O'Neil from parties in Rutland, and sent C. O. D. to such parties in Rutland through the National Express Company, where payment therefor was made to the express company. The respondent was found guilty, on the complaint for keeping, of one offense as of second conviction, the punishment for which is \$20 and one month's imprisonment, and, on the complaint for selling, of 307 offenses as

of second conviction, the punishment for which is \$6,140, (\$20 for each offense,) together with one month's imprisonment; and, in both cases, if the fine is not paid within 24 hours, the respondent is to be committed to the house of correction for three times the number of days as there are dollars of costs and fines, which alternative sentence is in addition to the month's imprisonment. The respondent claimed that the judgment should be only as of the first conviction, in which case the fine is only \$10 for each offense, without the month's imprisonment, because the record of the first conviction offered in evidence was more than three years before the commencement of the present complaint, and the statute provides that all prosecutions for violations of the liquor law must be commenced within three years.

J. C. Baker, for respondent. Prout & Walker, for claimants. W. C. Danton and L. B. Thompson, for the State.

ROYCE, Ch. J. The first and most important question presented by these cases, is whether or not the intoxicating liquors in question were (in the first two cases) in contemplation of law sold, or furnished, by the respondent in the county of Rutland and state of Vermont; or (in the last two cases) held and kept for the purpose of sale, furnishing, or distribution contrary to the statute, within said county and state. The answer depends upon whether the National Express Company, by which some of said liquors were delivered to the consignees thereof, and in whose possession the remainder were found and seized before delivery, was in law the agent of the vendors or of the vendees. If the purchase and sale of the liquors was fully completed in the state of New York, so that upon delivery of them to the express company for transportation the title vested in the consignees, as in the case of a completed and unconditional sale, then no offense against the laws of this state has been committed. If, on the other hand, the sale by its terms could only become complete so as to pass the title in the liquors to the consignees upon the doing of some act, or the fulfilling of some condition precedent after they had reached Rutland, then the rulings of the county court upon the question of the offense were correct.

The liquors were ordered by residents of Vermont from dealers doing business in the state of New York, who selected from their stock such quantities and kinds of goods as they thought proper in compliance with the terms of the orders, put them up in packages, directed them to the consignees, and delivered them to the express company as a common carrier of goods for transportation, accompanied with a bill, or invoice, for collection. The shipment was in each instance, which it is necessary here to consider, "C. O. D.," and the cases show that the effect of the transaction was a direction by the shipper to the express company not to deliver the goods to the consignees except upon payment of the amount specified in the C. O.

D. bills, together with the charges for the transportation of the packages and for the return of the money paid. This direction was understood by the express company, which received the shipments coupled therewith.

Whether or not, and when, the legal title in property sold passes from the vendor to the vendee, is always a question of the intention of the parties, which is to be gathered from their acts, and all the facts and circumstances of the case taken together. In order that the title may pass, as was said by Morton, J., in *Mason v. Thompson*, 18 Pick. 305: "The owner must intend to part with his property, and the purchaser to become the immediate owner. Their two minds must meet on this point; and if anything remains to be done before either assents, it may be an inchoate contract, but it is not a perfect sale." The authorities seem to be uniform upon this point: and the acts of the parties are regarded as evidence by which the court or jury may ascertain and determine their intent. *Benj. Sales*, ss. 311, 319, note (c). When there is a condition precedent attached to the contract, the title in the property does not pass to the vendee until performance or waiver of the condition, even though there be an actual delivery of possession. *Benj. Sales*, s. 329, note (d). The Vermont cases to the above points are referred to in *Roberts's Digest*, 610 et seq., and need not be specially reviewed here.

In the cases under consideration the vendors of the liquors shipped them in accordance with the terms of the orders received, and the mode of shipment was as above stated. They delivered the packages of liquors, properly addressed to the several persons ordering the same, to the express company, to be transported by that company and delivered by it to the consignees upon fulfillment by them of a specified condition precedent, namely: payment of the purchase price and transportation charges, and not otherwise. Attached to the very body of the contract, and to the act of delivery to the carrier, was the condition of payment before delivery of possession to the consignee. With this condition unfulfilled and not waived, it would be impossible to say that a delivery to the carrier was intended by the consignor as a delivery to the consignee, or as a surrender of the legal title. The goods were intrusted to the carrier to transport to the place of destination named, there to present them for acceptance to the consignee, and if he accepted them and paid the accompanying invoice and the transportation charges, to deliver them to him; otherwise, to notify the consignor and hold them subject to his order. It is difficult to see how a seller could more positively and unequivocally express his intention not to relinquish his right of property or possession in goods until payment of the purchase price than by this method of shipment. We do not think the case is distinguishable in principle from that of a vendor who sends his clerk or agent to deliver the goods, or forwards them to, or makes them deliverable upon the order of, his agent, with in-

structions not to deliver them except on payment of the price, or performance of some other specified condition precedent by the vendee. The vendors made the express company their agent in the matter of the delivery of the goods, with instructions not to part with the possession of them except upon prior or contemporaneous receipt of the price. The contract of sale therefore remained inchoate or executory while the goods were in transit, or in the hands of the express company, and could only become executed and complete by their delivery to the consignee. There was a completed executory contract of sale in New York; but the completed sale was, or was to be, in this state.

The authorities upon the above points and principles are so numerous, and are so fully collated in the brief of the learned counsel for the state, and in the text and notes of 2 *Benj. Sales* (4 Am. ed.), that we refrain from specific references in support of the conclusions at which we have arrived. These are fully supported by the decision of the United States district court in *Illinois in People v. Shriver*, 31 Alb. L. J. 163, 23 Fed. Rep. 134, a case involving precisely the same question. *Treat, J.*, says in the opinion: "In the case of liquor shipped by the defendant to Fairfield by express, C. O. D., the liquor is received by the express company at Shawneetown as the agent of the seller, and not as the agent of the buyer, and on its reaching Fairfield it is there held by the company, as the agent of the seller, until the consignee comes and pays the money, and then the company, as the agent of the seller, delivers the liquor to the purchaser. In such case the possession of the express company is the possession of the seller, and generally the right of property remains in the seller until the payment of the price. An order from a person in Fairfield to the defendant at Shawneetown for two gallons of liquor, to be shipped to Fairfield, C. O. D., a mere offer by the person sending such order to purchase two gallons of liquor from the defendant, and pay him for it when he delivers it to him at Fairfield, and a shipment by the defendant according to such order is practically the same as if the defendant had himself taken two gallons of liquor from his store in Shawneetown, carried it in person to Fairfield, and there delivered it to the purchaser, and received the price of it. It would be different if the order from Fairfield to the defendant was a simple order to ship two gallons of liquor by express to the person ordering, whether such order was accompanied by the money or not. The moment the liquor under such an order was delivered to the express company at Shawneetown it would become the property of the person ordering, and the possession of the express company at Shawneetown would be the possession of the purchaser—the sale would be a sale at Shawneetown—and if it were lost or destroyed in transit the loss would fall upon the purchaser. But in the case at bar the shipping of the liquor to Fairfield, C. O. D., the defendant made no sale at Shawneetown; the right of property remained in himself, and the right of possession, as

well as the actual possession, remained in him through his agent. Had it been lost or destroyed in transit the loss would have fallen on himself. He simply acted upon the request of the purchaser, and sent the liquor to Fairfield by his own agent, and there effected a sale by receiving the money and delivering the liquor."

II. It is insisted on the part of the claimant in the case of the State v. 68 Jugs, &c., that sec. 2 of No. 43 of the Acts of 1882, under which the liquors in that case were seized, is unconstitutional. Conceding the points contended for by the learned counsel for the claimant, that there is a well recognized right of property in intoxicating liquors, that they are not *malum in se*, and that their use is not by law prohibited to citizens of this state, these propositions are nevertheless clearly subject to the qualification, that when kept and intended for unlawful use, such liquors fall at once under the ban of the law, and become subject to seizure and confiscation by such methods as are provided by law in conformity with the constitution. That intoxicating liquors, when once branded with this unlawful intent on the part of the owner or possessor, become subject to confiscation by the government; and that the methods and means of their seizure and condemnation are within the police powers delegated to the legislature by Art. 5, part 1, of the constitution, is too well settled in this state and elsewhere to require extended discussion. *Spalding v. Preston*, 21 Vt. 9; *State v. Conlin*, 27 Vt. 318; *Id.* 325, 327; *State v. Comstock*, *Id.* 553; *Gill v. Parker*, 31 Vt. 610; *Pott, Dwaris, c.* 14; *Cooley Con. Lin.* (4ed.) 714, 727.

This section gives the officer the power to seize without warrant liquor found "under circumstances warranting the belief that it is intended for sale or distribution" contrary to the provisions of chap. 169 R. L. It does not purport to confer the power of search; nor does anything appear to show that the officer assumed to exercise such power in this case. It simply provides for the seizure, without warrant previously issued, of something which the law has declared subject to seizure and condemnation, under the police power delegated by the constitution, as an instrument intended by the owner or possessor for a use unlawful by express statute, and dangerous to the peace, health, and good morals of the community. That the article in itself may be innocuous, may be the subject of lawful ownership, or may even be susceptible of beneficial use, can no more affect the question than could the fact, that certain tools were susceptible of lawful and beneficial use in mechanics, save them from becoming subject to seizure and confiscation, if intended by their owner or possessor for use as the instruments for accomplishing a contemplated burglary; or the harmless character of the metal and its owner's right of property therein protect his ownership when fashioned and intended for passing as counterfeit coin. It cannot be doubted in this state, since the case of *Spalding v. Preston*, 21 Vt. 9, and has not been elsewhere, so far as we are aware,

that articles or instrumentalities once impressed with the characteristics of adaptation and intended use for purposes prohibited by law and contrary to public peace, health, or morals, are subject to summary seizure under statutory or even general police regulations. That the liquors in question were intended for such use has been determined in this case as a question of fact by the tribunal designated by law, and that adjudication is conclusive.

The scope and application of Art. 5, part 1, of the constitution have been defined by this court in the cases above referred to, and in *In re Powers*, 25 Vt. 265, which has ever since been regarded as conclusive against such application of that section of the bill of rights as is here contended for by the claimant. See *Gill v. Parker*, 31 Vt. 610; *State v. Peterson*, 41 Vt. 504; *State v. Intox. Liq.* 55 Vt. 82. In Massachusetts a statute practically identical with the one in question has been held not to contravene a similar constitutional provision. *Jones v. Root*, 6 Gray, 435; *Mason v. Lathrop*, 7 Gray, 354. The decisions in Maine are to the same effect. *State v. McCann*, 59 Me. 383; *State v. Howley*, 65 Me. 100.

III. Concerning the claim that sec. 8 of the federal constitution, conferring upon congress the exclusive right to regulate commerce among the states, has application, it is sufficient to say that no regulation of or interference with interstate commerce is attempted. If an express company, or any other carrier or person, natural or corporate, has in possession within this state an article in itself dangerous to the community, or an article intended for unlawful or criminal use within the state, it is a necessary incident of the police powers of the state that such article should be subject to seizure for the protection of the community. It would certainly be a strange perversion of language to claim that if this express company were to hold in possession within this state clothing infected with the small-pox or yellow fever, or tools with which it was intended to commit a burglary, the state government should be powerless to protect its citizens by seizing and rendering harmless such articles, simply because they might have been brought in the ordinary course of business from another state. If the express company has in possession within the state liquor, with intent to make unlawful use or disposition of it, then the right to seize it and prevent such unlawful use attaches. If it were competent for persons or companies to become superior to state laws and police regulations, and to override and defy them under the shield of the federal constitution simply by means of conducting an interstate traffic, it would indeed be a strange and deplorable condition of things. The right of the states to regulate the traffic in intoxicating liquors has been settled by the United States supreme court in the *License Cases*, 5 How. 577.

IV. Proof of the former conviction in the cases of *State v. O'Neil* was properly admitted, notwithstanding the conviction appeared to have been more than three

years before the trial. No provision of the statute requires that the former conviction must have been within three years, and we have no authority to add such a provision to the law, as it is plainly and unambiguously framed by the legislature. The reason for the limitation of prosecutions for the offenses charged in these cases to a period within three years from the time of commission, as for all similar limitations, is that a person should not be called upon to answer to a legal accusation after such a long time has elapsed as would, in the estimation of the law, make it difficult or impossible, by reason of the death or removal of witnesses, the loss or destruction of evidence, or the various embarrassments likely to arise from a considerable lapse of time, for him to establish his innocence. This reason has no application to a case where the only proof that can be used on the one side or the other is matter of record. We should therefore have no justification, even if we deemed it within the scope of our power and duty, for making applications of a rule of limitation by analogy in these cases.

V. The constitutional inhibition of cruel and unusual punishments, or excessive fines or bail, has no application. The punishment imposed by statute for the offense with which the respondent, O'Neil, is charged, cannot be said to be excessive or oppressive. If he has subjected himself to a severe penalty, it is simply because he has committed a great many such

offences. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him he might be kept in prison for life. The mere fact that cumulative punishments may be imposed for distinct offences in the same prosecution is not material upon this question. If the penalty were unreasonably severe for a single offence, the constitutional question might be urged; but here the unreasonableness is only in the number of offences which the respondent has committed.

The inevitable deduction from what has been said under the first point is, that the respondent, O'Neil, by what he did in respect of the transactions in question, made the express company his agent; and as what was done by such agent in the execution of the authority and instructions directly given by him committed offences against the statute, O'Neil must be held responsible. That he was innocent of any purpose or intent to break the law, and was unaware that what he did was contrary to law, cannot avail him in defence. *State v. Comings*, 28 Vt. 508.

The result is that in the cases of the *State v. O'Neil*, numbers 27 and 28, the respondent takes nothing by his exceptions; and in the cases of the *State v. Intoxicating Liquor*, *National Express Company*, claimant, numbers 25 and 26, the judgments are affirmed.

STOLLENWERCK et al. v. THACHER et al.
(115 Mass. 224.)

Supreme Judicial Court of Massachusetts. Suffolk. June 18, 1874.

Tort for the conversion of 189 bales of cotton. At the trial, before Morton, J., the jury were directed to find a verdict for the plaintiffs, and the case was reported for the consideration of the full court.

S. Bartlett and D. Thaxter, for plaintiffs.
H. W. Paine and R. D. Smith, for defendants.

GRAY, C. J. This is an action of tort for the conversion of a number of bales of cotton. A verdict has been ordered for the plaintiffs, and the case reserved for the determination of the full court upon a report containing an abstract of the evidence given at the trial, and a number of letters and documents. But the facts material to the decision, assuming all the controverted ones to be according to the testimony introduced by the defendants, are not many; and a brief statement of them will tend greatly to narrow the discussion of the principles of law by which the case is governed.

The plaintiffs, being buyers of cotton in Mobile, made an arrangement with Joseph I. Baker, a cotton broker in Boston, by which they agreed to pay him, upon such orders on them as he should obtain from his customers here, fifty cents a bale, out of their own commission of one and a half per cent., furnish him with types of their classification of cotton, and keep him advised at their own expense of the condition of the cotton market in Mobile; he agreed to procure and transmit the orders, and inform his customers of their acceptance or rejection; and the invoices were to be sent by the plaintiffs to, and the drafts for the price drawn upon, the customers, and the bills of lading attached to the drafts.

In pursuance of an order given him by Gorham Gray & Company, Baker telegraphed to the plaintiffs to buy for them two hundred bales of cotton. The plaintiffs replied, refusing to negotiate on any other basis than that the bill of lading should be attached to the draft. They bought the cotton in Mobile, drew a bill of exchange on Gray & Company against the cotton, took the bill of lading in their own name, indorsed it in blank, attached it to the bill of exchange, procured the latter to be discounted at a bank in Mobile, informed Baker of what they had done, and instructed him, on receiving the draft and bill of lading, to hold the bill of lading until the draft was paid. Baker by telegram and letter assented to all this. The invoice sent by the plaintiffs to Gray & Company showed that the cotton was consigned to the plaintiffs' order. The Mobile Bank transmitted the draft, with the bill of lading attached, to a bank in Boston, which presented the draft to Gray & Company for acceptance. Upon such presentment, Gray & Company asked for the bill of lading, and were told that Baker was to receive it. Gray & Company then accepted the draft, the bank deliv-

ered the bill of lading to Baker, and he afterwards delivered it to Gray and Company, who obtained the cotton from the carriers, gave them a check for the amount of the freight from Mobile to Boston, and pledged the cotton and delivered the bill of lading to the defendants as security for the payment of advances on the cotton. Gray testified that he accepted the draft upon Baker's assurance that he would hand him the bill of lading as soon as it came to Baker's possession, that Baker shortly afterwards delivered to him the bill of lading unconditionally, and that he transferred the cotton to the defendants believing that he owned it; and his testimony though contradicted by Baker's, must be assumed to be true for the purpose of deciding whether a verdict was rightly ordered for the plaintiffs.

Baker and the plaintiffs were not partners as between themselves, and Gray & Company did not deal with Baker as a partner of the plaintiffs. His relation to the plaintiffs was that of a broker only. He looked to them, and not to the cotton, for the payment of his commission. The case is not within the Gen. Sts. c. 54.¹ Baker was not a factor, or a general agent intrusted with the goods for the purpose of sale; but a special agent, with positive and restricted instructions to receive the bill of lading on the acceptance of the draft, hold the bill of lading and the cotton until the draft was paid, and then deliver them to Gray & Company. He had no right of possession of the bill of lading or the cotton for any other purpose, and no title in or lien on the cotton. This is not a case of stoppage in transitu. Gray & Company were not named in the bill of lading as consignees of the cotton, and the plaintiffs have never been divested of their property in the cotton as against Gray & Company or any persons claiming under them.

The numerous cases cited at the bar differ in their circumstances rather than in the statement of principles. A bill of lading, even when in terms running to order or assigns, is not negotiable, like a bill of exchange, but a symbol or representative of the goods themselves; and the rights arising out of the transfer of a bill of lading correspond, not to those arising out of the indorsement of a negotiable promise for the payment of money, but to those arising out of a delivery of the property itself under similar circumstances. If the bill of lading is once assigned or indorsed generally by the original holder, upon or with a view to a sale of the property, any subsequent transfer thereof to a bona fide purchaser may indeed give him a good title as against the original owner. But so long as the bill of lading remains in the hands of the original party, or of an agent intrusted with it for a special purpose, and not author-

¹ Gen. Sts. c. 54, § 2, provide that, "Every factor or other agent intrusted with the possession of merchandise, or a bill of lading consigning merchandise to him, for the purpose of sale, shall be deemed to be the true owner thereof so far as to give validity to any bona fide contract made by him with any other person for the sale of the whole or any part of such merchandise."

ized to sell or pledge the goods, a person who gets possession of it without the authority of the owner, although with the assent of the agent, acquires no title as against the principal. *National Bank of Green Bay v. Dearborn*, 115 Mass. 219. *Gurney v. Behrend*, 3 E. & B. 622, 632. *Pease v. Gloahec*, L. R. 1 P. C. 219, 228.

In the present case, Baker, being a special agent authorized to deliver the bill of lading only upon payment of the bill of exchange drawn against the goods and attached to the bill of lading, could not bind his principals by a delivery made without such payment. To hold otherwise would be to allow a person, intrusted with goods merely for the purpose of collecting the price and then delivering them, to sell them on credit. The authority of Baker, being special and limited, could not be enlarged by his own declarations. *Mussey v. Beecher*, 3 Cush. 511.

It follows that Gray & Company, not having paid the draft, nor acquired possession of the bill of lading with the plaintiffs' consent, had no property in the goods, and could convey none to the defendants, so as to defeat the plaintiffs' title. The plaintiffs are therefore entitled to recover.

This is not an action in the nature of assumpsit for the proceeds of a sale of the

property, in which the plaintiffs might be deemed to have waived any tort, and be obliged to submit to a deduction of the expenses of the sale by which such proceeds had been obtained. It is an action in the nature of trover for the conversion of the goods, in which the plaintiffs are entitled to recover their market value at the time of the conversion by the defendants, and are not obliged to allow a commission to Gray & Company for doing an act which is not shown to have been for the interest or according to the intent of the plaintiffs. *Bartlett v. Bramhall*, 3 Gray, 257.

But the amount paid by Gray & Company to discharge the lien which the carriers had against the plaintiffs for the freight on the cotton enured to the benefit of the plaintiffs, and should be deducted from the market value of the goods. *Adams v. O'Connor*, 100 Mass. 515. *Whitney v. Beckford*, 105 Mass. 267. That amount must therefore, unless the parties agree upon it, be ascertained by an assessor, pursuant to the terms of the report, the verdict amended accordingly, and

Judgment rendered thereon for the plaintiffs.

WELLS, COLT, and DEVENS, JJ., absent.



STRAUS et al. v. WESSEL et al.

(30 Ohio St. 211.)

Supreme Court Commission of Ohio. December Term, 1876.

Error to superior court of Cincinnati.

H. H. Wessel, doing business in Cincinnati as H. H. Wessel & Co., advanced to Stephens & Bro., pork packers in Indiana, \$5,000, under agreement that the latter would ship to them all the pork they would cut during the season to be sold by H. H. Wessel & Co. on commission, the proceeds, after paying freight and commissions, to be applied on the indebtedness, and any balance to be paid to Stephens & Bro. Stephens & Bro. made several shipments to H. H. Wessel & Co., but without sending bills of lading. The consignee, being well known, obtained the goods on their arrival in Cincinnati. March 24, 1870, Stephens & Bro. made a shipment to H. H. Wessel & Co., retaining the bill of lading, but sending the following letter of advice, which was received March 26, 1870.

"Shoals, Ind., March 24, 1870. Messrs. H. H. Wessel Co.—Gents: Shipped to-day car No. 761:

7 tierces lard, No. 1.	2,164
1 bbl. grease.	200
4 bbls. cracklings.	913
353 hogs' heads, (with the fat)	1,970
143 smoked jowls.	745
120 bacon hams.	1,412
183 hogs' heads, (skinned).	1,460
128 bacon shoulders.	1,805

"The balance of meat we will ship whenever you order. We think it best to hold the lard. I send you two kinds of hogs' heads,—one with fat on, the other skinned, which notice. We deliver you this load on our indebtedness. Do the best you can. Yours truly, Stephens & Brother."

On March 28, 1870, while in the possession of the railroad company at Cincinnati, it was attached by J. P. Straus & Co. on a claim against Stephens & Bro. H. H. Wessel paid the freight bill in the usual way, and brought replevin against the sheriff and J. P. Straus & Co., and recovered judgment, and defendants bring error.

Stallo & Kittredge, for plaintiffs in error. John Johnson, for defendant in error.

SCOTT, J. It is clear that the rights and interests of the plaintiffs in error, in the property which they, as creditors of Stephens & Bro., caused to be attached, can be no greater than those of their alleged debtors, Stephens & Bro. They could attach only the interest of their debtors, in the property, and in this controversy must stand in their shoes. Now, for whom was the pork in question held by the carrier at the time of the levy of the attachment? It had been delivered by Stephens & Bro., to the carrier for transportation to Cincinnati and delivery to the consignee, H. H. Wessel & Co. By the express terms of their bill of lading, it was the duty of the carrier to deliver it only to the consignee named therein. By the invoice and letter of advice sent to the

consignees, immediately before the shipment, it is very clear that the consignors had appropriated the pork shipped and the net proceeds of its sale to the partial discharge of their indebtedness to the consignees, for cash previously advanced. They expressly say: "We deliver you this load on our indebtedness."

The consignors of this shipment had not only the right, but, under their contract with the consignees, it was their duty so to appropriate it.

The relation of the parties to this shipment differed in no substantial respect from that of the case in which goods are shipped by a vendor to a purchaser, who has previously ordered and paid for them. And in such a case it is well settled that the delivery of goods to a common carrier for conveyance to the purchaser is equivalent to a delivery to the purchaser himself. The carrier is, in that case, in contemplation of law, the bailee of the person to whom, not by whom, the goods are sent; the latter, in employing the carrier, being considered as the agent of the former for that purpose. Benj. on Sales, sec. 181. And the numerous authorities there cited. By the terms of the letter of advice, in this case, there can be no doubt that Stephens & Bro., by delivering the pork to the carrier, intended thereby to invest the consignees, Wessel & Co., with the full and rightful possession, and the absolute *jus disponendi* of the property, for the purposes of their contract.

They intended to retain no interest even in the proceeds of its sale, other than the right to have the net amount applied in partial satisfaction of their indebtedness to the consignees. And to this intention a controlling effect must be given. *Emery's Sons v. Irving National Bank*, 25 Ohio St. 360.

It is claimed, however, by counsel for plaintiff in error, that, irrespective of the intention of Stephens & Bro. in their shipment of the pork, by taking the bill of lading in their own name, and retaining its possession, they reserved for themselves the power to dispose of the property, and vest the title thereto in any bona fide purchaser by a simple delivery of the bill of lading, and that they, therefore, remained the owners of the property, in contemplation of law, until it came to the actual possession of the consignees. But we think this position can not be maintained. A bill of lading, though transferable by delivery, like commercial paper, "is unlike commercial paper in this—the assignee can not acquire a better title to the property thus symbolically delivered, than his assignor had at the time of assignment." *Emery's Sons v. Irving National Bank*, supra, p. 368; Benj. on Sales, sec. 864.

Hence, as Stephens & Bro., under the circumstances of this case, had parted with all right of control over the property in question, they could confer no such right on another by a transfer of the bill of lading.

We think the evidence in the case shows that at the time of the levy of the attachment, the property in question was constructively in the possession of defendant

in error, who had the full and sole power of disposition over it, and the right to retain the proceeds of its sale.

The authorities cited by counsel for de-

fendant in error fully sustain these views, and justify us in saying that the judgment of the court below must be affirmed.

Judgment affirmed.



STUART v. WILKINS.

(1 Doug. 18.)

Court of King's Bench. Michaelmas Term, 1775.

The two first counts in the declaration in this case were as follows:—"David Stuart complains of James Wilkins being, &c. For that whereas the said James, on the first day of February, in the year of our Lord 1778, at Hatfield, in the county of Hertford, offered to sell to the said David, a certain mare of him the said James, and whereupon afterwards, to wit, on the day and year aforesaid, at Hatfield aforesaid, in the county aforesaid, in consideration that the said David, at the special instance and request of the said James, would buy of him the said James, the said mare, at and for a certain large price or sum, to wit, the price or sum of £31 10s. of lawful money of Great Britain, to be paid by the said David, to the said James, when he the said David should be thereunto afterwards requested; he the said James undertook, and then and there faithfully promised the said David, that the said mare was sound, and the said David in fact saith, that he, confiding in the said promise and undertaking of the said James, so by him made as aforesaid, afterwards, to wit, on the same day and year aforesaid, at Hatfield aforesaid, in the county aforesaid, at the special instance and request of the said James, did buy of the said James the said mare, at and for the said price or sum of £31 10s. and did then and there pay to the said James the sum of £25 5s. part of the said sum of £31 10s. and did then and there undertake and faithfully promise the said James to pay him the further sum of £6 5s. residue of the said sum of £31 10s. when he the said David should be thereunto afterwards requested. Yet the said James, not regarding his said promise and undertaking so by him made as aforesaid, but contriving, and fraudulently intending to injure the said David in this behalf, did not regard his said promise and undertaking so by him made as aforesaid, but craftily and subtly deceived the said David in this, that the said mare, at the time of the making the said promise and undertaking of the said James, was not sound, but, on the contrary thereof, was unsound, and was afflicted with a certain malady or disease, called the windgalls, to wit, at Hatfield aforesaid, in the county aforesaid; whereby the said mare then and there became, and is of no use or value to the said David.—And whereas also the said James, afterwards, to wit, the same day and year aforesaid, at Hatfield aforesaid, in the county aforesaid, in consideration that the said David, at the like instance and request of the said James, bought of him the said James, a certain other mare of him the said James, at and for a certain other large price or sum, to wit, the sum of £31 10s. of like lawful money, and had then and there paid to the said James, the sum of £25 5s. in part of the said last mentioned sum of £31 10s. and had then and there undertaken and promised to pay to the said James

the further sum of £6 5s. residue of the said last mentioned sum of £31 10s. when he the said David should be thereunto afterwards requested, he the said James undertook, and then and there faithfully promised him the said David, that the said last mentioned mare was sound.—Yet the said James, not regarding his said last mentioned promise and undertaking so by him made as last aforesaid, but contriving and fraudulently intending to injure the said David in this behalf, did not regard his said promise and undertaking so by him made as last aforesaid, but craftily and subtly deceived the said David in this, that the said last mentioned mare, at the time of the making the said last mentioned promise and undertaking of the said James, was not sound, but then was unsound, whereby the said last mentioned mare became, and is of no use or value to the said David.—To these were added a count for money laid out and expended, and another for money had and received.—The cause was tried at the assizes at Hertford, before Lord Mansfield, and a verdict found for the plaintiff; but the evidence given being of an express warranty, and a doubt being raised, whether, in such a case, this was a proper form of action, the verdict was taken subject to the opinion of the court on that question.

Upon a motion for setting aside the verdict, and entering a nonsuit, Lord Mansfield said, that it had been suggested, that the form of this declaration arose from a determination of his at the same place about twenty years ago, but that, he said, was a case of a clear fraud, and was declared on as a fraud.

Cause was now shewn against making the rule absolute.

Kempe, Serjeant, and Morgan, for defendant.

LORD MANSFIELD.—The declaration struck me as particular, in departing from the old rule of declaring expressly on the warranty. A warranty extends to all faults known and unknown to the seller. Selling for a sound price without warranty may be a ground for an assumption, but, in such a case, it ought to be laid that the defendant knew of the unsoundness. [a] I left it to the jury as on a warranty, subject to the opinion of the court, whether a nonsuit should not be entered. I am told by the learned judges on my left hand (ASHHURST, and BULLER, Justices,) that this sort of declaration, where a warranty is to be proved, has been practised for twenty years, and that it is made use of with a view to let in both proofs, if necessary.

ASHHURST, Justice.—Whatever may have been the old form, I believe it has been long settled that this form of action is right; and, having been long established, I am of opinion that it ought to be supported. There may be cases where the count for money had and received may be of use to the plaintiff, and the warranty including a promise, may be declared on as such.

BULLER, Justice,—This mode has been in use ever since I have known any thing of practice, and my Brother ASHURST remembers it much longer. There is no objection to it, in point of form, which could prevail even on a special demurrer. Promises are not all executory. Do not all our books make a distinction between promises executed, and promises executory;—that in one you may traverse the

consideration, in the other not? Because another action would lie, it does not follow that this will not. It was determined in Slade's Case, that there may be different actions for the same injury.¹

The rule discharged.

¹T. 44 Eliz. 4 Co. 92 b. See *Williamson v. Allison*. 2 East, 446.

STUBBS v. LUND.

(7 Mass. 453.)

Supreme Judicial Court of Massachusetts. Cumberland. May Term, 1811.

Replevin of a quantity of salt and coals. The defendant pleads in bar that the said salt and coals were the proper goods and chattels of Lemuel Weeks and William C. Weeks, traverses the property of the plaintiff, and prays a return to be adjudged him, with his damages and costs.

—The plaintiff tenders an issue on the traverse, which is joined by the defendant.

This issue was tried before Thatcher, J. at an adjournment of the last May term in this county, and a verdict found for the plaintiff, agreeably to the directions of the judge, to which directions the defendant filed his exceptions, which were allowed by the judge.

From the exceptions it appears that the house of Logan, Lenox & Co. at Liverpool in England, of which the plaintiff was one, had shipped the cargo of salt and coals on board the ship *Henry*, Joseph Weeks master, on the credit, and on the account and risk of the said L. & W. C. Weeks, and consigned the same to them or their assigns, for which the master has signed bills of lading; but before the ship had left the port of Liverpool, the shippers, being informed of the insolvency of the consignees, refused to let the ship sail under the said shipment of the cargo. Afterwards on the master's signing other bills of lading, acknowledging the cargo to be shipped by the same persons, consigned to the plaintiff, the master was permitted to sail.

There was shewn in evidence to the jury an agreement between Logan, Lenox & Co. and L. & W. C. Weeks, by which the former contracted to accept the draughts of the latter, or to advance them cargoes on credit, to a limited amount;—also a copy of an account current, in which the cargo in question was charged by the former to the latter. The defendant is a deputy sheriff of this county, and had attached the goods in question as the property of the said L. & W. C. Weeks, at the suit of Daniel Tucker, in an action brought upon several promissory notes.

The motion of the defendant for a new trial, grounded on the supposed misdirection of the judge, was argued by Whitman and Hopkins for the defendant, and Mellen and Emery for the plaintiff.

The action was continued nisi, and the opinion of the court was delivered in Boston, at an adjournment of the last March term, by

PARSONS, C. J. The title of the plaintiff is admitted to be good, if the consignors had under the circumstances of this case, a right to stop the goods in question in transitu.

To this right the defendant has made two objections.

1. That the general credit given to the original consignees by the consignors, which is stated at large in the exceptions,

had excluded the consignors from the right of stopping in transitu goods shipped and consigned pursuant to that agreement.—But in our opinion this objection cannot prevail. That agreement cannot bind the consignors after the insolvency of the consignees: the credit contemplated being predicated upon the supposed ability of the consignees to pay at the expiration of the credit. And a credit, given under such an agreement, can have no other effect on this question, than the credit given under the first bills of lading.

2. The other objection is, that the consignees being either the owners or the hirers of the ship *Henry*, as soon as the goods were received on board that ship, and bills of lading signed by the master, there was no further transit, the goods being in the possession and custody of the consignees. And to support this objection, it was urged by the defendant's counsel, that the right to stop in transitu extends only to goods shipped on board a general ship.

We think this objection cannot prevail. The right of stopping all goods shipped on the credit and risk of the consignee remains until they come into his actual possession at the termination of the voyage, unless he shall have previously sold them bona fide, and endorsed over the bills of lading to the purchaser. And in our opinion, the true distinction is, whether any actual possession of the consignee or his assigns, after the termination of the voyage be, or be not provided for in the bills of lading. When such actual possession, after the termination of the voyage, is so provided for, then the right of stopping in transitu remains after the shipment. Thus if goods are consigned on credit, and delivered on board a ship chartered by the consignee, to be imported by him, the right of stopping in transitu continues after the shipment [*Bohtlingk v. Juglis*, 3 East, 381]; but if the goods are not to be imported by the consignee, but to be transported from the place of shipment to a foreign market, the right of stopping in transitu ceases on the shipment, the transit being then completed: because no other actual possession of the goods by the consignee is provided for in the bills of lading, which express the terms of the shipment [*Hodgeson v. Loy*, 7 D. & E. 412.]

The same rule must govern, if the consignee be the shipowner. If the goods are delivered on board his ship, to be carried to him, an actual possession by him after the delivery is provided for by the terms of the shipment; but if the goods are put on board his ship to be transported to a foreign market, he has on the shipment all the possession contemplated in the bills of lading. In the former case the transit continues until the termination of the voyage; but in the latter case the transit ends on the shipment.

We think also that the same distinction must exist in the case of a general ship.—If a ship sail from this country to Great Britain, with the intention of taking on board goods for divers persons on freight, to be transported to a foreign market, as

the mercantile adventures of different shippers—if goods are so shipped by the several consignors, there is no transit to the consignees after the shipment; and no right of stopping remains with the consignors. But it is otherwise when several persons import goods in a general ship on their own credit and risk, for a future actual possession by them is provided for in the bills of lading.

Upon the best view we have been able to give the case before us, we are satisfied that the verdict is right, and that judgment must be entered upon it.

STURTEVANT v. ORSER.

(24 N. Y. 538.)

Court of Appeals of New York. June, 1862.

Action to recover a quantity of oil attached in the hands of a warehouseman by creditors of the vendee. Plaintiff had a verdict for the value of the oil, the general term affirmed the judgment, and defendant appealed.

W. Bliss, for appellant. E. Terry, for respondent.

SMITH, J. The delivery of the oil on board the vendee's ship at New Bedford was unquestionably a delivery to Wing, and vested the property in him. The property, it is true, was to be transported to New York for sale, but it was to be transported by the vendee himself, who could have changed its destination or sold it absolutely on shipboard. After such delivery it was not subject to stoppage in transitu, for it was not in the hands of a carrier or middle-man. (*Inglis v. Usherwood*, 1 East, 515; *Turner v. Trustees of Liverpool Docks*, 6 Eng. Law & Eq. 515; *Ogle v. Atkinson*, 5 Taunt. 759.)

But if this were not so, the vendee could not exercise the right of stoppage in transitu, and the vendor made no attempt to do so. (*Story Cont.*, § 816.) The plaintiff's right to recover the oil must, therefore, be put upon other grounds to be sustained.

The case is quite parallel to that of *Atkin v. Barwick* (1 Strange, 165). In that case the defendants were mercers, living in London; and Cripps & Co., the assignors of the plaintiff, were traders at Penzance, in Cornwall. On the 7th of April, 1715, the defendants, upon the order of Cripps & Co., sent them the goods in controversy, and gave them credit on their books for the amount. On the 18th of May, Cripps & Co., without the knowledge of the defendants, deposited the goods with a third person for the use of the defendants. On the 6th of June, Cripps & Co. wrote a letter to the defendants, stating that their affairs were in a bad condition, and that, for that reason, they thought it not reasonable that the last goods should go to other creditors; and that they had, therefore, not entered them in their books, but left them with a Mr. Penhallow, who had orders to deliver them to the defendants. On June 9th a commission of bankruptcy was issued against Cripps & Co., and their effects assigned to the plaintiffs. The letter of Cripps & Co. to the defendants was not received by them till the 13th of June, which was the first notice they had of the delivery to Penhallow; and they immediately signified their consent to take the goods again.

This case, in all its essential particulars, is like the present case. The goods, as in this case, were delivered to, and the title vested in, the vendee; they were deposited with a third person by the vendee for the use of the vendor before the rights of the creditors attached, and written notice of such deposit and of the failure of the ven-

dee given to the vendor, and the goods actually attached before the vendor attempted to reclaim them.

In the decision of the case of *Atkin v. Barwick*, the chief justice held that "the delivery to Penhallow to the use of the defendants before the act of bankruptcy, and grounded on a good consideration, transferred the absolute property to them." Fortescue, J., said that payment in satisfaction of the debt was a good consideration, and "we will intend an acceptance till the contrary appears." Eyre, J., said: "The precedent debt is a sufficient consideration, and it vests before notice [the title he means]; for, it being to his benefit, a disagreement shall not be presumed."

I have quoted this case thus fully because it is a leading one, and, if good law, is quite conclusive of the case now under consideration. This case of *Atkin v. Barwick* has been much discussed and much questioned, but not in any case overruled. In *Hurman v. Fisher* (1 Cowp. 125), Lord Mansfield said of it, that, "with respect to the case of *Atkin v. Barwick* the judgment seemed right, but the reasons wrong." In *Neate v. Ball* (2 East, 117), Lord Kenyon discussed it, and said that Lord Mansfield had extracted the true ground on which that judgment, if it did not proceed, ought to have proceeded; namely, that the trader, finding himself in failing circumstances, very honestly did not accept the goods, but returned them. But this distinction is obviously unsound and untenable. The bankrupt had the goods in possession for some time. They were sent him the 7th of April, and were in his possession, and sent by him for deposit with a third person on the 18th of May, more than forty days after being delivered to the vendee, or to the carrier for him; and were in his actual possession when so deposited. The title to them had absolutely vested before such deposit. They were not intercepted by the way, or the order of purchase countermanded before the actual receipt of the goods. But Lord Kenyon, and the whole court of king's bench, did recognize the case of *Atkin v. Barwick* as sound law in *Salte v. Field* (5 T. R. 211). Speaking of the case under consideration, Lord Kenyon there said: "I cannot distinguish this case from *Atkin v. Barwick* on principle; for in that case there had been a delivery of the goods by the seller, with the concurrence of all the parties interested. But the agreement of the parties to rescind that contract put an end to the sale, as if it had never taken place." Ashurst, J., said: "The case in *Strange* applies to the present case." Boller, J., said: "The principle on which the case of *Atkin v. Barwick* was decided governs this." In *Smith v. Field* (5 T. R. 402) the same court again affirmed the case of *Atkin v. Barwick*, and recognized it as sound law. The case has also been questioned in our courts. In *Berly v. Taylor* (5 Hill, 581), Judge Bronson discusses it, and, after referring to the various cases, says of it, that, "although it seems never to have been overruled, it would be difficult to support it upon principle without altering some of the facts."

But this was in a dissenting opinion. And in the same case, Judge Cowen, who gave the opinion of the court, considers and discusses the case, and declares that it has never been overruled, adopts its reasoning, and affirms the principle upon which it was decided, as the same learned judge had done before in *Ash v. Putnam* (1 Hill, 310), where there was no dissent to the decision or opinion. Speaking then of the case of *Atkin v. Barwick*, he says: "There was either a resale or rescission, or a refusal by the vendee to accept. Call it which you please, the effect is the same. In one case, the property is revested in the vendors; in the other, it was never divested."

The difficulty in all the class of cases like the present has been to fix the point of time when the title of the vendor became revested. The right of rescission, or resale, is undoubted; but the question is, whether the rescission or resale is consummated before the assent of the vendor to such rescission or resale is actually given or expressed. The moment the minds of the vendor and vendee meet on the question, it is conceded, the contract is rescinded, or the property resold and the title revested. If the vendor was present at the same place with the vendee, delivery to him by the vendee in relinquishment of the contract of purchase would, of course, completely restore him to his original rights of property; but when the vendor and vendee live in different places, it has been claimed in many cases that the purpose of the vendee to restore the property was ineffectual, till the consent of the vendor to the rescission of the contract was given, and that, intermediate that period, the title remained in the vendee, and was subject to attachment or execution at the instance of his creditors. That is the precise question now presented in this case.

Upon the principles which apply to sales, it is abstractly true that no title can pass till the bargain is complete, and that a contract is not consummated till the minds of the parties meet; and, strictly, this sale must also apply to agreements for the rescission of a contract. It is only upon the doctrine of relation, in such cases, that the title can be held to pass at the time of the delivery of the goods to the third person. This doctrine is generally alleged to apply in cases of trust; and it is upon this ground that the title can be held to pass at the moment the trust is created, as with cases of assignments in trust. Lord Mansfield in *Alderson v. Temple* (4 Barr. 2239), puts the case of *Atkin v. Barwick* on the proper ground. He said: "The court of chancery would have interposed and said 'the assignees should not have the goods without paying the price.' I think the determination was right; and there was an actual delivery to a person who became a trustee."

The direction to hold in trust for the vendor, and to deliver to him, accompanied by a delivery to the warehouseman, as was done in this case, and that of *Atkin v. Barwick*, is a parol transfer or assignment of the property to the vendor, and

vests the property. The doctrine of relation in such case, Judge Cowen says, in *Bely v. Taylor* (supra) applies to a delivery of goods in trust. The delivery was held, he says, of *Atkin v. Barwick*, to vest the property of the goods in them (the vendors) immediately, subject to be divested by the dissent. This was on the ground that the trust was beneficial, and the presumption was allowed although the vendors at the time knew nothing of the transaction.

This, I think, presents the true ground upon which the plaintiff's claim may securely rest. The delivery of the oil to Kelly, with direction to deliver it to the plaintiff, was a delivery by Wing to the plaintiff, and vested the title in him, unless he expressly disaffirmed the trust in his favor. The trust was irrevocable by Wing. He parted with all claim in or title to the property. He did all in his power to restore the property to the vendor. He acted with an honesty which ought to be encouraged and commended, not overreached and nullified by any manner of technical rule at variance with equity and common justice.

But the plaintiff's title to this oil can be sustained upon the narrow ground mentioned by Lord Mansfield in *Harman v. Fishar* (1 Cowp. 125), and stated by Lord Kenyon in *Neate v. Ball* (2 East, 124), that the vendee "did not accept the goods." Wing, in this case, before the goods arrived in New York, refused to take them upon the purchase, provided for their storage with Kelly and delivery to the plaintiff, and immediately advised the plaintiff of the fact. Wing then had the goods under his personal control after they arrived at their place of destination. He restored them to the plaintiff in the only way practicable under the circumstances.

• I think the judgment below right, and that the same should be affirmed.

DENIO, J. The law of stoppage in transitu has no application to this case. The oil was delivered to the purchaser on board his own vessel; and, moreover, supposing it had ever been in the hands of a carrier, it had arrived at its destination, and had passed into the actual possession, or at least had come under the absolute control of the plaintiff; and it was in no sense on its passage to him.

If the judgment can be sustained, it must be either upon the ground of a rescission of the contract by the mutual consent of seller and purchaser, or of a conveyance and redelivery of the goods to him, or to a third person for his use, in payment of the debt contracted by their purchase, and by way of preference in favor of the plaintiff as a creditor; and I think it can be sustained on the first of these grounds. The statement of facts is not as precise as could be desired; for it is not stated in it whether the plaintiff's clerk had or had not such a control of the business of his principal as authorized him to act upon the communication of Wing; nor what determination he came to upon the receipt of Wing's letter; or what he said to Wing when he saw him on the

10th of July. If behind the general authority of a managing clerk, in the absence of his principal, and if he immediately elected to take back the goods in pursuance of the offer of Wing, and communicated that determination to Wing, and went about securing the actual possession without unnecessary delay, I think that would be a sufficient rescinding of the sale. As the letter of Wing did not mention the place where, or the person with whom, the oil was stored, the only thing which the clerk could do was that which, in effect, he did do, namely, to see Wing, and ascertain these necessary facts. This could not be brought about in time to send to New York until after the service of the attachment. But if the clerk, with sufficient authority, consented to receive back the oil, and communicated such determination to Wing on the 10th, when he went to Falmouth, I think the sale was rescinded; and although the attachment was levied on the same day, it does not appear that it was prior to the interview with Wing. The cases of *Salte v. Field* (5 T. R. 211) and *Smith v. Field* (Id. 402) are in point.

By the application of the rules by which we examine cases brought here upon statements of facts, I think we ought to intend that the circumstances which I have suggested as necessary to a perfect rescission existed in this case. It is incumbent on the party appealing, to show that the judgment is contrary to law; and it is not sufficient that the case is so imperfectly stated that the law applicable to it cannot be ascertained. If we applied to such cases the principles by which special verdicts are tested, scarcely a judgment which is brought before us could be sustained. In cases of special verdicts the inquiry is, whether facts enough are found to sustain the judgment. If not, it is reversed. But in such cases as the present, the question is, whether, upon the facts stated, we can adjudge that the judgment is contrary to law. Unless we come to

such a conclusion, the judgment must be an affirmance. The facts which are stated in this case are perfectly consistent with those which I have considered as essential to constitute a rescission of the sale. The clerk acted as though he had authority to accept the offer of Wing, contained in the letter; for he sent a message to New York to the plaintiff's correspondent to take possession of the oil as soon as he ascertained where it was stored. He acted throughout as though determined to accept the offered abandonment of the purchase. It is not found, in so many words, that he told Wing that he would take the property back; but it is stated that the object of his journey to Falmouth, where Wing was, was to ascertain where, that is, in what storehouse, or with what person, the oil was stored; and immediately on his return he dispatched the telegraphic message to New York to take the delivery of it for the plaintiff. The idea that the message to those correspondents was to make a seizure under the law of stoppage in transitu is not found in the case; and it is improbable, upon the facts which are found. It would be absurd to attempt to make a seizure under the law of stoppage in transitu when the goods had reached the purchaser's hands at the place of destination, and he had placed them in the hands of a third person for the use of the seller, and had given him notice to come and take them. The facts actually found being in harmony with the supposition that the clerk notified Wing that the plaintiff accepted his offer, it was the business of the defendant, if he would impeach the judgment, as being against law, to have procured a statement which should have affirmed the disputed fact to be such as he assumes it to be. For these reasons, and without examining the further questions alluded to, I am for the affirmance of the judgment of the supreme court.

All concur in the judgment.



SWANWICK et al. v. SOTHERN et al.

(9 Adol. & E. 895.)

Court of Queen's Bench. Hilary Term, 1839.

Trover for 1028 bushels of oats. Pleas, 1. Not guilty 2. That the oats were not the property of the plaintiffs in manner and form, &c. Issues thereon. On the trial before Patteson, J., at the Liverpool spring assizes, 1837, the material facts appeared to be as follows. The plaintiffs were corn dealers at Manchester; the defendants carried on the business of wharfingers at the Duke's Quay, in the same town. The oats in question, being in a warehouse of the defendants, were sold by Turner and Co., the owners, to John Marsden, and the following delivery order given, addressed to the warehouse keeper.

"Mr. Wm. Eaton, Duke's Quay, deliver Mr. John Marsden 1028 12-45 bushel oats, bin 40. O. W., and you will please weigh them over and charge us the expense. Oct. 3d, 1836. Joseph Turner and Co."

The warehouse keeper entered this order in his book; and on October 5th he received the following order from John Marsden.

"Mr. Wm. Eaton, Duke's Quay. Deliver Messrs. Swanwick and Hall 1028 12-45 bushel oats in bin 40. O. Warehouse; and let them be weighed over and send a note up; I will see it paid. Fr. and Jno. Marsden, Manchester, 5th Oct. 1836."

Swanwick and Hall, the plaintiffs, accepted a bill drawn by Marsden, October 7th, 1836, for the value of the oats, which was duly honoured. Eaton entered the order of October 5th in his book, and said to the party delivering it, that all would be right, and he would attend to the order. The oats were transferred to the plaintiffs in the defendants' books, but without weighing over. There were no oats in bin 40 but the quantity mentioned in the order. Eaton stated, at the trial, that from the 5th to the 12th of October the oats would have been delivered to the plaintiffs if required. Marsden becoming insolvent, Turner, on October 12th, gave the defendants notice not to part with the oats; and, on the 14th, the defendants gave them up to Turner on an indemnity. At that time, and not before, they were weighed over, and they were found to be two bushels short of the weight mentioned in the orders. It was proved at the trial that the defendants did not consider themselves bound to weigh, and were not used to weigh, till delivery, when the grain was weighed to ascertain any loss of quantity. The question was, whether, without weighing, the property was sufficiently transferred to vest in the plaintiffs; or whether, on October 14th, Turner still had a right to stop in transitu.

Patteson J., thought that, on the above state of facts, the plaintiffs were entitled to recover, but he gave leave to move for a nonsuit; and the plaintiffs had a verdict. In Easter term, 1837, a rule nisi was obtained for a nonsuit or a new trial. In Hilary term, 1839.

Cresswell and Tomlinson showed cause. Wightman and W. H. Watson, contra.

Lord DENMAN, C. J. The question in this case turns upon the construction of two delivery orders. [His lordship then read the orders set out, p. 321, ante.] The oats were all that were in bin 40. They were transferred to the plaintiffs in the defendants' books, but never weighed over. The plaintiffs had accepted a bill for the price, which they duly honoured. On Marsden's failure, Messieurs Turner sought to stop them; and the only question is, whether weighing over was in this case necessary, in order to vest the property in the plaintiffs and defeat the stoppage in transitu. Neither of the contracts of sale were given in evidence.

The cases on this subject establish the principle that, wherever any thing remains to be done by the seller, which is essential to the completion of the contract, a symbolical delivery by transfer in the wharfinger's books will not defeat the right of stoppage in transitu as between buyer and seller. *Hanson v. Meyer*, 6 East, 614; *Shepley v. Davis*, 5 Taunt. 617, (1 E. C. L. R. 211); *Busk v. Davis*, 2 M. & S. 397, abundantly show this. Therefore, if part of a bulk be sold, so that weighing or separation is necessary to determine the identity or individuality (as Lord Ellenborough expresses it in *Busk v. Davis*) of the article, or if the whole of a commodity be sold, but weighing is necessary to ascertain the price, because the quantity is unknown, the weighing or measuring must precede the delivery; and the symbolical delivery without such weighing will not be sufficient.

But where the identity of the goods and the quantity are known, the weighing can only be for the satisfaction of the buyer, as was held in *Hammond v. Anderson*, 1 New Rep. 63; and in such case the transfer in the books of the wharfinger is sufficient. We are of opinion that the present case is of the latter description, and that this property passed as between buyer and seller. We have therefore no occasion to resort to the doctrine of stoppage, which is strongly enforced in *Hawes v. Watson*, 2 B. & C. 540; but we do not mean, in so saying, to cast any doubt upon the authority of that case. Under these circumstances, the rule for a nonsuit must be discharged.

Rule discharged.

SWIM v. WILSON. (No. 12,634.)

(27 Pac. Rep. 33, 90 Cal. 126.)

Supreme Court of California. July 1, 1891.

In bank. Appeal from superior court, city and county of San Francisco; JONAS HUNT, Judge.

Wilson & Wilson, for appellant. Tilden & Tilden, for respondent.

DE HAVEN, J. The plaintiff was the owner of 100 shares of stock of a mining corporation, issued to one H. B. Parsons, trustee, and properly indorsed by him. This stock was stolen from plaintiff by an employe in his office, and delivered for sale to the defendant, who was engaged in the business of buying and selling stocks on commission. At the time of placing the stock in defendant's possession, the thief represented himself as its owner, and the defendant relying upon this representation, in good faith, and without any notice that the stock was stolen, sold the same in the usual course of business, and subsequently, still without any notice that the person for whom he had acted in making the sale was not the true owner, paid over to him the net proceeds of such sale. Thereafter the plaintiff brought this action to recover the value of said stock, alleging that the defendant had converted the same to his own use, and, the facts as above stated appearing, the court in which the action was tried gave judgment against defendant for such value, and from this judgment, and an order refusing him a new trial, the defendant appeals. It is clear that the defendant's principal did not by stealing plaintiff's property acquire any legal right to sell it, and it is equally clear that the defendant, acting for him and as his agent, did not have any greater right, and his act was therefore wholly unauthorized, and in law was a conversion of plaintiff's property. "It is no defense to an action of trover that the defendant acted as the agent of another. If the principal is a wrong-doer, the agent is a wrong-doer also. A person is guilty of a conversion who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title." *Kimball v. Billings*, 55 Me. 147; *Coles v. Clark*, 3 Cush. 399; *Koch v. Branch*, 44 Mo. 542. In *Stephen v. Elwell*, 4 Maule & S. 259, this principle was applied where an innocent clerk received goods from an agent of his employer, and forwarded them to such employer abroad; and, in rendering his decision on the case presented, Lord ELLENBOROUGH uses this language: "The only question is whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit, when he sent the goods to his master; but, nevertheless, his acts may amount to a conversion; for a person is guilty of conversion who intermeddles with my property, and disposes of it, and it is no answer that he acted under the authority of another, who had himself

no authority to dispose of it." To hold the defendant liable, under the circumstances disclosed here, may seem upon first impression to be a hardship upon him. But it is a matter of every-day experience that one cannot always be perfectly secure from loss in his dealings with others, and the defendant here is only in the position of a person who has trusted to the honesty of another, and has been deceived. He undertook to act as agent for one who it now appears was a thief, and, relying on his representations, added his principal to convert the plaintiff's property into money, and it is no greater hardship to require him to pay to the plaintiff its value than it would be to take the same away from the innocent vendee who purchased and paid for it. And yet it is universally held that the purchaser of stolen chattels, no matter how innocent or free from negligence in the matter, acquires no title to such property as against the owner, and this rule has been applied in this court to the case of an innocent purchaser of shares of stock. *Barnstow v. Mining Co.*, 64 Cal. 388, 1 Pac. Rep. 349; *Sherwood v. Mining Co.*, 50 Cal. 413.

The precise question involved here arose in the case of *Berch v. Marye*, 9 Nev. 312. In that case, as here, the defendant was a stockholder who had made a sale of stolen certificates of stock for a stranger, and paid him the proceeds. He was held liable, the court in the course of its opinion saying: "It is next objected that, as the defendant was the innocent agent of the person for whom he received the shares of stock, without knowledge of the felony, no judgment should have been rendered against him. It is well settled that agency is no defense to an action of trover, to which the present action is analogous." The same conclusion was reached in *Kimball v. Billings*, 55 Me. 147, the property sold in that case by the agent being stolen government bonds, payable to bearer. The court there said: "Nor is it any defense that the property sold was government bonds payable to bearer. The bona fide purchaser of a stolen bond payable to bearer might perhaps defend his title against even the true owner. But there is no rule of law that secures immunity to the agent of the thief in such cases, nor to the agent of one not a bona fide holder. * * * The rule of law protecting bona fide purchasers of lost or stolen notes and bonds payable to bearer has never been extended to persons not bona fide purchasers, nor to their agents." Indeed, we discover no difference in principle between the case at bar and that of *Rogers v. Hule*, 1 Cal. 571, in which case, BENNETT, J., speaking for the court, said: "An auctioneer who receives and sells stolen property is liable for the conversion to the same extent as any other merchant or individual. This is so both upon principle and authority. Upon principle, there is no reason why he should be exempted from liability. The person to whom he sells, and who has paid the amount of the purchase money, would be compelled to deliver the property to the true owner or pay him its full value; and there is no more hardship in requiring

the auctioneer to account for the value of the goods than there would be in compelling the right owner to lose them, or the purchaser from the auctioneer to pay for them." It is true that this same case afterwards came before the court, and it was held, in an opinion reported in 2 Cal. 571, that an auctioneer, who in the regular course of his business receives and sells stolen goods, and pays over the proceeds to the felon, without notice that the goods were stolen, is not liable to the true owner as for a conversion. This latter decision, however, cannot be sustained on principle, is opposed to the great weight of authority, and has been practically overruled in the later case of *Cerkel v. Waterman*, 63 Cal. 34. In that case the defendants, who were commission merchants, sold a quantity of wheat, supposing it to be the property of one Williams, and paid over to him the proceeds of the

sale before they knew of the claim of the plaintiff in that action. There was no fraud or bad faith, but the court held the defendants there liable for the conversion of the wheat. It was the duty of the defendant in this case to know for whom he acted, and, unless he was willing to take the chances of loss, he ought to have satisfied himself that his principal was able to save him harmless if in the matter of his agency he incurred a personal liability by the conversion of property not belonging to such principal. Judgment and order affirmed.

GAROUTTE, McFARLAND, and SHARPSTEIN, J.J., concurred.

BEATTY, C. J., and PATERSON, J., dissented.

Rehearing denied.

TALCOTT v. HENDERSON.

(31 Ohio St. 162.)

Supreme Court of Ohio. Dec. Term, 1877.

Motion for leave to file a petition in error to the district court of Cuyahoga county. The original action was brought in the court of common pleas of Cuyahoga county by James Talcott against John M. Henderson, assignee of De Forrest & Son, to recover the possession of certain goods. The issue in the case was in relation to the ownership of the goods, which the court found to be in the defendant. On petition in error the district court affirmed the judgment of the common pleas. The real question in the case is whether there was fraud in the purchase of the goods in controversy from the plaintiff by the defendant's assignors, De Forrest & Son. The following facts were proved: About the middle of June, 1873, an agent of the plaintiff (who was a merchant in the city of New York) solicited an order for goods suitable for the fall trade from De Forrest & Son, in Cleveland. An order was given for the goods in dispute to be shipped on or before the 1st of September following, to be paid for at four months from that date. De Forrest & Son had knowledge at the time of their insolvency, but the plaintiff was ignorant of it. No information was sought or given as to the responsibility of the purchasers. On the 23d of July, shortly after the goods had been received, De Forrest & Son assigned to the defendant, for the benefit of their creditors, all their property, and the goods in question, with other goods, were delivered to the assignee. The stock of goods in the store delivered to the assignee was appraised at \$88,000. De Forrest showed that the condition of De Forrest & Son had not materially changed for 18 months previous to the assignment. Their principal creditors were H. B. Claflin & Co., of New York, who had extended to them during that period a line of credit to the amount of \$200,000, under an arrangement that it would be continued as long as Claflin & Co. could use the paper of De Forrest & Son. Mr. De Forrest further testified that, at the time of purchasing the goods in controversy, "my purpose was to comply with the terms of the purchase we made to pay for them." "I had no reason at that time to think that we would not be able to do so. I knew, and had known for the last year, if Claflin & Co. did not continue the arrangement, we could not continue to buy; felt we were carried by a strong party, and I was in hopes to see the trade improve. I should think we were selling at the rate of half a million a year,—\$15,000 per month." Without previous notice, Claflin & Co., on the 21st of July, 1873, refused to extend the arrangement with De Forrest & Son any longer; and, on the 23d of the month, the general assignment was executed as above stated.

Hutchins & Campbell, for the motion.
Henderson & Klein, contra.

McILVAINE, J. The contention of the plaintiff in error is, that the failure of De Forrest & Son, at the time of making the purchase, to disclose the fact that their liabilities were largely in excess of the value of their assets, was, in law, such a fraud upon the plaintiff as warranted him in avoiding the contract, and reclaiming the goods.

An intention on the part of the purchaser of goods not to pay for them, existing at the time of purchase, and concealed from the vendor, is, unquestionably, such a fraud as will vitiate the contract. But it is as certainly true, on the other hand, that, where no such fraudulent intent exists, the mere fact that the purchaser has knowledge that his debts exceed his assets, though the fact be unknown and undisclosed to the vendor, will not vitiate the purchase.

Whether, therefore, a contract of purchase, where the purchaser fails to disclose his known insolvency, is fraudulent or not, depends on the intention of the purchaser; and whether that intention was to pay or not to pay, is a question of fact, and not a question of law.

In the resolution of this question, though it be one of fact, it is true, however, that certain presumptions arise which are entitled to consideration and force. Thus, while it may be said that fraud must be proved, and will not be presumed, there is a presumption that every reasonable person anticipates and intends the ordinary and probable consequences of known causes and conditions. Hence, if a purchaser of goods has knowledge of his own insolvency, and of his inability to pay for them, his intention not to pay should be presumed. I would go a step farther, and hold that an insolvent purchaser, without reasonable expectations of ability to pay, should be presumed to intend not to pay. Indeed, I would not deny that an intention not to pay might be inferred from the mere fact that the purchaser had undisclosed knowledge of his gross insolvency; but, in such case, the inference may be rebutted by other facts and circumstances.

It is claimed that, in good morals, a purchaser, knowing himself to be insolvent, should not accept credit from one ignorant of the fact. Whether this proposition be true or not, it is enough to say that the law, in its practical morality, does not afford a remedy for the violation of every moral duty. While, therefore, a purchase of goods by an insolvent vendee, who conceals his insolvency, with intent to injure the vendor, is fraudulent and voidable, yet a purchase under like circumstances, save only that such intent is absent, is not, in law, fraudulent.

If the rule of law be not as stated, and the intent to injure be not of the essence of the fraud in such case, then it would be wholly immaterial whether the insolvency of the purchaser was known to himself; and the rule would be that all sales to an insolvent purchaser, where the insolvency is unknown to the vendor, are fraudulent and voidable. For such a rule, no one would contend. All would admit that knowledge by the purchaser of his own

insolvency is necessary to establish the fraud. But such knowledge, of itself, is entirely innocent. It is only where connected with the concealment of the fact, that fraud is shown. The simple failure to disclose a fact, however, is not equivalent to its concealment. The latter implies a purpose—a design; the former does not. If, then, such knowledge on the part of the purchaser be necessary to make out a fraud, it is because it becomes the predicate of an intent—an intent to injure.

True, the decisions of different courts upon this question are not uniform. The discrepancies, however, are not so much on the point whether a fraudulent intent on the part of the purchaser is necessary to avoid the purchase, as to the question of conclusiveness, under the circumstances of each case, of the inference of fraudulent intent, from the facts that the purchaser had knowledge of his insolvency, and failed to disclose it to the vendor. There is no well-considered case, so far as I have examined the authorities, which holds that fraud is conclusively presumed from these facts alone. Where, in addition, it is shown that the appearance and circumstances of the purchaser indicate solvency and wealth, there are cases which hold the inference of fraudulent intent to be conclusive. Of course, we admit that if the appearance of solvency be assumed for the purpose of deceiving, as in *Ford v. Atwater*, 1 Root, 58, the existence of fraud is actually shown; but, we think that where such appearance is entirely innocent, the question of the existence of fraud is still open to further inquiry.

From these views, how stands the case before us? At the date of the contract, De Forrest & Son were largely insolvent. They had knowledge of the fact, and did not disclose it to the plaintiff, who was ignorant of it. They were also in possession of a large stock of merchandise, and were doing an extensive business. From these facts, it might well be inferred

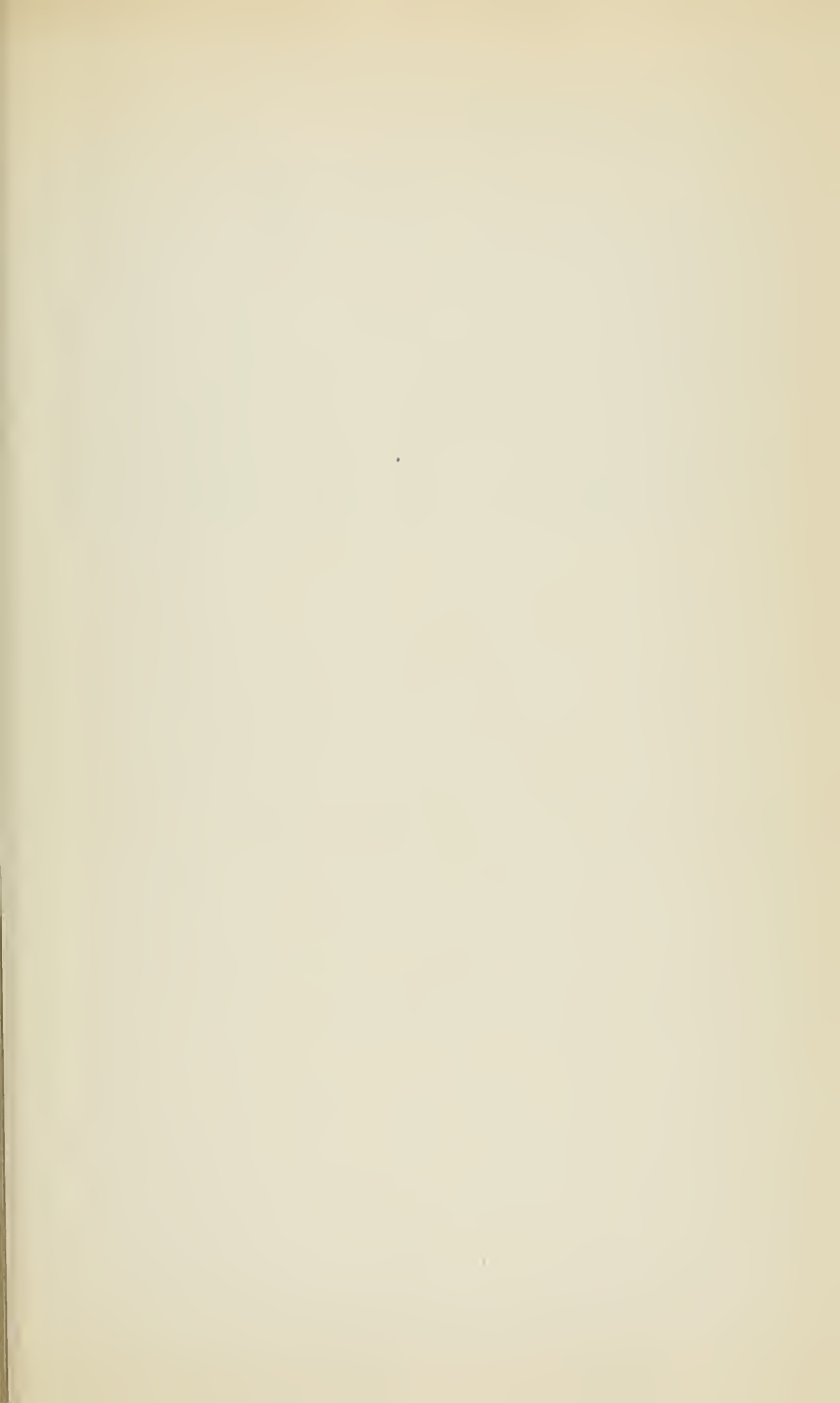
that they intended to obtain the plaintiff's goods without paying for them; at least, that they had no reasonable expectation of being able to pay for them at the maturity of their promise. If the court below had so found, we would not disturb the finding; and, for aught that appears, the court would have so found, if no other fact had appeared in the case.

But there was other testimony, tending to prove that De Forrest & Son did, in fact, intend to pay for the goods, according to the terms of their agreement, and that, under all the circumstances, they might reasonably have expected to be able to do so. It is quite sure that they could not reasonably have expected to be able, at that time, to pay all their indebtedness; but, in our opinion it was not essential to the good faith of the transaction, that there should have been reasonable grounds for the latter expectation; it was enough, if they reasonably expected to be able to pay for the goods in question at maturity.

It is quite clear, from the evidence, that the appearances of wealth which surrounded the purchasers were entirely innocent. It may be that the plaintiff was misled by these appearances; but, upon this ground, he can not complain of fraud. Where an insolvent merchant is engaged in an honest effort to retrieve his fortunes, the appearance of wealth indicated by his stock in trade is not equivalent to a representation of solvency; and one who gives him credit, without inquiry, has no right to complain of fraud.

It was the duty of the court of common pleas, discharging the functions of a jury, to weigh all the testimony; and having done so, and found that there was no intent to defraud in the transaction, we, as a reviewing court, can not say that the district court erred in not finding that the judgment of the common pleas was manifestly against the evidence.

Motion overruled.





TALVER et al. v. WEST.

(Holt, 173.)

Nisi Prius, Common Pleas. Hilary Term, 1816.

This was an action to recover the price of some trefoil sold by plaintiffs to defendant; the invoice delivered to the defendant was as follows: "Bought of Talver and Prestwich the half quantity of four hundred sacks of trefoil, to be made up to twenty-seven tons, at £10 per ton." On the other side credit was given for some hops sold by the defendant to the plaintiffs, and a balance stated to be due to them of £208. The hops were taken in part payment of the trefoil, which remained in the plaintiffs' warehouse; no sample or delivery was made of any part and no money was paid; but the invoice had been delivered to the defendant, who read it at the time of the sale. Some months after, the defendant came to the warehouse and asked for his seed; it was at that time set apart for him in the store, but it had no particular mark to denote to whom it belonged. Defendant took samples of it, and inquired if it had not

been thrown down and mixed; he finally refused it.

Best, Serjeant, and Comyn, for plaintiffs. Vaughan and Copey, Serjeants, for defendant.

GIBBS, C. J. If the trefoil were sold to be paid for in part by the delivery of the hops, the plaintiffs should have declared specially, and not for goods sold and delivered; but I consider this case not within the statute. The delivery of a sample, which is no part of the commodity, will not take the case out of the statute; but if the sample delivered is to be considered as part of the thing sold, it then binds the contract. It is then an execution of the bargain. The sale in this case was complete when the invoice was delivered, and the defendant afterwards took samples. He took them for his own use; they were delivered to him as part of the bulk; not as an ordinary sample to guide his judgment previous to a purchase, but in order to give him possession of the thing itself. The statute therefore does not apply.

Verdict for plaintiff.



TARLING v. BAXTER.

(6 Barn. & C. 360.)

Court of King's Bench. Hilary Term, 1827.

Assumpsit to recover back £145 paid by the plaintiff to the defendant's use. The declaration contained counts for money had and received, and the other common counts. Plea, general issue, with a notice of set-off for goods sold and delivered and bargained and sold. At the trial before Abbott C. J., at the London sittings after Hilary term, 1826, a verdict was found for the plaintiff for £145, subject to the opinion of this court on the following case.

On the 4th of January 1825, the plaintiff bought of the defendant a stack of hay belonging to the defendant, and then standing in a field belonging to the defendant's brother. The note signed by the defendant, and delivered to the plaintiff, was in these words: "I have this day agreed to sell James Tarling a stack of hay, standing in Canonbury Field, Islington, at the sum of one hundred and forty-five pounds, the same to be paid on the 4th day of February next, and to be allowed to stand on the premises until the first day of May next." And the following note was signed by the plaintiff, and delivered to the defendant. "I have this day agreed to buy of Mr. John Baxter, a stack of hay, standing in Canonbury Field, Islington, at the sum of £145, the same to be paid on the 4th day of February next, and to be allowed to stand on the premises until the first day of May next, the same hay not to be cut until paid for. January 4th, 1825." At the meeting at which the notes were signed, but after the signature thereof, the defendant said to the plaintiff, "You will particularly oblige me by giving me a bill for the amount of the hay." The plaintiff rather objected. The defendant's brother, S. Baxter, on the 8th of the same month of January, took a bill of exchange for £145 to the plaintiff, drawn upon him by the defendant, dated the 4th of January 1825, payable one month after date, which the plaintiff accepted. The defendant afterwards indorsed it to George Baxter, and the plaintiff paid it to one Taylor, the holder, when it became due. The stack of hay remained on the same field entire until the 20th of January 1825, when it was accidentally wholly consumed by fire, without any fault or neglect of either party.

A few days after the fire, the plaintiff applied to the defendant to know what he meant to do when the bill became due; the defendant said, "I have paid it away, and you must take it up to be sure: I have nothing to do with it, why did you not remove the hay." The plaintiff said, "he could not, because there was a memorandum that it should not be removed until the bill was paid; would you have suffered it to be removed?" and the defendant said, "certainly not." The defendant's set-off was for the price of the hay agreed to be sold as aforesaid. The question for the opinion of the court was, whether the plaintiff under the circum-

stances was entitled to recover the sum of £145 or any part thereof.

Chitty, for plaintiff.

BAYLEY J.—It is quite clear that the loss must fall upon him in whom the property was vested at the time when it was destroyed by fire. And the question is, in whom the property in this hay was vested at that time? By the note of the contract delivered to the plaintiff, the defendant agreed to sell the plaintiff a stack of hay standing in Canonbury Field at the sum of £145, the same to be paid for on the 4th day of February next, and to be allowed to stand on the premises until the first day of May next. Now this was a contract for an immediate, not a prospective sale. Then the question is, in whom did the property vest by virtue of this contract? The right of property and the right of possession are distinct from each other; the right of possession may be in one person, the right of property in another. A vendor may have a qualified right to retain the goods unless payment is duly made, and yet the property in these goods may be in the vendee. The fact in this case, that the hay was not to be paid for until a future period, and that it was not to be cut until it was paid for, makes no difference, provided it was the intention of the parties that the vendee should, by the contract, immediately acquire a right of property in the goods, and the vendor a right of property in the price. The rule of law is, that where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of the property follow, one of which is, that if it be destroyed, the loss falls upon the vendee. The note of the buyer imports also an immediate, perfect, absolute agreement of sale. It seems to me that the true construction of the contract is, that the parties intended an immediate sale, and if that be so, the property vested in the vendee, and the loss must fall upon him. The rule for entering a nonsuit, must therefore be made absolute.

HOLROYD J.—I think that in this case there was an immediate sale of the hay, accompanied with a stipulation on the part of the vendee, that he would not cut it till a given period. Now in the case of a sale of goods, if nothing remains to be done on the part of the seller, as between him and the buyer, before the thing purchased is to be delivered, the property in the goods immediately passes to the buyer, and that in the price to the seller; but if any act remains to be done on the part of the seller, then the property does not pass until that act has been done. I am of opinion, therefore, in this case, not only that the property immediately passed to the buyer by the contract, but that the seller thereby immediately acquired a right in the price stipulated to be paid for the goods, although that was not to be paid until a future day. The

property having passed to the vendee, and having been accidentally destroyed before the day of payment, the loss must fall upon him.

LITTLEDALE J.—The parties on the 4th of January stipulated for the sale and purchase of a stack of hay, to be paid for in a month.—Thus the case would have stood but for the note of the contract delivered to the buyer, and in that there was

a stipulation, that the purchaser would not cut until the money was paid, but the property in the hay had already passed by the contract of sale to the purchaser, and the latter afterwards merely waived his right to the immediate possession. Then the property having passed to the buyer, the loss must fall upon him, and consequently, this rule for entering a nonsuit must be made absolute.

Rule absolute.



TERRY v. WHEELER.

(25 N. Y. 520.)

Court of Appeals of New York. June Term,
1862.

Action to recover the price of a quantity of lumber purchased by plaintiff's assignor. On the trial it appeared, that on the 24th of August, 1854, the defendant sold to one Elmore, a quantity of lumber, at the price, and upon the terms set forth in the following bill of sale:

"Troy, N. Y., August 24, 1854. Mr. Lewis Elmore, Bought of E. B. Wheeler. (Terms —Three months from date of sale.)

4,160 feet clear pine,	\$34.....	\$141 44
4,779 " 4 " 24.....		114 69
7,319 " box " 20.....		146 38
1/2 Inspection.....		2 03
600 pieces boards, 17c.....		102 00
		<hr/> \$506 54

Cr.

By deduction for cash.....	\$ 5 00
Aug. 25. By cash.....	250 00
Your note due Nov. 23....	251 54
	<hr/> \$506 54

"Rec'd payment as above, E. B. Wheeler, Per Wm. A. Craig. To be delivered to the cars free of charge. E. B. Wheeler, Craig."

The memorandum "To be delivered," etc., was made after the completion of the sale.

Before its delivery as agreed upon, and within a short time after and on the day of sale, the lumber was, without fault on defendant's part, accidentally consumed by fire.

The trial court held that there was no conflict in the evidence as to the delivery; though requested to pass upon the credibility of the witnesses declined so to do.

Defendant's counsel excepted to the finding of fact, conclusions of law, and to the refusal of the court to pass upon the credibility of the witnesses.

Plaintiff had judgment, the general term affirmed the same, and defendant appealed.

William A. Beach, for appellant. William L. Learned, for respondent.

SELDEN, J. There may be some doubt whether the parol evidence in regard to the agreement to deliver the lumber was admissible, but if it were necessary to decide that question, I should regard it as admissible, on the ground that what is called the bill of sale was, in substance, a mere receipt for the purchase-money, and did not purport to be a contract. (*Dunn v. Hewitt*, 2 Den. 637; *Blood v. Harrington*, 8 Pick. 552; *Filkins v. Whyland*, 24 N. Y. 338.) If the lumber had not been paid for, and the instrument, omitting the receipt, had been signed by the defendant and delivered, as a note or memorandum of the sale, it would then have been the evidence of a contract, executory on one part at least, and not open to explanation by parol. But looking at the whole instrument, I think it is to be regarded as a receipt, and not a contract, within the cases above cited. Of course, in this view, the memorandum at the foot of the bill is not regarded as a part of it; if it were, its character would be changed from

a receipt to an executory contract, conclusive upon the parties, except so far as it was still a receipt. (*Egleston v. Kalkrebacker*, 6 Barb. 458.)

The point which is made upon the contradictory character of the evidence in relation to the contract to deliver the lumber on the cars, and its sufficiency to establish such contract, presents only a question of fact which this court cannot review. Where the finding of a court or referee upon a question of fact is ambiguous, the evidence may be referred to for the purpose of removing the ambiguity, but not to reverse or modify a distinct finding, or to establish an independent fact not found. (*Hoyt v. Thompson's Ex'r.*, 19 N. Y. 210; *Curman v. Pultz*, 21 id. 550; *Grant v. Morse*, 22 id. 324; *Sanford v. Railroad Co.*, 23 id. 344.) We can no more review the decision of the court, that the testimony was not conflicting, than we can the conclusion that it was sufficient; and we can do neither without making a precedent which would open to review here the details of the evidence in all cases.

But in the view which I take of the remaining question, it becomes immaterial whether there was a contract to deliver at the cars or not. The lumber had not been actually delivered, but remained in the possession of the vendor. In the absence of any express contract to deliver, there was an implied one to deliver at the yard of the vendor, when called for. In either case the lumber did not remain at the risk of the vendor, if the title did not remain in him. The risk attends upon the title, not upon the possession where there is no special agreement upon the subject. (*Tarling v. Baxter*, 6 Barn. & Cress. 360; *Willis v. Willis*, 6 Dana, 49; *Hinde v. Whitehouse*, 7 East, 558; *Joyce v. Adams*, 8 N. Y. 296; 2 Kent Com. 492, 496; *Noy's Maxims*, 88.) I entertain no doubt that upon the facts found in this case, the title was in the vendee. The lumber was selected by both parties and designated as the lumber sold to Elmore, except the six hundred pieces which were selected by the parties, and the precise pieces sold designated with as much precision as if the purchaser had marked every piece with his name; that which was sold by measurement was inspected and measured, and the quantity ascertained; the price for the whole was agreed upon and paid and a bill of parcels receipted and delivered to the purchaser. These facts, I think, vested the title in the purchaser, notwithstanding the agreement of the seller to deliver the lumber free of charge, at the cars. "The sale of a specific chattel passes the property therein to the vendee without delivery." (*Chitty Contr.* [5th Am. ed.] 332.) "It is a general rule of the common law that a mere contract for the sale of goods, where nothing remains to be done by the seller before making delivery, transfers the right of property, although the price has not been paid, nor the thing sold delivered to the purchaser." (*Olyphant v. Tinker*, 5 Den. 382.) The authorities are numerous, where the expression is used that if any thing remains to be done by the seller, the title does not pass; but the cases which

are referred to to sustain that position, only go the length of showing that where something is to be done by the seller to ascertain the identity, quantity or quality of the article sold, or to put it in the condition which the terms of the contract require, the title does not pass. (2 Kent Com. 496; Hanson v. Meyer, 6 East, 614; Simmons v. Swift, 5 Barn. & Cress, 857; Joyce v. Adams, 8 N. Y. 291; Field v. Moore, Lalor's Sup. 418.) The list of cases to this effect might be indefinitely increased; but no case has been referred to by counsel, nor have I discovered any, in which, where the article sold was perfectly identified and paid for, it was held that a stipulation of the seller to deliver at a particular place prevented the title from passing. If the payment was to be made on or after delivery, at a particular place, it might fairly be inferred that the contract was excentory, until such delivery; but where the sale appears to be absolute, the identity of the thing fixed, and the price for it paid, I see no room for an inference that the property remains the seller's merely because he has engaged to transport it to a given point. I think in such cases the property passes at the time

of the contract, and that, in carrying it, the seller acts as bailee, and not as owner. The questions which arise in such cases, as to sales, are questions of intention, such as arise in all other cases of the interpretation of contracts; and when the facts are ascertained, either by the written agreement of the parties or by the findings of a court, as they are here, they are questions of law. That the parties to the contract in this case intended to pass the title to the lumber immediately, appears very clear; nor do I suppose that any one would question it, were it not for the apparent hardship of the case to the purchaser. If the property, instead of being lumber, had been sheep or cows, capable of increase (which follows the ownership), and there had been a sudden, and large increase to the flock or drove, before they could be delivered at the point agreed upon, I think no one would have said that the defendant could have discharged his obligation to deliver, and yet retained the increase. Such, however, must be the conclusion, if the plaintiff's position is maintained. The judgment should be reversed, and a new trial granted.

All concur.

THOMPSON v. GARDINER.

(1 C. P. Div. 777.)

Common Pleas Division. June 28, 1876.

Action for not accepting butter pursuant to contract.

The cause was tried before Brett, J., at the last spring assize at Liverpool. The contract was made by one Price acting as broker for the seller, and he delivered notes to both buyer and seller, signing the note which he sent to the seller, but not that which he sent to the buyer. He, however, entered the contract in his book, in which he signed both the bought and the sold-note. The defendant kept the bought-note without complaint or remonstrance for two or three weeks; and, when called upon to accept the butter, he repudiated the contract, not on the ground that he had not entered into it, but on the ground that it was unsigned, writing to the broker "You did not sign it."

It was objected, on the part of the defendant, that there was no sufficient memorandum of the contract within the statute of frauds.

The learned judge ruled otherwise, observing that, after receiving and keeping the bought-note, the defendant could not allege that Price was not an agent to make a memorandum; and he directed judgment to be entered for the plaintiff, but gave the defendant leave to move to enter judgment for him, if the court should be of opinion that there was no sufficient memorandum within the statute.

Gully moved for judgment accordingly. T. H. James shewed cause.

The judgment of the court (BRETT, GROVE, and ARCHIBALD, JJ.,) was delivered by

BRETT, J. This was an action for not accepting butter pursuant to contract. It was tried before me, and I directed judgment to be entered for the plaintiff. A motion has been made to enter judgment for the defendant in pursuance of leave reserved by me for that purpose, on the ground that there was no evidence of any memorandum of the contract within the statute of frauds. The facts were these:—The contract was made with a person who must be taken to be a broker, and who was acting for the seller only, and not for the buyer. The defendant agreed upon the terms of sale with the broker. These terms were not disputed. If there was a sufficient memorandum in writing signed by or on behalf of the party to be charged, the defendant had unjustifiably refused to accept the butter. The broker sent a note of the contract to the buyer and also to the seller. He signed the note which was sent to the seller, but he did not sign that which he sent to the buyer. He, however, entered in his broker's book both the bought and the sold-note, and signed them both. The butter was tendered to the defendant some time after the note was sent to him, he having kept the

latter until then without complaint or remonstrance. The reason he assigned for his refusal was, not that he had not entered into the contract, but that the note sent to him was not signed. I decline to enter into the terms of the two notes, as to which was the bought and which was the sold-note. The real question upon the notes on this point always turns on the person to whom the note is sent. If the broker is authorized by the buyer to make a contract, the note sent by him to the seller is the note which is intended to be the bargain, and vice versa. The note which was to bind the defendant here, was the sold-note. We are not driven to rely on the notes in the broker's book, because the note delivered to the plaintiff (if the broker had authority to sign the memorandum) binds him. The authorities are conclusive to show that the broker acting for one of the contracting parties, making a contract for the other, is not authorized by both to bind both. But the broker who makes a contract for one may be authorized by that person to make and sign a memorandum of the contract. That has frequently been held. The question here is whether there was any evidence that the broker was so authorized. The evidence was, that a note of the bargain was sent to the buyer; and that his only objection was, not that the broker who sent it had no authority to send it, or that no such contract was made, but that the memorandum sent to him was not signed. That was ample evidence for the jury that the defendant recognized the authority of the broker to sign for him. Luckily, however, the broker did sign the note which was to bind the defendant, that is, the sold-note. Then, this further fact remains, that the broker kept a book in which both bought and sold-notes were entered and signed by him. I therefore think that, even if the signature to the note sent to the seller was not sufficient to bind the buyer, the signature in the broker's book was enough to satisfy the statute. The broker being a broker authorized to make a memorandum of the contract on the defendant's behalf, the entry in his book was sufficient evidence of a memorandum of the bargain signed by a duly authorized agent within the meaning of the statute of frauds to bind the defendant.

My Brother Grove has doubts, and wishes me to say that, in his judgment, the fact of the defendant keeping the note sent to him without objection was not sufficient to show an authority in the broker to bind him. But he thinks that, inasmuch as when the defendant made the objection he confined it to saying "You did not sign it," he thereby admitted the agency of the broker to make the contract on his behalf. He therefore agrees with me that judgment was rightly entered for the plaintiff.

My Brother Archibald authorizes me to say that he concurs in the above judgment, and in the reasons I have given.

Judgment for the plaintiff.



THOMPSON v. WEDGE.

(7 N. W. Rep. 560, 50 Wis. 642.)

Supreme Court of Wisconsin. Dec. 17, 1880.

Appeal from Dodge county court.

Replevin for a cow and calf. The plaintiff sold a quantity of property at public auction. The defendant bid off the cow and calf at such sale for \$37. The terms of sale were cash for all purchases not exceeding five dollars, and approved paper for those exceeding that sum. After the sale the defendant informed the plaintiff that he had not sufficient money with him to pay for the property, and requested permission to take it away. The plaintiff gave such permission on defendant's promise to pay a few days later, when the plaintiff should go to Waupun, a few miles distant, where the defendant resided. Nothing was said by the parties concerning security, but the plaintiff delivered the property to defendant without further stipulation or condition. The defendant failed to pay for the property when the plaintiff called on him at his residence, three days after the sale, and afterwards refused to deliver it to the plaintiff when the latter made demand therefor. The cause was tried by the court. The county judge held, on the above facts, that the title to the property passed to the defendant by such delivery, and gave judgment for a return of the property to him, or for its value in case a return cannot be had. The plaintiff appealed from the judgment.

Eli Hooker, (C. E. Hooker, of counsel,) for appellant. H. W. Frost, for respondent.

LYON, J. The plaintiff delivered the property in controversy to the defendant unconditionally, and gave him credit for the price. He waived the security required by the terms of the auction sale by making the delivery without requiring it. He did not expressly reserve to himself the title to the property until the purchase money should be paid, and there is nothing in the evidence tending to raise a presumption that he intended to do so. Neither is there any ground for claiming that the defendant obtained delivery of the property by fraud. Thus we have here the simple case of a sale of property on credit, and an absolute delivery thereof to the purchaser. Such sale and delivery passes the title, and it is not divested merely because the purchaser fails to pay for the property at the stipulated time. If authorities are required to propositions so plain and well established, the cases cited in the brief of counsel for defendant, and many of those cited by counsel for plaintiff, abundantly sustain the doctrine. To these may be added the late case in this court of *The Singer Mann'g Co. v. Sammons*, 49 Wis. 316, 5 N. W. Rep. 788. That was a stronger case for the plaintiff than this, yet we held that the title passed. None of the cases in this court, cited to show that the title to the property here in controversy remained in the plaintiff, meet the conditions of this case, for in none of them was credit given for the price, and an unqualified delivery of the property made to the purchaser.

We think the ruling of the learned county judge, that the title to the cow and calf passed to the defendant by the delivery, was correct. We must, therefore, affirm the judgment.

TOWNE v. COLLINS.

(14 Mass. 500.)

Superior Court of Massachusetts. Essex. Nov.
Term, 1785.

This was an action of trover for oxen. One Hutchins stole the cattle from the plaintiff and sold them to Collins, who was not privy to the theft, nor had any knowledge of their being the property of the plaintiff. Hutchins was afterwards convicted of the theft, and sentenced, at the instance of the attorney general, to pay threefold damages to the plaintiff, according to the statute. Towne had no other

agency in the prosecution, than procuring the arrest of the thief upon a warrant, and attending at the trial as a witness, upon being summoned.

The question referred to the court was, whether the conviction and sentence were a bar to the plaintiff's recovering in this action.

PER CURIAM, viz. CUSHING C. J. SARGEANT, DANA and SUMNER, justices. There being no market overt here, and actual satisfaction of the threefold damages not having been made to the plaintiff; the conviction and sentence can be no bar to this action of trover.

TUFTS v. GRIFFIN.

(12 S. E. Rep. 65, 107 N. C. 47.)

Supreme Court of North Carolina. Oct. 27, 1890.

Appeal from superior court, Bertie county; WOMACK, Judge.

Action by James W. Tufts against J. S. Griffin on a note given by defendant for part of a purchase price of a soda fountain purchased by him of plaintiff. By the contract of sale the title to the property sold was not to pass until the entire price was paid. The property was destroyed before the note matured. Judgment for plaintiff, and defendant appeals.

D. C. Winston, for plaintiff. W. L. Williams, for defendant.

SHEPHERD, J. This is a case of the first impression in this state. We have here an absolute promise of the defendant to pay the plaintiff a certain sum, it being the balance of the purchase money due the plaintiff upon the sale of a soda apparatus to the defendant. The sale was a conditional one, (see *Clayton v. Hester*, 80 N. C. 275; *Frick v. Hilliard*, 95 N. C. 117; and the cases cited,) and, under the contract, the defendant took the apparatus into his possession, and used it in all respects as his own. Without any negligence on the part of the defendant and before any default in the payment of the purchase money, the property was destroyed by fire. The question is, who shall bear the loss? The defendant insists that it should fall upon the plaintiff because the transaction amounted to nothing more than an executory agreement to sell, and that, inasmuch as the plaintiff cannot now perform the contract, the defendant should not be compelled to pay. It is very true that such contracts are sometimes called "executory," (as in the case of *Ellison v. Jones*, 4 Ired. 48,) and the vendee is also termed a "bailee," (*Perry v. Young*, 105 N. C. 466, 11 S. E. Rep. 511,) but it must be observed that these expressions are used in reference to the strict, legal title to the property, and they can therefore have no influence in the determination of the present question, which is purely one of considerations for an absolute promise to pay. The recent decision in *Burnley v. Tufts*, 66 Miss. 49, 5 South. Rep. 627, is directly in point. There, it seems that this same plaintiff sold a soda apparatus under a contract precisely similar to this, and the property was destroyed, as in this case, after some of the notes had been paid, and before the maturity of the others. The court decided that the plaintiff was entitled to recover the amount due upon the remaining notes. As we entirely concur in the reasoning upon which the decision is based, we will reproduce a part of the language of the opinion. The court says: "Burnley un-

conditionally and absolutely promised to pay a certain sum for the property, the possession of which he received from Tufts. The fact that the property has been destroyed while in his custody, and before the time for the payment of the note last due, on payment of which only his right to the legal title of the property would have accrued, does not relieve him of payment of the price agreed on. He got exactly what he contracted for,—viz., the possession of the property, and the right to acquire an absolute title by payment of the agreed price. The transaction was something more than an executory conditional sale. The seller had done all he was to do except to receive the purchase price. The purchaser had received all that he was to receive as the consideration of his promises to pay. The inquiry is not whether, if he had foreseen the contingency which has occurred, he would have provided against it, nor whether he might have made a more prudent contract; but it is whether by the contract he has made his promise absolute or conditional. The contract was a lawful one, and, as we have said, imposed upon the buyer an absolute obligation to pay. To relieve him from this obligation, the court must make a new agreement for the parties, instead of enforcing the one made, which it cannot do." As is said in the foregoing extract, the vendor has done all that he was required to do, and the transaction amounted to "a conditional sale to be defeated upon the non-performance of the conditions." * * * The vendee had an interest in the property which he could convey, and which was attachable by his creditors, and which could be ripened into an absolute title by the performance of the conditions." 1 Whart. Cont. § 617. The vendee had the actual, legal, and rightful possession with a right of property upon the payment of the money. *Vincent v. Cornell*, 13 Pick. 296. The vendor could not have interfered with this possession "until a failure to perform the conditions." *Newhall v. Kingsbury*, 131 Mass. 445. Having acquired these rights, under the contracts, and the property having been subjected to the risks incident to the exercise of the exclusive right of possession, it would seem against natural justice to say that there was no consideration for the promise, and that the loss should fall upon the plaintiff. The case of *Swallow v. Emery*, 111 Mass. 356, cited by the defendant, may, perhaps, be distinguished from ours, because it was agreed that, upon the payment of the price, the vendor was to execute a bill of sale to the vendee. However this may be, we think that the principles enunciated in *Burnley v. Tufts*, supra, are better sustained, both by reason and authority, and we therefore affirm the judgment of the court below. No error.

TUFTS v. SYLVESTER.

(9 Atl. Rep. 357, 79 Me. 213.)

Supreme Judicial Court of Maine. March 1, 1887.

On report from supreme judicial court, Franklin county.

Trover by the vendor of merchandise against the messenger of the insolvent vendee. The opinion states the facts.

S. Clifford Belcher, for plaintiff. H. L. Whitecomb, for defendant.

PETERS, C. J. The plaintiff sold a bill of goods to be shipped at Boston to the buyer at Farmington, in this state. The buyer, becoming insolvent after the purchase, countermanded the order, but not in season to stop the goods. Before the goods came, he had gone into insolvency, and a messenger had taken possession of his property. An express company bringing the goods tendered them to the buyer, who refused to receive them, but the messenger accepted the goods from the carrier, paying his charges thereon. After this, but before an assignee was appointed, the seller made a demand upon both the carrier and the messenger, attempting to reclaim his goods. The question, upon these facts, is whether the goods were seasonably stopped in transitu to preserve the plaintiff's lien thereon. We think they were. The right of stoppage in transitu is favored by the law. It is clear that the goods did not go into the buyer's possession. He refused to receive them. He had a moral and legal right to do so. Such an act is commended by jurists and judges. He in this way makes reparation to a confiding vendor. "He may refuse to take possession," says Mr. Benjamin, "and thus leave unimpaired the right of stoppage in transitu, unless the vendor be anticipated in getting possession by the assignees of the buyer." Benj. Sales, § 858. In *Grout v. Hill*, 4 Gray, 361. Shaw, C. J., says: "Where a purchaser of goods on credit finds that he shall not be

able to pay for them, and gives notice thereof to the vendor, and leaves the goods in possession of any person, when they arrive, for the use of the vendor, and the vendor on such notice expressly or tacitly assents to it, it is a good stoppage in transitu, although the bankruptcy of the vendee intervene." See same case at page 369; 1 Pars. Cont. *596, and cases.

The decision of the case, then, turns upon the question whether the messenger could accept the goods, and terminate the lien of the vendor. We do not find any authority for it. A bankruptcy messenger acts in a passive capacity; is intrusted with no discretionary powers; acts under mandate of court, or does certain things particularly prescribed by the law which creates the office; is mostly a keeper or defender of property,—a custodian until an assignee comes; and he can neither add to nor take from the bankrupt's estate. He is to take possession of the "estate" of the insolvent. These goods had not become a part of the estate. He was not at liberty to affirm or disaffirm any act of the insolvent. The law imposes on him no such responsibility. Chancellor Kent says that the transit is not ended while the goods are in the hands of a carrier or middle-man. A messenger has no greater authority, *ex officio*, than a middle-man, excepting as the insolvent law expressly prescribes. In *Hilliard's Bankruptcy* (page 101) the office of a messenger is likened to that of a sheriff under a writ. He becomes merely the recipient of property. The title of the assignee, when appointed, dates back of the appointment of a messenger. Until appointment of assignee, the bankrupt himself is a proper person to tender money for the redemption of lands sold for taxes. *Hampton v. Rouse*, 22 Wall. 263. See *Stevens v. Palmer*, 12 Metc. 464. The case cited by the plaintiff, *Sutro v. Holle*, 2 Neb. 186, supports his contention.

Defendant defaulted.

WALTON, VIRGIN, LIBREY, EMERY, and HASSELL, JJ., concurred.



TUTHILL et al. v. SKIDMORE et al.

(26 N. E. Rep. 348, 124 N. Y. 148.)

Court of Appeals of New York, Second Division.
Jan. 14, 1891.

Appeal from a judgment of the general term of the second judicial department affirming a judgment for the plaintiffs entered on a verdict directed at circuit, September 11, 1886, the plaintiffs, under their firm name of Ellsworth Tuthill & Co., and Walter E. Lawton, doing business under the name of Lawton Bros., entered into the following written contract: "September 11, 1886. Sold for account of Messrs. Ellsworth Tuthill & Co. to Messrs. Lawton Brothers, New York, five hundred tons sellers' usual good make platform-dried fish scrap, not treated with acids, of this season's make, to be ready for delivery before close of sellers' works, at \$28 per ton, of 2,000 lbs., actual weight in bulk, F. O. B. sellers' factory, Promised Land, Long Island. Terms: Payment by buyers' notes at four months, with interest added at a rate of six per cent. per annum from date of delivery on presentation bills of lading, invoice, weigher's return, and Stillwell & Gladding's certificate of moisture. If scrap removed before closing sellers' factory this fall, or if scrap is not removed before such time, buyers are to give their notes, bearing same interest, for an approximate amount, bearing date of such closing. Buyers to have privilege of leaving scrap at their own risk, free of charge for storage, till opening of fishing season of spring, 1887, provided, if they require any scrap between such closing and opening, buyers are to pay thirty-five cents per ton for loading. Scrap guaranteed not to exceed twelve per cent. moisture. Stillwell & Gladding's analysis from samples drawn in the usual way. Scraps to be in good order and condition." From the date of this contract to the date of the trial of this action, (October 25, 1887,) the plaintiffs, at all times, had on hand at their factory at Promised Land, L. I., more than 500 tons of fish scrap of the kind and quality mentioned in the contract, but neither the quantity sold nor any part of it was ever set apart for the vendee. November 12, 1886, the vendee gave the vendors, towards the purchase price, three promissory notes, signed by the purchaser, and payable to the order of the sellers, of the dates, for the amounts, and due, as follows:

Date.	Amt.	Time.	Due.
November 12, 1886..	\$5,000	Four months	March 15, 1887
" 19, "	\$5,000	" "	" 22, "
" 26, "	\$3,000	" "	" 29, "

The purchase price was \$14,000, and, after deducting these notes, \$1,000 remained, which was never paid, nor was a note given for it. These notes were all dishonored, and have never been paid, nor has any part of the purchase price of the property. About the 1st of December, 1886, the plaintiffs sent the purchaser the following receipt: "Ellsworth Tuthill &

Co., Manufacturers of Menhaden Oil and Guano. Factory at Promised Land, L. I. Promised Land, N. Y., Nov. 12, 1886. We hereby certify that we hold five hundred (500) tons of platform-dried fish scrap, of good quality, and in good condition, in bulk, subject to the order of Messrs. Lawton Bros., in our factory at Promised Land, Long Island, Suffolk county, N. Y., as per terms of contract. Dated September 11th. ELLSWORTH TUTHILL & Co." March 21, 1887, Joseph L. Morton began an action in the supreme court against Walter E. Lawton for the recovery of money, in which an attachment was issued, by virtue whereof, March 28, 1887, the defendant Skidmore, as sheriff, and the defendant Pfand, as his deputy, levied upon and seized five hundred tons of fish scrap then stored at the plaintiffs' factory. The quantity attached was not separated from a larger quantity of which it was a part, and was never removed from the plaintiffs' premises. June 15, 1887, Morton recovered a judgment against Lawton in that action for \$22,629.66, which was entered in the office of the clerk of the city and county of New York, a transcript of which was duly filed, and the judgment duly docketed June 27, 1887, in the office of the clerk of the county of Suffolk. May 13, 1887, the plaintiffs demanded of the defendants that they release the attachment, and surrender the property to them, which was refused, and on the next day this action in replevin for the recovery of the property was begun. Upon the trial, each party asked that a verdict be directed in his favor, neither claiming that there was any question of fact for the jury. A verdict was directed for the plaintiffs, upon which a judgment was entered, which was affirmed at general term.

Abram Kling, for appellants. *Thomas Young*, for respondents.

FOLLETT, C. J., (after stating the facts as above.) It will be assumed that the title to the property passed to the vendee, which is the most favorable view which can be taken of the case for the defendants. Permitting commercial paper to be dishonored by one engaged in commerce, and his property to be attached in an action in which judgment is subsequently recovered by default, is evidence, and, if unexplained, is proof, of insolvency. *Brown v. Montgomery*, 20 N. Y. 287; *Booth v. Powers*, 56 N. Y. 22, 32; *Abb. Tr. Ev.* 616. Neither party asserting at the trial that Lawton's solvency was a question of fact for the jury, the court was justified in holding, as a question of law, that he was insolvent. When the price of goods sold on credit is due and unpaid, and the vendee becomes insolvent before obtaining possession of them, the vendor's right to the property is often called a "lien," but it is greater than a lien. In the absence of an express power, the lienor usually cannot transfer the title to the property on which the lien exists by a sale of it to one having notice of the extent of his right, but he must proceed by foreclosure. When a vendor rightfully stops goods *in transitu* or retains them before *transitus* has begun, he can, by a sale made, on notice to the vendee, vest a pur-

chaser with a good title. *Dustan v. McAndrew*, 44 N. Y. 72. His right is very nearly that of a pledgee, with power to sell at private sale in case of default. *Bloxam v. Sanders*, 4 Barn. & C. 941; *Bloxam v. Morley*, Id. 951; *Milgate v. Keble*, 3 Man. & G. 100; *Andenreid v. Randall*, 3 Cliff. 99, 106; *Blackb. Sales*, (2d Ed.) 445, 454, 459; *Benj. Sales*, (Corbin's Ed.) § 1280; *Jones v. Liens*, § 802. The vendee having become insolvent, and refused payment of the notes given for the purchase price of the property which remained in the vendor's possession, his right to retain it as security for the price was revived as against the vendee and his attaching creditor. *Arnold v. Delano*, 4 Cuth. 33; *Haskell v. Rice*, 11 Gray, 249; *Milliken v. Warren*, 57 Me. 46; *Clark v. Draper*, 19 N. H. 419; *Bloxam v. Sanders*, 4 Barn. & C. 941; *Bloxam v. Morley*, Id. 951; *Hamburger v. Rodman*, 9 Daly, 93; *Benj. Sales*, (Bennett's Ed.) § 825; 2 *Benj. Sales*, (Corbin's Ed.) § 1227; *Story, Sales*, § 285; *Blackb. Sales*, 454.

The plaintiffs allege in their complaint that they own the property, and also that they "had a special property therein,—to-wit, a lien for unpaid purchase money,"—both of which allegations the defendants specifically denied. It is now insisted, as it was at the trial, by the defendants that the allegation in respect to the special property is not a compliance with section 1720 of the Code of Civil Procedure, which provides that when "the right of action or defense rests upon a right of possession, by virtue of a special property, in which case the pleading must set forth the facts upon which the special property depends, so as to show that at the time when the action was commenced, or the chattel replevied, as the case may be, the party pleading, or the third person, was entitled to the possession of the chattel." The defendants not having moved to make the complaint more definite and certain, and it affirmatively appearing that they were neither harmed nor misled by the omission to set forth all of the facts out of which the special property arose, the judgment will not be reversed for this defect in the complaint.

When the trial began, it was moved in behalf of the defendants that the plaintiffs be compelled to elect whether they would seek to recover on the ground that they owned the property, or on the

ground that they had a lien thereon for unpaid purchase money. To this request the court replied: "I will hear the evidence first before I compel him to do that." To this remark the defendants excepted. At the close of the plaintiffs' case, the defendants offering no evidence, both parties asked the court to direct a verdict. The object of requiring plaintiffs to elect between inconsistent causes of action is to simplify the issues of fact, so that they may be intelligibly and fairly tried, but it is plain in this case that the defendants were not misled nor harmed by the refusal of the court to compel an election. The plaintiffs' allegation that they owned the property, and their allegation that they had a lien thereon for unpaid purchase money, are inconsistent. *Hudson v. Swan*, 83 N. Y. 552. But when, as in the case at bar, the inconsistency plainly appears on the face of the complaint, the defendants should, before answering, move that the plaintiffs be compelled to elect. *Cassidy v. Daly*, 11 Wkly. Dig. 222. If in such a case the defendant lies by until the trial, and then moves, the court may, in its discretion, wait until part or all of the evidence is taken before deciding the motion, (*Southworth v. Bennett*, 58 N. Y. 659,) and its denial is so far discretionary (*Kerr v. Hays*, 35 N. Y. 331, 336; *People v. Tweed*, 63 N. Y. 194) that it will not be reviewed when it appears that the defendant was not harmed.

It is also urged, on the authority of *Hudson v. Swan*, supra, and the cases therein cited, that the plaintiffs, by alleging in their complaint and asserting at the trial absolute ownership of the property, and also a special interest in or lien upon it, waived their special interest or lien, if any they had, and cannot recover without establishing ownership. In the case cited the facts alleged by the plaintiff to establish ownership were inconsistent with those upon which he relied to establish a lien, which is not the fact in the case at bar. As has been shown, the plaintiffs' interest was more than that of mere lienors, and, there being no dispute about the facts, the inconsistency relating wholly to the legal conclusions to be drawn from the agreed facts, the case cited is not controlling. The judgment should be affirmed with costs. All concur, except *Brown, J.*, not sitting.



TWYNE'S CASE.

(3 Coke, 80.)

Mich. 44 Eliz. In the Star Chamber.

In an information by Coke, the queen's attorney-general, against Twyne, of Hampshire, in the star-chamber,¹ for making and publishing of a fraudulent gift of goods. The case on the stat. of 13 Eliz. c. 5, was such: Pierce was indebted to Twyne in £400, and was indebted also to C. in £200. C. brought an action of debt against Pierce, and pending the writ, Pierce, being possessed of goods and chattels of the value of £300, in secret made a general deed of gift of all his goods and chattels, real and personal whatsoever, to Twyne, in satisfaction of his debt; notwithstanding that Pierce continued in possession of the said goods, and some of them he sold; and he shorn the sheep, and marked them with his own mark; and afterwards C. had judgment against Pierce, and had a fieri facias directed to the sheriff of Southampton, who by force of the said writ came to make execution of the said goods; but divers persons, by the command of the said Twyne, did with force resist the said sheriff, claiming them to be the goods of the said Twyne by force of the said gift; and openly declared by the commandment of Twyne, that it was a good gift, and made on a good and lawful consideration. And whether this gift, on the whole matter was fraudulent and of no effect by the said act of 13 Eliz. or not, was the question. And it was resolved by Sir Thomas Edgerton, lord keeper of the great seal, and by the Chief Justice Popham and Anderson, and the whole court of star-chamber, that this gift was fraudulent, within the stat. of 13 Eliz. And in this case divers points were resolved:

1. That this gift had the signs and marks of fraud, because the gift is general, without exception of his³ apparel, or of anything of necessity; for it is commonly said, "*quod⁴ dolus versatur in generalibus.*"

¹Chamberlain v. Twyne, Moore, 638; Rex v. Earl of Nottingham, Lane, 44, 45, 47; Co. Litt. 3b, 76a, 290a; Edgbury v. Rosindal, 3 Kob. 259; See the Stat. 27 Eliz. c. 4.

²Gooch's Case, 5 Coke, 60a, b; Packman's Case, 6 Coke, 18b; Case of Chancellor, etc., of University of Oxford, 10 Coke, 56b; 3 Inst. 153; Co. Litt. 3b, 76a, 290a, b; 13 Eliz. c. 5; Creswell v. Cokes, 2 Leon. 8, 9; Pendleton v. Gunston, 1 Leon. 47; Stamford's Case, 2 Leon. 225; Carter v. Claycole, 1 Leon. 308, 309; Case No. 83, 3 Leon. 57; Turvil v. Tipper, Ratch, 222; Turbervill v. Tipper, 2 Rolle, 493; Paston v. Lea, Palmer, 415; Brunkhorne's Case, Cro. Eliz. 233, 234; Darrel v. Wilson, Id. 645; Bethel v. Stanhope, Id. 810; Hawes v. Leader, Cro. Jac. 270, 271; 3 Dyer, 295, pl. 17; Creswell v. Cokes, Id. 351, pl. 23; Stone v. Grubham, 2 Bulst. 226; Rast. Ent. 207b; Rex v. Earl of Nottingham, Lane, 47; Kitchin v. Calvert, Id. 103; Humberton v. Howgill, Hob. 73b; Id. 169; Chamberlain v. Twyne, Moore, 638; Doct. Plac. 200; Hawes v. Loader, Yelv. 196, 197, 1 Brownl. & G. 111; Co. Ent. 162a.

³Whittle v. Weston, Godb. 398; Englefield's Case, Moore, 321.

⁴Stone v. Grubham, 2 Bulst. 226; Doddington's Case, 2 Coke, 34a; Warren v. Smith, 1 Rolle, 157.

2. The donor continued in possession, and used them as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

3. It was made in secret, "*et dona clandestina sunt semper suspiciosa.*"

4. It was made pending the writ.

5. Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always appured and clad with a trust, and a trust is the cover of fraud.

6. The deed contains, that the gift was made honestly, truly and bona fide; "*et clausula inconsect⁵ semper inducunt suspicionem.*"

Secondly, It was resolved, that notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not within the proviso of the said act of 13 Eliz., by which it is provided, that the said act shall not extend to any estate or interest in lands, &c., goods or chattels, made on a good consideration, and bona fide; for although it is on a true and good consideration, yet it is not bona fide, for no gift shall be deemed to be bona fide within the said proviso which is accompanied with any trust. As if a man be indebted to five several persons in the several sums of £20, and hath goods of the value of £20, and makes a gift of all his goods to one of them in satisfaction of his debt, but there is a trust between them, that the donee shall deal⁶ favorably with him in regard of his poor estate, either to permit the donor, or some other for him, or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able, this shall not be called bona fide within the said proviso; for the proviso saith on a good consideration, and bona fide; so a good consideration does not suffice, if it be not also bona fide. And therefore, reader, when any gift shall be to you in satisfaction of a debt, by one who is indebted to others also; 1st, Let it be made in a public manner, and before the neighbors, and not in private, for secrecy is a mark of fraud. 2nd, Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. 3rd, Immediately after the gift, take the possession of them: for continuance of the possession in the donor is the sign of trust. And know, reader, that the said words of the proviso, on a good consideration, and bona fide, do not extend to every gift made bona fide; and, therefore, there are two manners of gifts on a good consideration, scilicet, consideration of nature, of blood, and a valuable consideration. As to the first in the case before put;⁷ if he who is indebted to five several persons, to each party in £20 in consideration of natural affection gives all his goods to his son, or cousin, in that case, for as much as others should lose their debts, &c., which are things of value, the intent of the act was, that the consideration in such case should be valu-

⁵Gresham v. Man, Gouldsb. 161.

⁶Osborn v. Churchman, Cro. Jac. 127; Llinaston v. Lloyd, Palmer, 214.

able; for equity requires that such gift, which defeats others, should be made on as high and good consideration as the things which are thereby defeated are; and it is to be presumed that the father, if he had not been indebted to others, would not have dispossessed himself of all his goods, and subjected himself to his estate; and therefore it shall be intended, that it was made to defeat his creditors; and if consideration of nature of blood should be a good consideration within this proviso, the statute would serve for little or nothing, and no creditor would be sure of his debt. And as to gifts made bona fide, it is to be known, that every gift made bona fide, either is on a trust between the parties, or without any trust; every gift made on a trust is out of this proviso; for that which is betwixt the donor and donee, called⁷ a trust per nomen speciosum, is in truth, as to all the creditors, a fraud, for they are thereby defeated and defrauded of their true and due debts. And every trust is either expressed or implied; an express trust is, when in the gift, or upon the gift, the trust by word or writing is expressed; a trust implied is, when a man makes a gift without any consideration, or on a consideration of nature, or blood only; and, therefore, if a man before the statute of 27 H. 8, had bargained his land for a valuable consideration to one and his heirs, by which he was seised to the use of the bargainee; and afterwards the bargainor, without a consideration, enfeoffed others, who had no notice of the said bargain; in this case the law implies a trust and confidence, and they shall be seised to the use of the bargainee; so in the same case, if the feoffees, in consideration of nature or blood, had without a valuable consideration, enfeoffed their sons, or any of their blood, who had no notice of the first bargain, yet that shall not toll the use raised on a valuable consideration; for a feoffment made only on consideration of nature or blood, shall not toll an use raised⁹ on a valuable consideration, but shall toll an use raised on consideration of nature for both considerations are in equali jure, and of one and the same nature.

And when a man, being greatly indebted to sundry persons, makes a gift to his son, or any of his blood, without consideration, but only of nature, the law intends a trust betwixt them, scil., that the donee would, in consideration of such gift being voluntarily and freely made to him, and also in consideration of nature, relieve his father, or cousin, and not see him want who had made such gift to him, vide 33 H. 6, 33,¹⁰ by Prisot, if the father enfeoffs his son and his apparent within age, bona fide, yet the lord shall have the wardship of him; so note, valuable consideration is a good consideration within this proviso; and a gift made bona fide is a gift made without any trust either expressed or implied; by which it appears, that as a gift made on a good considera-

tion, if it be not also bona fide, is not within the proviso; so a gift made bona fide, if it be not on a good consideration, is not within the proviso; but it ought to be on a good consideration, and also bona fide.

To one who marvelled what should be the reason that acts and statutes are continually made at every parliament without intermission, and without end; a wise man made a good and short answer, both which are well composed in verse.

Queritur, ut crescant tot magna volumina legis?
In promptu causa est, crescit in orbe, dolus.

And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole court, that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud. Note, reader, according to their opinions, divers resolutions have been made.

Between Pauncefoot and Blunt, in the exchequer chamber, Mich. 35 & 36 Eliz., the case was: Pauncefoot being indicted for recusancy, for not coming to divine service, and having an intent to flee beyond sea, and to defeat the queen of all that might accrue to her for his recusancy or flight, made a gift of all his leases and goods of great value, colored with feigned consideration, and afterwards he fled beyond sea, and afterwards was outlawed on the same indictment; and whether this gift should be void to defeat the queen of her forfeiture, either by the common law, or by any statute, was the question. And some conceived that the common law, which¹¹ abhors all fraud, would make void this gift as to the queen, vide Mich. 12 & 13 Eliz.; 3 Dyer,¹² 295; 4 & 5 P. & M. 160.

And the statute of¹³ 50 E. 3, c. 6, was considered; but that extends only in relief of creditors, and extends only to such debtors as flee to sanctuaries, and other privileged places; but some conceived that the stat. of¹⁴ 3 H. 7, c. 4, extends to this case. For although the preamble speaks only of creditors, yet it is provided by the body of the act generally, that all gifts of goods and chattels made or to be made on trust to the use of the donor, shall be void and of no effect, but that is to be intended as to all strangers who are to have prejudice by such gift, but between the parties themselves it stands good. But it was resolved by all the barons, that the stat. 13 Eliz. c. 5¹⁵, extends to it; for there-

¹¹ Fiermo's Case, 3 Coke, 78a.

¹² Fiermo's Case, 3 Co. 78a, 78b, 3 Dyer, 295, pls. 8, 9, 10, &c.; Rex v. Earl of Nottingham, Lane, 44.

¹³ Co. Litt. 76a.

¹⁴ Ridler v. Punter, Cro. Eliz. 291, 292; Rex v. Earl of Nottingham, Lane, 45.

¹⁵ Co. Litt. 3b, 76a, 290a, 290b; 3 Inst. 152; Gooch's Case, 5 Coke, 60a, 60b; Packman's Case, 6 Coke, 18b; Case of Chancellor, etc., of University of Oxford, 10 Coke, 56b; Co. Ent. 162a; Pendleton v. Gunston, 1 Leon. 47; Carter v. Claycole, Id. 308, 309; Creswell v. Cokes, 2 Leon. 8, 9; Stamford's Case, Id. 223; Case No. 83, 3 Leon. 57; Turvil v. Tipper, Latch, 222; Turberville v. Tipper, 2 Rolle, 493; Paston v. Lea, Palmer, 415; Brunkhorne's Case, Cro. Eliz. 233, 234; Darrel v. Wilson, Id. 645;

⁷ Burrell's Case, 6 Coke, 72b.

⁸ Rolle, Abr. 799.

⁹ Rolle, Abr. 779.

¹⁰ 33 H. 6, 16; Lillingston's Case, 7 Coke, 89b.

by it is enacted and declared, that all feoffments, gifts, grants, &c., "to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs," shall be void, &c. So that this act doth not extend only to creditors, but to all others who had cause of action, or suit, or any penalty, or forfeiture, &c.

And it was resolved, that this word "forfeiture" should not be intended only of a forfeiture of an obligation, recognisance, or such like (as it was objected by some, that it should, in respect that it comes after damage and penalty), but also to everything which shall by law be forfeited to the king or subject. And therefore, if a man, to prevent a forfeiture for felony, or by outlawry, makes a gift of all his goods, and afterwards is attainted or outlawed, these goods are¹⁶ forfeited, notwithstanding this gift; the same law of recusants, and so the statute is expounded beneficially to suppress fraud. Note well this word¹⁷ "declare" in the act of 13 Eliz., by which the parliament expounded that this was the¹⁸ common law before. And according to this resolution it was decreed, 11il. 36 Eliz., in the exchequer chamber, Mich. 42 & 43 Eliz. in the common pleas, on evidence to a jury, between Standen¹⁹ and Bullock, these points were resolved by the whole court on the stat. of 27 Eliz. c. 4. Walmsley, J., said that Sir Christopher Wray, late C. J., of England, reported to him, that he and all his companions of the king's bench were resolved, and so directed a jury on evidence before them; that where a man had conveyed his land to the use of himself for life, and afterwards to the use of divers other of his blood, with a future power of revocation, as after such feast, or after the death of such one; and afterwards, and before the power of revocation began, he, for valuable consideration, bargained and sold the land to another and his heirs; this bargain and sale is within the²⁰ remedy of the said stat. For although the stat. saith, "the said first conveyance not by him revoked, according to the power by him reserved," which seems by the literal sense to be intended of a present power of revocation, for no revocation can be made by force of a future power until it comes in

esse; yet it was held that the intent of the act was, that such voluntary conveyance which was originally subject to a power of revocation, be it in present or in futuro, should not stand against a purchaser bona fide for a valuable consideration; and if other construction should be made, the said act would serve for little or no purpose, and it would be no difficult matter to evade it: so if A. had reserved to himself a power of revocation with the assent of B., and afterwards A. bargained and sold the land to another, this bargain and sale is good, and within the remedy of the said act; for otherwise the good provision of the act, by a small addition, and evil invention, would be defeated.

And on the same reason it was adjudged, 38 Eliz., in the common pleas, between Lee and his wife, executrix of one Smyth, plaintiff, and Mary²¹ Colshill, executrix of Thomas Colshill, defendant in debt on an obligation of 1000 marks, Rot. 1707. The case was, Colshill, the testator, had the office of the queen's customer, by letters patent, to him, and his deputies; and by indenture between him and Smyth, the testator of the plaintiff, and for £300 paid, and £100 per ann. to be paid during the life of Colshill, made a deputation of the said office to Smyth; and Colshill covenanted with Smyth, that if Colshill should die before him, that then his executors should repay him £300. And divers covenants were in the said indenture concerning the said office, and the enjoying of it; and Colshill was bound to the said Smyth in the said obligation to perform the covenants; and the breach was alleged in the non-payment of the said £300, forasmuch as Smyth survived Colshill; and although the said covenant to repay the £300, was lawful, yet, forasmuch as the rest of the covenants were against the statute of²² 5 E. 6, cap. 16, and if the addition of a lawful covenant should make the obligation of force as to that,²³ the statute would serve for little or no purpose; for this cause it was adjudged that the obligation was utterly void.

2d. It was resolved that if a man hath power of revocation, and afterwards to the intent to defraud a purchaser, he lev-

Bethel v. Stanhope, Id. 810; Hawes v. Leader, Cro. Jac. 270; Stone v. Grubham, 2 Bulst. 226; Humberton v. Howgil, Hob. 72; Id. 166; Hawes v. Leader, Yelv. 196, 197, 1 Brownl. & G. 111; 3 Dyer, 295, pl. 17; Creswell v. Cokes, Id. 351, pl. 23; Rastal, Fraudulent Deeds, 1 Rast. Ent. 207b; Rex v. Earl of Nottingham, Lane, 47; Kitchen v. Calvert, Id. 103; Chamberlain v. Twyne, Moore, 635; Doct. Plac. 200.

¹⁶ Co. Litt. 290b.

¹⁷ Co. Litt. 76a, 290b.

¹⁸ Jenkins v. Kemishe, Hardr. 397; Standen v. Bullock, Toth. 71.

¹⁹ Digges' Case, Moore, 605; Bullock v. Thorne, Id. 615; Garth v. Ersefeld, Bridg. 23; Gooch's Case, 5 Coke, 60b; Llinaston v. Lloyd, Palmer, 217; St. Saviours in Southwark, Lane, 22; Buller v. Waterhouse, T. Jones, 95.

²⁰ Prodders v. Langham, 1 Sid. 133.

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²¹ 2 And. 55, Id. 107; Norton v. Symm, Godb. 213; Lee v. Colshill, Cro. Eliz. 529; Nort v. Symm, Moore, 587; Bishop of Chester v. Freeland, Ley, 75, 79.

²² Hill v. Farmer, Style, 29; Lee v. Colshill, Cro. Eliz. 529; Trevor's Case, Cro. Jac. 269; Humberton v. Howgil, Hob. 72; Co. Litt. 234a; Trevor's Case, 12 Coke, 75; 3 Inst. 148, 154; Daws v. Paynter, 3 Keb. 26; Ellis v. Nelson, Id. 659, 660; Welch v. Baden, Id. 717, 718; Williamson v. Barnsley, 1 Brownl. & G. 70, 71; Smyth v. Colshill, 2 And. 55, Id. 107; Rex v. Zakar, 3 Bulst. 91, 3 Leon. 33; Warren v. Smith, 1 Rolle, 157; Southcott v. Adams, Id. 256; Gouldsb. 180.

²³ Smyth v. Colshill, 2 And. 56, 57, Id. 108. Maleverer v. Redshaw, 1 Mod. 35, 36; Norton v. Symm, Hob. 14; Pigot's Case, 11 Coke, 27b; 2 Rolle, Abr. 28; Co. Litt. 221a; Bishop of Carlisle v. Wells, T. Jones, 90, 91; Lee v. Colshill, Cro. Eliz. 529, 530; Elliot v. Skyppe, Cro. Jac. 288; Norton v. Symm, Godb. 212, 213, 1 Brownl. & G. 64; Dive v. Manlingham, Plowd. 68b; Norton v. Symm, Moore, 586, 587; Bishop of Chester v. Freeland, Ley, 75, 79.

les a²⁴ fine, or makes a feoffment, or other conveyance to a stranger, by which he extinguishes his power, and afterwards bargains and sells the land to another for a valuable consideration, the bargainee shall enjoy the land, for as to him the fine, feoffment, or other conveyances by which the condition was extinct, was void by the said act; and so the first clause, by which all fraudulent and covinous conveyances are made void as to purchasers, extend to the last clause of the act; scil., when he who makes the bargain and sale had power of revocation. And it was said that the stat. of 27 Eliz. hath made voluntary estates made with power of revocation, as to purchasers, in equal degree with conveyances made by fraud and covin to defraud purchasers.

Between²⁵ Upton and Basset in trespass, Trin. 37 Eliz. in the common pleas, it was adjudged that if a man makes a lease for years by fraud and covin, and afterwards makes another lease bona fide, but without fine or rent, reserved, that the second lessee should not avoid the first lease.

For first it was agreed, that by the common law an estate made by fraud should be avoided only by him who had a former right, title, interest, debt or demand, as 23 H. 6. n sale in open²⁶ market by covin shall not bar a right which is more ancient; nor a covinous gift shall not defeat execution in respect of a former debt, as it is agreed in 22 Ass. 72; but he who hath right, title, interest, debt, or demand more puiſne shall not avoid a gift or estate precedent by fraud by the common law.

2d. It was resolved that no purchaser should avoid a precedent conveyance made by fraud and covin, but he who is a²⁷ purchaser for money or other valuable consideration; for although in the preamble it is said "for money or other good consideration," and likewise in the body of the act "for money, or other good consideration," yet these words "good consideration" are to be intended only of valuable consideration, and that appears by the clause which concerns those who had power of revocation, for there it is said, for money or other good consideration paid or given, and this word "paid" is to be referred to "money," and "given" is to be referred to "good consideration," so the sense is for money paid, or other good consideration given, which words exclude all considerations of nature or blood, or the like, and are to be intended only of valuable considerations which may be given; and therefore he who

makes a purchase of land for a valuable consideration is only a purchaser within the statute, and this latter clause doth well expound these words "other good consideration," mentioned before in the preamble and body of the act.

And so it was resolved, Pasch. 32 Eliz., in a case referred out of the chancery to the consideration of Windham and Periam, Justices;²⁸ between John Needham, plaintiff, and Beaumont, serjeant-at-law, defendant, where the case was, Henry Babington seised in fee of the manor of Lit-Church, in the county of Derby, by indenture, 10 Feb. 8 Eliz., covenanted with the Lord Darcy, for the advancement of such heirs male, as well those he had begot, as those he should afterwards beget on the body of Mary then his wife (sister to the said Lord Darcy), before the feast of St. John Baptist then next following, to levy a fine of the said manor to the use of the said Henry for his life, and afterwards to the use of the eldest issue male of the bodies of the said Henry and Mary, begotten in tail, &c., and so to three issues of their bodies, &c., with the remainder to his right heirs. And afterwards, 8 Maii, Ann. 8 Eliz., Henry Babington, by fraud and covin, to defeat the said covenant, made a lease of the said manor for a great number of years to Robert Heys; and afterwards levied the fine accordingly: and on conference had with the other justices, it was resolved, that although the issue was a purchaser, yet he was not a purchaser in vulgar and common intentment; also consideration of blood, natural affection, is a good consideration, but not such a good consideration which is intended by the stat. of 27 Eliz., for²⁹ a valuable consideration is only a good consideration within that act. In this case, Anderson, C. J., of the common pleas, said, that a man who was of small understanding, and not able to³⁰ govern the lands which descended to him, and being given to riot and disorder, by mediation of his friends, openly conveyed his lands to them, on trust and confidence that he should take the profits for his maintenance, and that he should not have power to waste and consume the same; and afterwards he being seduced by deceitful and covinous persons, for a small sum of money bargained and sold his land, being of a great value: this bargain, although it was for money, was holden to be³¹ out of this statute, for this act is made against all fraud and deceit, and doth not help any purchaser, who doth not come to the land for a good consideration lawfully and without fraud or deceit; and such conveyance made on trust is void as to him who purchases the land for a valuable consideration bona fide, without deceit or cunning.

And by the judgment of the whole court Twyne was convicted of fraud, and he and all the others of a riot.

²⁴ Albany's Case, 1 Coke, 112b; Digges' Case, Id. 174a; Co. Litt. 237a; Sheffield v. Ratcliffe, Hob. 337, 33a; Digges' Case, Moore, 605; In re Le Roy, 2 Rolle, 337; Sir Sheffield's Case, Id. 496; Oxford v. Golding, Winch, 65.

²⁵ Co. Ent. 676b, note 19; Rex v. Earl of Nottingham, Lane, 45; Upton v. Basset, Cro. Eliz. 445.

²⁶ Fermor's Case, 3 Coke, 75; Wimbish v. Tailbois, Plow. 46b, 55a; Fitz. Replic. 15; Br. Trespass 25; Br. Collusion 4; Br. Property 6; 2 Inst. 713; 14 H. 8, 5b; 33 H. 6, 5a, b.

²⁷ Upton v. Basset, Cro. Eliz. 445.

²⁸ Needham and Beaumont's Case, 1 And. 233.

²⁹ Beverly v. Gatacre, 2 Rolle, 305, 306.

³⁰ Upton v. Basset, Cro. El. 445.

³¹ Upton v. Basset, Cro. El. 445.

UNEXCELLED FIRE-WORKS CO. v. POLITES.

(18 Atl. Rep. 1058, 130 Pa. St. 536.)

Supreme Court of Pennsylvania. Jan. 6, 1900.

Error to court of common pleas, Lawrence county.

Before PAXSON, C. J., STERRETT, GREEN, CLARK, WILLIAMS, McCOLLUM, and MITCHELL, JJ.

W. H. Falls, for plaintiff in error. *D. Jameson*, (with him *G. E. Treadwell*), for defendant in error.

CLARK, J. This is an action of *assumpsit*, brought July 20, 1888, to recover the price of a certain lot of fire-works and celebration goods, ordered by the defendant, George Polites, from the Unexcelled Fire-Works Company, of New York, in February, 1888. The first order, which was for his store in New Castle, was given through the plaintiff's agent, Alexander Morrison, and amounted to \$208.53; the second, sent directly to the plaintiff, was for the defendant's store in Washington, Pa., and amounted to \$123.83. These orders were in writing, and were signed by the defendant. They specified, not only the particular kind and quality of the articles ordered, but contained also a schedule of the prices to be paid therefor. The goods were to be shipped in May, and were to be paid for on the 10th day of July thereafter. Upon receipt of these orders the plaintiff transmitted by letter a formal acceptance of them. A contract was thus created, the obligation of which attached to both parties, and which neither of them, without the agreement or assent of the other, could rescind. On the 5th day of April, 1888, the defendant, by letter, informed the plaintiff that he did not want the goods, and notified the plaintiff not to ship them, as he could do better with another company. The plaintiffs replied that they had accepted the orders, and had placed them in good faith, and that the goods would be shipped in due time, according to the agreement. The goods were shipped within the time agreed upon,—the first lot to New Castle, and the second lot to Washington, according to contract; but on the arrival the defendant declined to receive them. The carrier notified the shipper that, owing to the dangerous and explosive quality of the goods, they would not retain them in their possession. The plaintiff thereupon received them back from the carriers, and placed them on storage, subject to the defendant's order.

The plaintiff alleges that it is a manufacturer and importer of such fire-works as are used in the 4th of July celebrations throughout the country; that it is not profitable to

carry these goods over from one season to another, and that therefore the quantity manufactured and imported depends upon the extent of the orders received; that the defendant's orders entered into its estimates of goods to be made up and imported for the season of 1888, and that the goods ordered by the defendant were actually made up before the order was countermanded. The defendant testifies, however, that Mr. Morrison, the plaintiff's agent, informed him, at the time he gave the first order, that the plaintiff had some, at least, of the articles in stock, and that he did not order any, either to be manufactured or imported on his account; that the transaction was simply a bargain and sale of goods, and not an order for goods to be manufactured or imported; and the evidence does not seem to conflict with this view of the case. It is plain that the notice given to the plaintiff by the defendant not to ship the goods was a repudiation of the contract. It was not a rescission, for it was not in the power of any one of the parties to rescind; but it was a refusal to receive the goods, not only in advance of the delivery, but before they were separated from the bulk, and set apart to the defendant. The direction not to ship was a revocation of the carrier's agency to receive, and the plaintiff thereby had notice of the revocation. The delivery of the goods to the carrier, therefore, was unauthorized, and the carrier's receipt would not charge the defendant. The plaintiff itself made the carrier its agent for delivery, but the goods were in fact not delivered. A delivery was tendered by the carrier, when the goods arrived at their destination, but they were not received. The action, therefore, could not be for the price, but for special damages for a refusal to receive the goods when the delivery was tendered. We think the statement was sufficient to justify a recovery of such damages, as the words of the statement were clearly to this effect; but there was no evidence given of the market value of the goods as compared with the price. It does not appear that the plaintiff had suffered any damage. For anything that was shown, the goods were worth the price agreed upon in the open market. While the manifest tendency of the cases in the American courts now is to the doctrine that when the vendor stands in the position of a complete performance on his part he is entitled to recover the contract price as his measure of damages, in the case of an executory contract for the sale of goods not specific the rule undoubtedly is that the measure of damages for a refusal to receive the goods is the difference between the price agreed upon and the market value on the day appointed for delivery. Judgment affirmed.



WALKER v. DAVIS.

(18 Atl. Rep. 196, 65 N. H. 170)

Supreme Court of New Hampshire. Merrimack.
July 26, 1889.

On report of referee.

Assumpsit for not accepting and paying for a quantity of wool according to a contract. Facts found by a referee.*Daniel Barnard* and *Frank N. Parsons*, for plaintiff. *Sanborn & Hardy*, for defendant.

CLARK, J. The contract for the sale of the wool was an entire contract. *Gault v. Brown*, 48 N. H. 183. The first wool delivered was not properly sorted through the fault of the plaintiff's servants, and between 20 and 30 cords of a different quality from that contracted for were loaded on the cars at Grafton, and forwarded to the defendant at Franklin. The plaintiff, learning that the wool forwarded was not according to the contract, wrote to the defendant, stating how it happened to be sent, inclosing a bill for it in which a discount was made because it was not according to contract, and stating that the defendant could pay this bill, or sort the wool to conform to the contract, and charge the expense to him, and promising to conform to the contract in the future. The defendant, upon ascertaining that the wool was not according to the contract, notified the plaintiff that he did not consider himself

under any obligation to take any more of the wool, and that he should not do so for the reason that the plaintiff had broken the contract. The case finds that the defendant did not waive his right to rescind if upon the facts he could rescind. A party to a contract is not bound to accept anything less than a full performance according to its terms and conditions. The wool forwarded up to the time of the attempted rescission was not in compliance with the contract, and the defendant refused to accept it as such, and notified the plaintiff that he rescinded the contract. This he had a right to do. The wool delivered not being such as the contract called for, the defendant was not bound to receive it. The plaintiff's letter, insisting upon an acceptance of the wool and a variation from the original contract, presented the alternative to the defendant, either to accept the wool at a reduced price, or sort it to conform to the contract, charging the expense to the plaintiff. The defendant was under no obligation to do either. If all the wool contracted for had been delivered at once containing the wool delivered up to the time the notice of the rescission was given, the defendant would not have been compelled to accept it, because it was not of the quality stipulated for. Judgment for the defendant.

ALLEN, J., did not sit. The others concurred.



WALTER A. WOOD MOWING & REAPING MACHINE CO. v. GAERTNER.

(30 N. W. Rep. 106, 63 Mich. 520.)

Supreme Court of Michigan. Nov. 4, 1886.

Error to Monroe; Joslin, Judge.
Assumpsit. Defendant brings error.
Reversed.

This action was brought to recover the contract price of a twine self-binding harvester, under an order of which the following is a copy: "Walter A. Wood Mowing & Reaping Machine Co., 80 Taylor Street, Chicago, Ill.: I hereby order one Walter A. Wood twine self-binding harvester, 5 feet 6 inches cut, to be delivered at Petersburg, Mich., care of O. H. Russell, on or before July 15, 1883, for which I agree to pay you the sum of \$78 in Junior reaper, and in manner as follows: The balance, \$147, cash, with freight from Petersburg, on or before September 25, '83, with interest at 7 per cent. per annum from the date of delivery of machine or commencement of harvest. If paid on or before maturity, no interest to be paid. Warranty: This machine is warranted to be well made, of good materials, and with proper management, capable of cutting and binding in a workmanlike manner, doing the binding at least as well as is usually done by hand. The purchaser shall be allowed one day's use to give the machine a fair trial, and if it should not work well immediate written notice must be given to the agent from whom it was purchased, and reasonable time allowed to get to it and remedy the defects, if any, (the purchaser rendering necessary and friendly assistance;) when, if it cannot be made to do good work, it shall be returned to the place where received free of charge, and the payments of money or notes will be refunded. Failure to give notice as above shall be deemed conclusive evidence that the machine fills the warranty, whether it is kept in use or not. [Signed] Fred. Gaertner, Purchaser."

I. R. Grosvenor and A. B. Bragden, for appellant. O. A. Critchett, for appellee.

MORSE, J. This case has been once heretofore in this court. The contract sued upon is set forth in the opinion of Mr. Justice SHERWOOD in 55 Mich. 454, 21 N. W. Rep. 885. We then held that it was competent for the defendant to show that it was a part of the consideration for which the order was given that the plaintiff should, at the time of the delivery of the property ordered, furnish a man to set up the machine, and make it work in the manner prescribed in the order. The defendant, upon the last trial in the circuit, introduced testimony fairly tending to show that the consideration, in part, consisted of the agreement upon the part of plaintiff's agent that the machine should be delivered ready for use on or before the fifteenth day of July. The contract for the purchase of the machine was on the tenth of that month, and made with the evident object and purpose for use in the harvest of that year, which was expected to come closely upon the heels of the purchase. The evidence was undisputed that on the fourteenth of July,

on Saturday, the machine, or boxes and packages supposed to contain the different parts of the machine, arrived at Petersburg. Mr. Russell, the local agent of the plaintiff company, helped defendant to load the boxes and packages, and defendant drew them to his home, a few miles from the station, in the forenoon of that day. At this time Russell told defendant that he expected an expert there to set it up. Russell swears he said the expert would be there Monday or Tuesday, while defendant testifies that Russell said the expert would arrive on the afternoon train that day,—Saturday. Defendant went to town in the afternoon of Saturday, for the expert, who had not arrived. The expert came to Petersburg, Monday afternoon, and on Tuesday set up a machine for another man, who had ordered a machine later than defendant. He went to defendant's on Wednesday morning, July 18th, to set up the machine. Defendant, having cut most of his wheat before this, commencing on Monday,—as he claimed, because it was so ripe he could wait no longer,—refused to take the machine.

It is admitted that Russell could not set up the machine, and so informed defendant. Defendant swears that he told Russell, Saturday morning: "I want that machine set up; that is, if there is anything like it in the boxes. I want that put up, so I can run it, and cut my wheat, because it is ripe now." Russell said he "didn't know how to set it up. He expected an expert for that work, and he thought the expert would be in that afternoon, on the 5 o'clock train." Defendant went to town after the 5 P. M. train, and was then told by Russell that the expert would be there Monday. Monday morning defendant went to Petersburg again. The expert not having arrived, he told Russell he did not want the machine, because his wheat was dead ripe, and he must hire men, and cut it right away. This he proceeded to do.

The court, after charging the jury at considerable length, finally said: "I may, in short, say to you: Find a verdict for the plaintiff, with the amount of this order, with interest to the present time, \$265. I receive the verdict." Instantly thereupon the court continued: "No; I will not. I say to the jury, if you find the machine was delivered there on or before the 15th, then the company were to have a reasonable length of time after Mr. Gaertner had drawn the machine home in which to set it up, and give him an opportunity to test it, and that by Wednesday was a reasonable time, within the law; and that if you find from the evidence that Mr. Gaertner said, 'I will not take it,' as early as Monday, which was the next day after the time fixed for its delivery, and repeated it on Tuesday, and then on Wednesday, 'I will not hitch onto it, and I am not going to take it,' then the company need not set it up, nor test it, nor give him any opportunity to examine it at all, and he became liable for the machine at the contract price. Swear an officer."

This was practically directing a verdict

for plaintiff, and was error. The machine could not be considered as delivered until it was set up as a machine. The different parts, which none but an expert could put together and form into a machine, could not be called a machine, as required by the contract, until attached together, and forming a complete harvester. Under all the circumstances, it would seem that both parties contemplated that the machine should be delivered in a condition fit for use on or before July 15th. Certain it is that the whole tenor of defendant's testimony was to that effect, and he had a right to go to the jury upon that theory. If the jury so found, the question of

reasonable time would be out of the case entirely.

We are referred by plaintiff's counsel to portions of defendant's evidence which are claimed to establish the plaintiff's theory that there was no arrangement that the machine should be set up on or before July 15th. Be this as it may, the testimony of the defendant, as a whole, tended to support his theory of the contract, and the jury should have determined its weight and bearing. This they were not permitted to do.

The judgment is reversed, with costs, and a new trial granted.

The other justices concurred.



WARD v. SHAW.

(7 Wend. 404.)

Supreme Court of New York. July Term, 1831.

Error from the superior court of the city and county of New York. Ward sued Shaw in an action of trover for two oxen, being fat cattle, taken by him as sheriff out of the possession of one Crawbuck, by virtue of an execution in favor of one Platt. The oxen came into the possession of Crawbuck under these circumstances: he was a butcher and agreed to purchase them of Ward at \$7.50 for each cwt., which the quarters should weigh when slaughtered, he to take the cattle into his possession, prepare them for slaughtering, slaughter them in the week in which the contract was made, and when slaughtered take the quarters to market, weigh them, and pay for the cattle the amount the weight of the quarters would come to at \$7.50 for each cwt., which sum was to be received by Ward in full, as well of all other parts of the cattle as the quarters. Crawbuck took the cattle into his possession, and on the same day they were levied upon under Platt's execution, which was issued on a judgment obtained previous to the contract between Ward and Crawbuck, and taken away. On the trial of the cause, the presiding judge charged the jury, that the contract between Ward and Crawbuck, and the delivery of the cattle to Crawbuck vested the title and ownership in Crawbuck, and that they were subject to the execution. The plaintiff excepted to the decision. The jury found for the defendant, and the superior court refused on motion to set aside the verdict (Mr. Justice Oakley dissenting). The plaintiff sued out a writ of error.

S. P. Staples, for plaintiff in error. J. O. Grim and J. R. Whiting, for defendant in error.

By the court, SAVAGE, C. J. The question is whether Crawbuck had an interest in the cattle which could be sold on execution. The sheriff and the plaintiff in the execution are possessed of the rights of Crawbuck and no more. Had Crawbuck sold the cattle to a purchaser for valuable consideration, without notice of the terms on which he possessed them, other considerations might prevail; but in this case no new credit has been given to Crawbuck in consequence of his having the cattle in his possession. Platt's debt accrued antecedent to the transactions in question, and of course was not contracted upon the credit of this property. If he fails, he is in no worse situation than he was before the sale of the oxen.

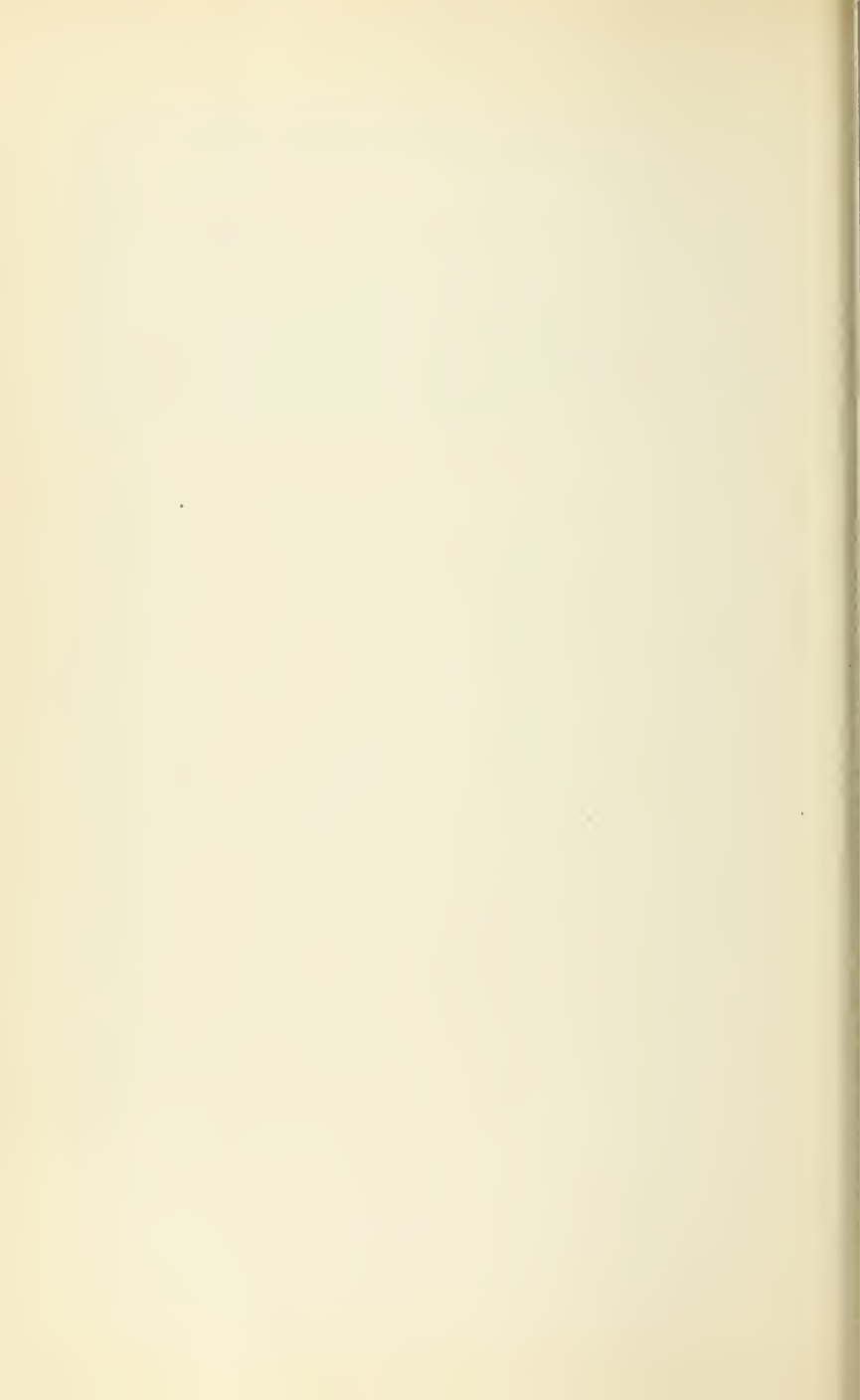
The question, then, is one between vendor and vendee, and as between them certain principles have been settled. 1. Where no credit is agreed to be given for the price of an article sold, the payment and delivery are concurrent acts. The vendor may refuse to deliver without payment; but if he does deliver freely and absolutely, and without any fraud on the part of the vendee, the condition of payment simultaneously with the delivery is waived; con-

fidence is reposed, credit is given, and the property passes. This was so decided in *Chapman v. Lathrop*, 6 Cowen, 110, and is supported by the cases there cited, *Hussey v. Thornton*, 4 Mass. 405, *Tooke v. Hollingworth*, 5 T. R. 222, and also by *Harris v. Smith*, 3 Serg. & Rawle, 20, 24, and by *Chancellor Kent*, 2 Kent's Com. 391. But where part only of the property has been delivered, without demanding compliance with the condition, the vendor may refuse to deliver the residue until performance of the condition. *Payne v. Shadbolt*, 1 Camp. 427. 2. If the vendor deliver the goods, accompanied with a declaration that he does not consider them sold until payment is made, according to a previous contract, the sale is conditional, and the property does not pass by the delivery as between the parties to the sale. *Hussey v. Thornton*, 4 Mass. 405; *Marston v. Baldwin*, 17 Id. 606. Two things are essential to the transfer of the title to personal property upon a cash sale: payment by the vendee, and actual or constructive delivery by the vendor. The first may be waived by the vendor, and the cases above cited show that an absolute delivery is such waiver, but that a delivery subject to the condition of payment is not. 3. It is also a settled principle, that where any thing remains to be done by the vendor before the article is to be delivered, the right of property has not passed. So in the case of *Hanson v. Meyer*, 6 East, 615, where a quantity of starch was contracted to be sold at a certain price per hundred, the vendor gave the vendee an order, addressed to the keeper of the warehouse where the starch lay, directing him to weigh and deliver all his starch, it was held that the property did not pass before the weighing, which was to precede the delivery and to ascertain the price. The language of Lord Ellenborough in that case is applicable here: "By the terms of the bargain, two things, in the nature of conditions or preliminary acts, necessarily preceded the absolute vesting in them (the purchasers) the property contracted for. The first of them is one which does so according to the generally received rule of law in contracts of sale; to wit, the payment of the price or consideration for the sale. The second, which is the act of weighing, does so in consequence of the particular terms of this contract, by which the price is made to depend upon the weight. The weight therefore must be ascertained, in order that the price may be known and paid." Vide *Outwater v. Dodge*, 7 Cowen, 86.

The sale being for cash, and by weight, the vendor is not bound to deliver until payment is made. Payment cannot be made until the price is ascertained by the act of weighing. Should, therefore, the vendee refuse to slaughter the oxen according to contract, and put them to work on a farm, the vendor may retake them. Should he refuse to pay, after weighing the quarters, the owner may take possession of his slaughtered cattle, for the property has not passed under such a contract, until payment is made or waived. The terms of the contract in this

case forbid the idea of a waiver of payment when the cattle were delivered to be prepared for slaughter. The rule laid down in *Hanson v. Meyer* is, that the property does not pass when any thing remains to be done by the vendor; when the thing to be done is necessary to ascertain the price, and the sale is for cash, it can make no difference whether that thing is to be done by the vendor or vendee. The property is not to pass till payment; the price must precede the payment, and until the price is ascertained, payment cannot be made or waived, unless by express terms; the acts of the vendor cannot before that time be construed into a waiver.

This case is unlike most of the English cases, where the property was in a warehouse of a third person. I put the case upon its own circumstances; the delivery was for a special purpose, not an absolute delivery to the vendee as such, but rather as bailee. There was an act to be done to ascertain the price. In general, the act of weighing or measuring is to be done by the seller, but parties have a right to stipulate that the purchaser shall do such act. It is sufficient that the vendor has an interest in the act to be done, and has a right to be present; when the weight is ascertained, then, and not before, can the vendor demand payment. If payment is then made or waived, the property passes absolutely, otherwise not. If I am correct in this view of the case, *Crawbuck* had no interest in the cattle which could be sold on *Platt's* execution. I am of opinion, therefore, that the court below erred, and that the judgment must be reversed; a *venire de novo* to issue by that court, and the costs to abide the event.



WATSON v. ROODE.

(46 N. W. Rep. 491, 50 Neb. 264)

Supreme Court of Nebraska. Sept. 17, 1890.

Error to district court, Gage county;
MORRIS, Judge.*R. S. Bibb and J. E. Bush*, for plaintiff
in error. *Griggs & Kincker and Hazlett
& Bates*, for defendant in error.

NORVAL, J. This action was commenced by Orange A. Roode to recover damages for an alleged breach of warranty given by Joseph Watson on the sale by him to Roode of a stallion. The amended petition alleges "that on the 18th day of November, 1884, the defendant, as an inducement to plaintiff to purchase from him a certain imported black stallion, called 'Knight of the Shires,' for the sum of \$2,000, warranted the said horse to be a foal getter, and sound in every respect, except an enlargement of said horse's bag, which was caused by a kick, and represented the said horse as being then and there sound; that the title to the same was clear, and that the said horse was registered in the Stud Book of England, as well as his sire and dam and would furnish the secretary's receipt for such pedigree; and plaintiff, relying upon said warranty and statements, purchased said horse from the defendant for the sum of \$2,000, then duly paid. Plaintiff avers that said horse at the time of said sale was unsound in this: that the enlargement of said horse's bag was hernia at the time of said sale, and in no way was he free from difficulty or trouble, and was of no value whatever; that one testicle of said horse was mashed and completely ruined, and was of no benefit to the said horse; and on account of said hernia, mashed testicle, and urethral gleet, all of which the said horse had at the time of the purchase, combined to cause the death of said horse, to-wit, on the 16th day of June, 1886. Plaintiff avers that the pedigree of said horse was not as warranted by the defendant, and that the said defendant never has furnished the secretary's receipt for such pedigree, as agreed to have been done on the part of the defendant. Plaintiff avers that said horse was not a good foal getter. And by reason of above premises plaintiff has sustained damages in the sum of \$5,000." The answer of the defendant admits the sale of the horse to the plaintiff, and denies all the other allegations of the amended petition. On the trial of the case to a jury, a verdict was returned for the plaintiff, assessing his damages at \$1,476.50. The defendant filed a motion for a new trial, containing 32 assignments of error, which motion being overruled, judgment was rendered upon the verdict. Eight of the assignments are based upon the rulings of the trial court, upon the admission and exclusion of testimony. The plaintiff upon the trial offered in evidence the following instrument: "Diller, Neb., Nov., 1884. In consideration of \$2,000, receipt whereof is hereby acknowledged, I have this day sold my imported black English draft-horse, 'Knight of the Shires,' to O. A. Roode, and hereby agree

to warrant and defend the title to said horse from all claims whatsoever, and I also guaranty said horse to be a foal getter, and I further state that the enlargement of said horse's bag was caused by a kick, and in no way troubles him, and I further guaranty the said horse to be registered in the Stud Book of England; also his dam, as well as his sire; and will furnish the secretary's receipt for such pedigree. It is further agreed that, if said O. A. Roode is unable to pay a note bearing even date with this agreement from the proceeds of the first year's services of said horse, he shall have the privilege of another year's time on \$200. JOSEPH WATSON." The defendant objected to the receiving in evidence of this paper, as incompetent, irrelevant, immaterial, and inadmissible under the pleadings, which objections were overruled, and the defendant took an exception. It will be observed that it is nowhere alleged in the amended petition that the warranty upon which the action is founded was in writing, nor is a copy of the instrument attached to the pleading.

It is claimed by the plaintiff in error that, as the pleading does not aver that the warranty was in writing, the presumption is that it existed in parol, and that it was incompetent to prove a written warranty. The Indiana cases cited by counsel sustain that view, but they are believed to be contrary to the weight of authority. The rule as laid down in the decisions, and in the works on pleadings, is that in an action upon a written contract it is not absolutely necessary that the plaintiff should allege in his pleading that the contract was in writing; and that on the trial under such a pleading the writing is admissible in evidence. *Maxw. Pl. & Pr. 99; Steph. Pl. 331; Abb. Tr. Ev. 522; Tuttle v. Hannegan, 54 N. Y. 686; Marston v. Swett, 66 N. Y. 206.* Where the contract is one that the law requires to be in writing, and the pleading based thereon is silent as to whether it is in writing or not, the law presumes that a written contract was intended; but where the contract is valid, whether it be in writing or in parol, there is no such presumption. Under the allegations of the petition in this case, the written warranty was competent evidence. The defendant had an undoubted right, had he moved at the proper time, to have required the plaintiff to make his petition more certain and specific, by stating that the warranty was a written one, and by attaching a copy thereof to the petition.

The plaintiff, on rebuttal, introduced in evidence the following paper, signed by the defendant, and marked "Exhibit B:": "Bentrice, Neb., April 24, 1885. To whom it may concern: I, Joseph Watson, upon honor, state that I have known the imported horse, 'Knight of the Shires,' since he was imported in 1882, by Mr. B. Holmes, of Moline, Ill., and know him to be a good and sure foal getter, as compared with the best of horses, and any reports to the contrary are without foundation and malicious. Hiscolt, owned by Mr. Thomas McLaughlin, Moline, Ill., took first premium at the Fairbury, Ill., fair, and I will deposit ten dollars with any man that he can

show, at the Gage county fair, five of best colts sired by any horse in the county. JOSEPH WATSON." The defendant objected to the receiving of this paper in evidence as being immaterial, irrelevant, and not proper rebutting testimony. This objection was overruled. No testimony had been introduced by the defendant that made this paper competent rebutting testimony. It is urged by the defendant that, as the writing was made by the defendant and delivered to the plaintiff several months after the purchase of the horse, it therefore could not be relied upon by the plaintiff as a warranty of the horse, for the obvious reason that no new consideration passed for the giving of this writing. Had this paper been made the basis or foundation of the suit, the position of the defendant would be well taken, for the rule undoubtedly is that where the warranty of an article is given after the sale has been fully made, and the property delivered to the purchaser, it must be based upon a new consideration. 2 Benj. Sales, § 930; *Morehouse v. Comstock*, 42 Wis. 626. But this paper was not claimed by the plaintiff to be the warranty declared upon, nor was it received in evidence for that purpose. It was contended by the defendant on the trial in the lower court that the meaning of the term "foal getter," as used by the defendant in the written warranty given at the time of the sale, was that the horse was capable of producing a foal, and did not mean, and was not so understood by the parties at the time, that the horse was a sure foal getter. The sole purpose and object in introducing this paper in evidence was to show what the defendant meant by the term "foal getter," and to show what construction the defendant had given the term used in the warranty. It should have been given in evidence in chief, and not on rebuttal. The horse was purchased for the stud, as the defendant at that time fully understood, and it is not reasonable to suppose that either party to the agreement at the time expected that the purchaser was paying \$2.00 for a horse that was totally unfit for the purpose for which he was bought. The horse, prior to the sale, had received a kick, which caused an enlargement of the bag. The defendant, by his warranty, guaranteed that this injury in no way troubled him; in other words, that it did not injure him as a "foal getter." The warranty, when read in the light of the construction subsequently placed thereon, by the defendant, and in view of the purpose for which the horse was purchased, and the price paid, is in effect a guaranty that the injury caused by the kick did not unfit the horse for the stud, and that he was capable of producing the usual percentage of foals. The testimony fully establishes that the injury unfitted the horse for breeding purposes, and that he subsequently died on the 16th day of June, 1886, from the effects of the injury he had received prior to the sale to the plaintiff. During the season of 1885, the horse was bred to some 80 mares, and out of the number only 15 mares were with foal, and but 9 of these had living colts. The testimony likewise shows that the

usual percentage of foals is two-thirds of the number of mares covered. The defendant insists that the defect in the horse was plain and noticeable at the time of the sale; that it was of such a character as to require the plaintiff to take notice of its extent and effect; and, that the injury being plain and visible to the buyer, the warranty did not cover such defect. It is true that the evidence discloses that the blemish on the horse was apparent, and was observed by the plaintiff prior to the sale, yet it was impossible for him to tell whether the defect was of such a character as to injure the horse as a foal getter. The defendant, by his contract, warranted against this hidden imperfection, and he cannot escape liability because the injury was one that left an external blemish plainly visible. While a general warranty does not usually extend to imperfections known to both parties, yet it is equally well settled that the seller may bind himself, as against patent defects, if the warranty is so worded. *Pinney v. Andrus*, 41 Vt. 631; *Bank v. Grindstaff*, 45 Ind. 158. The contract of warranty in the case at bar expressly stipulates that "the enlargement of the horse's bag in no way troubled him," and is a guaranty against the extent of the injury. The defendant having, by his contract, expressly warranted against the defects of the horse, he cannot relieve himself from liability by showing that the plaintiff was aware at the time of the sale that the horse was injured.

It was admitted by the defendant on the trial that the horse was not registered in the Stud Book of England. That the horse was warranted to be so registered is not denied. The defendant on the trial sought to escape the force and effect of this clause of his written warranty by attempting to show that, at the time of the sale, he informed the plaintiff that the horse was not registered. Upon the cross-examination of the plaintiff, Roode, he was asked by the defendant's counsel this question: "At the time the writing was made, [being the warranty in question,] I will ask you to state to the jury whether or not Watson didn't tell you that the horse was not registered in the Stud Book of England." The plaintiff's objection to the witness answering the question was sustained, and the answer was not taken. This ruling of the court is now assigned as error. The testimony sought to be elicited, had it been received, would have contradicted and varied the written agreement of the parties. It is too well established to require the citation of authorities that parol testimony cannot be received to contradict or vary a written contract. It is claimed by the defendant that the purpose of this testimony was to show that the defendant had knowledge that the horse was not registered, and that the defendant could not have relied upon the statement in the warranty that the horse was registered, and therefore no claim for damages can be based upon the fact that the horse was unregistered.

While it is true that in a suit on a breach of warranty against defects in the article sold the seller may prove that the defects were of such a character that the

purchaser must have known of their existence, or that the buyer knew of them prior to the sale, for the purpose of showing that the plaintiff did not rely upon the warranty, yet it does not follow that it is competent to prove that the seller, during the negotiations leading up to the sale, made representations to the purchaser directly contradictory of his written warranty subsequently made. No case has been cited by counsel for plaintiff in error holding the doctrine contended for by him in this case, nor have we been able to find such a case reported in the books. To permit such testimony to be received would violate the familiar rule of evidence above referred to. There was therefore no error in sustaining the plaintiff's objection to the question propounded.

After the defendant had closed his case, the plaintiff put in evidence, over the objection of the defendant, what purported to be a copy of a letter written by the plaintiff to the defendant, on the 24th day of February, 1885. Among the objections made by the defendant at the time was that no foundation had been laid for its introduction, and that no notice was served upon the defendant or his attorneys to produce the original. No foundation was laid for the introduction of the copy. It does not appear that the original could not have been produced at the trial, nor was it shown that the paper offered was a correct copy of the original. Numerous other errors are assigned in the brief of counsel for the plaintiff in error, based upon the rulings of the trial court upon the admission of testimony, which we will not take the time to notice, as many of them are disposed of by what we have said in this opinion, and the other errors are not likely to occur upon a retrial of the case.

Nine assignments in the petition in error are predicated upon the giving of certain instructions to the jury, but, as they are not referred to in the brief of plaintiff in error, these assignments are abandoned. The record, however, discloses that no exception was taken to any paragraph of the charge of the court until after the verdict was returned into court. A party cannot wait until after he learns that an unfavorable verdict has been received and then except to the charge of the court, and assign for error the giving of such instructions. An exception must be taken when the instructions are given, in order to have the same considered by the reviewing court.

The defendant requested 12 instructions to be given to the jury, all of which were refused. These requests are quite lengthy, and it is not deemed important that they should all be copied into the opinion. The first and twelfth requests correctly stated the rule that the burden of proof was upon the plaintiff. The substance of these requests is contained in the third paragraph of the charge given by the court on its own motion, and no error was committed in refusing them.

The second request is as follows: "The court instructs the jury that if they believe from the evidence that the plaintiff, Orange A. Roode, is a person of bad reputa-

tion for truth and veracity in the neighborhood where he resides, then, as a matter of law, this fact tends to discredit his testimony, and the jury may entirely disregard it, except in so far as he is corroborated by other credible testimony, or by facts and circumstances proved on the trial." The defendant introduced several witnesses, who testified that the plaintiff's reputation for truth and veracity in the neighborhood where he lived was bad. In view of this testimony, the jury should have been told what weight should be given to the plaintiff's testimony. The request contained a correct statement of the law, and, as it was not covered by the instructions given, it was error to refuse it.

The substance of the third request is that the warranty made by the defendant on the 27th day of April, 1885, after the contract of sale was concluded, being without consideration, is not binding on the defendant. There is in the record no testimony tending to show that a warranty was made on that date. Doubtless the defendant meant Exhibit B, that was made on April 24th. As heretofore stated, this exhibit was in no way relied upon as a warranty, or made the foundation of the action, and the request was not applicable to the testimony.

Request No. 4 was rightly refused. It, in effect, stated that, if the horse was capable of producing a single foal, then there was no breach of the warranty upon that point. The defendant was not entitled to so favorable an instruction.

The defendant's fifth prayer reads "that although the defendant warranted in writing the stallion 'Knight of the Shires,' to be registered in the Stud Book of England, also his dam, as well as sire, and that the defendant would furnish the secretary's receipt for such pedigree, still, if the jury further believe from the evidence that at said time the defendant informed plaintiff that said horse was not registered but simply eligible to registry, and that said plaintiff knew that said horse was not registered, and did not rely on said warranty in making his purchase of the said horse, the plaintiff could not recover for a breach of said warranty, as in law it would be no warranty unless the plaintiff relied upon it in making the purchase." No testimony was given that the defendant informed the plaintiff that the horse was not registered. Such testimony was excluded, and we think rightly so.

The sixth and ninth instructions refused, stated in substance that defects or blemishes which are known to the purchaser must be expressly warranted against to make the seller liable for such defects. We find no fault with the statement of the law in these instructions. The plaintiff did not seek to recover for defects that were visible at the time of the purchase, and that were not expressly covered by the terms of the warranty. The plaintiff claimed damages because the horse was unregistered, and on account of the injury which the horse had received prior to the sale. Both of these matters were expressly covered by the warranty.

The eleventh request covers the question

of reliance by the purchaser upon the warranty. It is as follows: "(11) The court further instructs the jury to entitle the plaintiff to recover in the suit it is not only necessary for the jury to find from the evidence that the plaintiff warranted the animal in question as alleged in the petition, but it must further appear from the evidence that the plaintiff relied upon said warranty in making the purchase of the horse, and was induced to make said purchase by said warranty, and it must also appear from the evidence that the horse was not as warranted at the time of the sale; and, unless all of these facts appear from the evidence, the jury should

find for the defendant." The law undoubtedly is, and has been so declared by this court, that the purchaser of personal property must have relied upon the statements of the seller as to the quality of the article sold, in order to make the representations a warranty. *Little v. Woodworth*, 8 Neb. 281; *Halliday v. Briggs*, 15 Neb. 219, 18 N. E. Rep. 55. This instruction stated the law correctly, and, not being covered by any of the instructions given, should not have been refused. For the errors pointed out, the judgment of the district court is reversed, and the cause remanded for further proceedings.

The other judges concur.

WELLS v. TUCKER et ux.

(3 Bin. 366.)

Supreme Court of Pennsylvania. March 30, 1811.

This was an action of trover for two bonds, tried under the general issue at the nisi prius in February last before Mr. Justice Yeates.

From the report of his honour, the evidence was in substance this:

Andrew Craig, the intestate, had adopted the wife of Tucker at a very early age, and maintained her in his house until her marriage. After that event, he frequently manifested his kindness to her family, and in one or two unfinished wills which he left at his death, appeared to have designed a legacy of about £1000 for her husband and children. He died on the 20th August 1805, intestate and without issue, leaving a widow, a brother and sister, and some nephews and nieces the children of deceased brothers and sisters. His widow, who by the law of New Jersey where he had lived, was entitled to half his personal estate, proved upon the trial, that about the 17th of August 1805, her husband, having then a sketch of a will in his hand, which he was too ill to finish, said to her, "I have bonds against Benjamin Tucker (the defendant) to the amount of about £1000, which I give to his children to be divided between them." He told her where they were, wrapped up in the pigeon-hole of a desk, of which he delivered her the key, and requested her to go and get them. She accordingly got them and locked them up until after his death, when she delivered them to the defendants. After the delivery, Tucker, imprudently, but not with any dishonest view, canceled them, and induced the original obligee, who had assigned them and a mortgage for securing them, to the intestate, to enter satisfaction of record.

Judge Yeates charged the jury, that if they believed the evidence of Mrs. Craig, they ought to find for the defendants, as he was of opinion that the delivery of the bonds to the wife for the children, made them a good *donatio causa mortis*.

The jury found for the defendants; motion for a new trial.

Ingersoll, for plaintiff. Hallowell and Rawle, contra.

TILGHMAN, C. J. This is an action of trover for two bonds, which were the property of A. Craig, the plaintiff's intestate. The defendants claim them as a *donatio causa mortis* made by Andrew Craig in his last illness to the children of the defendants. Andrew Craig died intestate, and without issue, and the gift was proved by Theodosia Craig, his widow, who is entitled by law to one half of her husband's personal estate. She swore, that the gift was made by her husband about three days before his death, and the bonds delivered to her, to be by her delivered over, and that she kept them locked up in her trunk till after the death of her husband, when she gave them to the defendants for the use of their children.

The first reason offered for a new trial, is that the verdict was against evidence.

But this does not appear to have been by any means the case; for the witness who proved the gift was of irreproachable character, and swearing against her own interest. Her credibility was submitted to the jury, and I cannot say that they were wrong in believing her.

The second reason for a new trial is, that there was no delivery of the bonds, which is essential to a gift of this kind; that a delivery to the wife, was, in point of law, no delivery at all, and that the judge who tried the cause erred in not charging the jury accordingly. This is the only point for consideration.

A *donatio causa mortis* is a gift of a personal chattel, made by a person in his last illness, subject to an implied condition, that if the donor recovers, the gift shall be void. So also it shall be void, if the donee dies before the donor. In this and some other circumstances (being subject to the debts of the donor, etc.) it is in nature of a legacy. It was introduced into the common law from the Roman civil law, but not in the full extent in which it is recognized in the latter. The civil law takes notice of three different kinds of *donationes mortis causa*, to some of which delivery is essential, but not to all. It is unnecessary to inquire minutely into the civil law, because I consider it as settled, that to gifts of this kind, as incorporated into the common law, delivery is necessary. The whole law on this subject is fully laid down by Lord Hardwicke in *Ward v. Turner*, 2 Ves. Sr. 431. It was formerly doubted, but is now established, (as conceded by the plaintiff's counsel) that a bond is a proper subject of this kind of gift. It is a wise principle of our law, that delivery is essential, because delivery strengthens the evidence of the gift. Too much care cannot be taken, in insisting on the most convincing evidence in cases of this kind; for these donations do in effect amount to a revocation pro tanto, of written wills; and not being subject to the forms prescribed for nuncupative wills, they are certainly of a dangerous nature. Now, let us consider the delivery which was made in this case. In the first place, it was not to the donee, but to the donor's wife to be by her delivered over. There is no objection to this mode of delivery. Whether made to the donee immediately, or to another for his use, is immaterial. It was so decided in *Drury v. Smith*, 1 P. Wms. 404. The circumstance relied on by the plaintiff's counsel, is, that the delivery to the wife was in fact no change of possession, because the possession of the wife is the possession of the husband, and the wife being in the husband's power, he may at any time take back the possession, and thus avoid the gift. To give this observation its full force, it is contended on the part of the plaintiff, that a gift of this kind passes the property immediately, and is not subject to revocation by the donor. Without absolutely committing myself, I incline to the opinion, that in this as in several other particulars, it partakes of the nature of a legacy, and is revocable. No case has been cited exactly in point; but it is laid down in *Ayl. Pand.* 331, that it may be

revoked by the donor's repenting thereof; and in *Jones v. Selby*, Prec. Ch. 300, the Lord Chancellor, in delivering his opinion, said to the counsel, "you agree that a *donatio causa mortis* is revocable by the testator." It is true that in the arguments of the counsel, as reported, no such concession appears. One would hardly suppose however, that the chancellor would have used those expressions unless the fact had been so. But the case of *Miller v. Miller*, 3 P. Wms. 356, is strong to the point of delivery. Indeed, the argument from that case is *a fortiori*; for there the donation was to the wife, and the delivery to the wife, and held good. There is no weight in the remark, that in that case the testator delivered the chattel in the first instance to a servant, to be by him delivered to the wife; for she was present, and the delivery over to her was made in a short time and in the testator's presence. There can be no reason why a delivery to the wife for her own use should be good, and yet not good if for the use of another. Upon the whole then this donation was perfect; it was made in the testator's last illness, and accompanied with the delivery of the bonds, which is all that the nature of the case admits of. I am therefore of opinion that the plaintiff's rule should be discharged.

YEATES, J. There seems to me no ground whatever for asserting that the present verdict was contrary to evidence. It rested solely on the credibility of Theodosia Craig, the widow of the intestate, of which the jurors were the sole judges. They were instructed to deliberate calmly upon her testimony, and on the one hand to consider the danger of such evidence, the necessary consequences of parol evidence in such cases in general, and the particular prepossessions of the witness in this case towards her niece; on the other hand, they were told to recollect, that she testified against her own interest as to one half of the demand, that the impulse of her husband's mind was favourably directed towards Mrs. Tucker his adopted child from early infancy, which was confirmed by the unfinished wills wherein he marks her husband and children as objects of his bounty, that the probability of her story, her character and manner of giving testimony, should also be taken into view, and a temperate decision formed on the whole. The jury have affirmed the credibility of the witness by their verdict, with which I am perfectly satisfied. As to the conduct of Tucker in cancelling the bonds, and prevailing on Stephen Sicard to acknowledge satisfaction on the record of the mortgage, after he had assigned it over to the intestate, the jury were told that it was highly improper and reprehensible; but if the children independently of these acts were entitled to the benefit of these bonds, such acts would not defeat their interest therein.

I think the evidence would have warranted the jury to pronounce the gift to the defendant's children to be absolute in the first instance, and to take effect im-

mediately, and therefore irrevocable in its nature. Nothing was said or hinted at, of its being a conditional gift in case of his death; but he gave the bonds to Tucker's children equally to be divided between them; and such might be a good present *donatio inter vivos*.

Supposing however that the act was done in contemplation of death, and that it could only take effect as a *donatio causa mortis*, I think it may be established as such. It is agreed on all hands, that in such cases the gift must be made in the party's last sickness, and be accompanied by a delivery of the article to the donee, or some one in his behalf. The objection made in this instance is, that the delivery to the intestate's wife was insufficient, because it still remained while in her possession subject to his control, and therefore revocable. The answer is, that a small matter will operate as a good delivery; such as a mixed possession, the delivery of the key of the room in which the furniture given is, to the donee. *Smith v. Smith*, 2 Stra. 955. Besides, it is fully established, that a wife is capable of taking a *donatio causa mortis* from her husband, being in nature of a legacy, though it need not be proved as a will. *Miller v. Miller*, 3 P. Wms. 356, 2 Eq. Ab. 356, pl. 24; *Lawson v. Lawson*, 1 P. Wms. 441, 2 Eq. Ab. 575; 3 Wood. sect. 514. Now, what good reason can be assigned, that the possession of the article by the wife is sufficient to validate a gift made by her husband in his last illness for her exclusive benefit, and yet that a like possession as agent for another shall not be good? It is equally subject to countermand and revocation in both instances. She may be attorney to deliver seisin to her husband. Co. Litt. 52a. Moreover we have the authority of the lord chancellor for asserting that a *donatio causa mortis* taking place in futuro, is revocable as a will during the life of the party. *Jones v. Selby*, Prec. Ch. 303. And the reason why it should not prevail against creditors, is that it is considered as a legacy. *Drury v. Smith*, 1 P. Wms. 406; 2 Bla. Com. 514. According to the language of the chancellor in the last case, a man certainly, notwithstanding his will, has a power to give away any part of his estate in his lifetime. He might in his lifetime, after the making of his will, give away any part of his estate absolutely; and by the same reason he might do it conditionally. The conditional gift presupposes the power of revocation; were it not so, a gift *bona fide* in the lifetime of the party, would prevail against creditors after his death.

Many of the observations of the plaintiff's counsel seem to me rather referable to the general state of the law, as now settled, than as objections to what was done either by the court or jury in the cause before them. I feel the force of the remarks made, that a written will is attended with more security and certainty, than a verbal gift of goods and property in the nature of a *donatio causa mortis*; and that frauds and perjuries may arise from parol testimony in the latter case, no reasonable mind can doubt. To

the court belongs the duty of deciding upon the competency of evidence; but the jury ultimately must decide upon the credibility of the witnesses. As to a widow's oath in cases of this nature, her interests will in general prevent her from acting collusively to the prejudice of children, or collateral kinsmen. Should it unhappily prove otherwise, I know of no other safeguard than the intelligence of independent jurors. If the circumstances

will fairly warrant the conclusion, that a nefarious scheme has been meditated to plunder the next of kin, I trust it would soon be rendered abortive.

On the whole, I am of opinion, that judgment on the verdict should be rendered for the defendants.

BRACKENRIDGE, J., was of the same opinion.

Judgment for defendants.

WHEELHOUSE v. PARR.

(6 N. E. Rep. 787, 141 Mass. 593.)

Supreme Judicial Court of Massachusetts.
Middlesex. May 8, 1886.

This was an action of contract to recover \$410.22 for a lot of leather sold to defendant. Hearing in the superior court, which found for the plaintiff, and the defendant appealed. The facts appear in the opinion.

F. W. Qua and F. P. Marble, for plaintiff. Wm. H. Anderson, for defendant.

DEVENS, J. When goods ordered and contracted for are not directly delivered to the purchaser, but are to be sent to him by the vendor, and the vendor delivers them to the carrier, to be transported in the mode agreed on by the parties, or directed by the purchaser; or when no agreement is made, or direction given, to be transported in the usual mode; or when the purchaser, being informed of the mode of transportation, assents to it; or when there have been previous sales of other goods to the transportation of which, in a similar manner, the purchaser has not objected,—the goods, when delivered to the carrier, are at the risk of the purchaser, and the property is deemed to be vested in him, subject to the vendor's right of stoppage in transitu. This proposition assumes that proper directions and information are given to the carrier as to forwarding the goods. *Whiting v. Farrand*, 1 Conn. 60; *Quimby v. Carr*, 7 Allen, 417; *Finn v. Clark*, 16 Allen, 484; *Finn v. Clark*, 12 Allen, 522; *Downer v. Thompson*, 2 Hill, 137; *Foster v. Rockwell*, 104 Mass. 170; *Odell v. Boston & M. R. R.*, 109 Mass. 50; *Wigton v. Bowley*, 130 Mass. 252.

The defendant had made a purchase of leather in November previously to the purchase of that the price of which is in controversy, under a direction to the plaintiff to "ship to care of D. and C. Melver, shipping merchants, Liverpool, as soon as possible, for their next steamer to Boston, direct." This shipment was made as ordered, and on December 16, 1884, the defendant sent a further order saying: "As regards the shipping of the leather just received, you have done everything satisfactory. Ship this order in like manner."

The directions by which the plaintiff was to be controlled must be interpreted as requiring him to forward the goods to D. & C. Melver, to be transported by them by the Cunard line, of which they were managers and agents. The words "their next steamer" could not have meant any steamer which would accept freight from D. & C. Melver. Cases may be readily imagined where these words would be of the highest importance; as if

the defendant had an open policy of insurance protecting his goods which might be sent by the Cunard line. It might also be true that the defendant would not deem a policy of insurance necessary when goods were sent by a well-established passenger line, where greater precautions might probably be taken for safety, which he would deem necessary when they were sent by a purely freight-steamer. The goods were actually forwarded to D. & C. Melver, with instructions in conformity with the directions of the defendant, and, had the matter ended there, so far as any directions to D. & C. Melver is concerned, the plaintiff would be entitled to treat them as delivered to the defendant, and to require him to pay the purchase money. If, on the other hand, while the goods were yet in the hands of the carrier, and before transportation of them had commenced, the plaintiff changed the directions given to him by the defendant, or authorized the carrier to transport them in a different mode from that directed by the defendant, and loss has thereby occurred, he cannot contend that they were delivered to the defendant by him. By continuing to exercise dominion over them, and by giving a new direction, impliedly withdrawing the directions previously given, he cannot be allowed to assert that he had made a complete delivery by his original act, if a loss has occurred by reason of that which he has subsequently done or directed. The change in the directions given relates back to and qualifies the original delivery.

The plaintiff, in answer to a letter from D. & C. Melver, after the goods had reached them, inquiring whether they were to keep the goods "for our steamer, 14th inst., or ship by the Glamorgan," ordered them to be shipped by the steamer arriving out first, presumably the steamer which D. & C. Melver believed would be the first to arrive. The Glamorgan was not a steamer of any line of which D. & C. Melver were owners or agents, and in no way answers the description of "their steamer" as applied to D. & C. Melver. By neglecting to limit the authority of D. & C. Melver to send by a steamer which could be thus described, and by directing them to send by the steamer which would first arrive, the plaintiff had failed to comply with the orders of the defendant as to the shipment of goods; and if correct directions had originally been given, had withdrawn them, and substituted others. When, therefore, exercising the authority thus given by the plaintiff, D. & C. Melver send by the Glamorgan, as being, in their judgment, the steamer likely to arrive first, and a loss occurs, it should not be borne by the defendant, whose directions have not been followed. Judgment for the defendant.

WHEELWRIGHT v. DEPEYSTER.

(1 Johns. 471.)

Supreme Court of New York. Aug. Term, 1806.

This was an action of trover, for a quantity of coffee. The cause was tried at the New-York Sittings, the 18th day of April, 1806, before Mr. Justice Spencer.

At the trial, the following facts appeared in evidence. The plaintiffs were owners of the schooner *Peggy*, of Newburyport, and of a greater part of the cargo, consisting of coffee in hogsheads, barrels and bags, marked S. P., and they and the master were joint owners of another part of the cargo, being five bags of coffee, without marks. The schooner had sold her outward cargo at St. Marks, in the island of St. Domingo, in January, 1804, and took in her homeward cargo, consisting chiefly of coffee, belonging to the plaintiffs and others. On her voyage homeward to the United States, she was captured, the 15th of February, 1804, by a French privateer, and carried into St. Jago de Cuba, where she arrived the 1st of March. The coffee in question was purchased, on account of the defendants, of a Spanish merchant, at St. Jago de Cuba, and the ship *Two Brothers*, in which it was brought to New-York, went along side of the *Peggy*, and took it out of her. The coffee came into possession of the defendants, with the rest of the cargo of the *Two Brothers*, in May, 1804, and a demand thereof was made by the plaintiffs on the 29th of May, which was refused by the defendants. It further appeared, that the coffee in question had been purchased by the plaintiffs at St. Marks, which all the time was in possession of negroes, under the government of Dessalines, and in a state of revolt from the French government. Great quantities of coffee are sold at St. Jago de Cuba, but chiefly prize coffee. The master and crew of the *Two Brothers*, when they took the coffee on board, had no knowledge of the plaintiffs' claim, but believed it to have been the property of the vendor there.

The defendants then offered in evidence certain proceedings of the agency of the French government at St. Jago de Cuba, and the sentence of condemnation of the *Peggy* and her cargo by a French admiralty court at St. Domingo. These documents were admitted to be duly authenticated, and contained the whole of the proceedings. The facts which they disclosed were, that after a process verbal and examination of the master and mate, a survey of the *Peggy* was ordered by the French agency of St. Jago de Cuba, and it being reported that she was leaky, and her cargo in danger of being spoiled, it was ordered to be sold provisionally, and the proceeds to be deposited, to abide the final decision; and the whole cargo was sold, under such order, to a Spanish merchant there; that, afterwards, on the 16th of April, subsequent to the sale of the coffee to the defendants, a sentence of condemnation was pronounced on the coffee at St. Domingo, grounded on a process verbal drawn up at sea, and one at St. Jago de Cuba, by the French agent there,

at the time the *Peggy* arrived as a prize, and on the examination of the master and mate. The cause of condemnation assigned, was a contravention of the article of the French government, as to the trade and intercourse with those parts of the island of St. Domingo that were in possession of the negroes. This evidence was objected to by the plaintiffs, and was overruled by the judge. The defendants then offered to prove, that an agency of the French government for such purposes was established at St. Jago de Cuba, by permission of Spain, with power to proceed in the manner stated; but the judge overruled the testimony. It appeared in evidence, that, at that time, Spain was not at war with any power.

The judge charged the jury, that the property of the coffee remained in the plaintiffs, and had not been changed, either by the purchase made by the defendants, nor by any of the acts and proceedings of the captors, or the French tribunals; that in ascertaining the damages, they ought to take into calculation, not only the coffee, exclusively owned by the plaintiffs, but a moiety of that part also owned by them jointly with the master. The jury found a verdict for the plaintiffs accordingly.

The defendants moved for a new trial, on the following grounds. 1. That the property in the coffee became vested in the defendants by the purchase; 2. That prize goods may lawfully be sold by the captors in a neutral country, with the consent of the neutral power; 3. That a neutral power may lawfully permit a belligerent to bring prizes into its ports, and to proceed against them there for offences against the laws of neutrality; 4. That a prize carried into a neutral port, may be condemned while lying there, by the tribunals in the country of the captor; 5. That prizes may be sold previous to a condemnation, and a condemnation after such sale, by a court of competent jurisdiction, will divest the original owner of his property; 6. That the proceedings and condemnation in the present case ought to have been received in evidence, as they were conclusive, and formed a complete defence in the cause; 7. That the present suit is a question of prize or no prize, and belongs, therefore, exclusively to the prize courts; 8. That the judge misdirected the jury, as to the assessment of damages for the moiety of the coffee, which the plaintiffs owned jointly with the master.

Harrison and D. A. Ogden, for plaintiffs. S. Jones and Hoffman, for defendants.

KENT, Ch. J. delivered the opinion of the court. This cause was very ably argued by the counsel, and the several points submitted, have received, as they merited, the attentive consideration of the court.

It was contended that a bona fide purchase by the defendants at St. Jago, for a valuable consideration, and without notice, was equivalent to a purchase in market overt under the English law, and bound the property against the party who had right. As no local law is al-

leged, or proved, this question must be governed by the general principles of the law of sales, which we are to presume, until the contrary be shown, are received and adopted in all commercial countries, at St. Jago as well as at New-York. It was the maxim of the civil law that *nemo plus juris in alium transferre potest quam ipse habet*; and this plain dictate of common sense is considered by Pothier¹ and Erskine² as a fundamental doctrine of the contract of sale in France and Scotland; and there is good reason to conclude, that it prevails in most of the countries in Europe which have felt the influence, or obeyed the precepts, of the civil law. Lord Kaimes, in his *Historical Law Tracts*, tit. "History of Property," vindicates this principle in the transfer of chattels, and observes, that when notions of property were slight, a bona fide purchase of stolen goods, gave a good title against the original owner; but that in the progress of society, property acquired such stability and energy, as to affect the subject wherever found, and to exclude even an honest purchaser, when the title of his vendor was discovered to be defective. It was also a principle in the English common law, that a sale out of market-overt did not change the property against the rightful owner, and the custom of the city of London, which forms an exception to the general rule, has always been regarded and restricted by the courts, with unusual jealousy and vigilance. (Comyns' Dig. tit. "Market," E.) The effect of such a purchase made here is not strictly before us, but I have no difficulty in saying that I know of no usage or regulation within this state, no Saxon institution of markets-overt, which controls or interferes with the application of the common law.³ The purchase by the defendants did not, therefore, of itself, and without reference to the title of the vendor, give them an indefeasible right to the goods in question.

The original title of the plaintiffs to the coffee being made out upon the trial, and not contested here, we are next to inquire, whether the power and proceedings of the agent of the French government, established at St. Jago, were competent to authorize a sale of the coffee. This agency would appear to have been a prize tribunal with limited and provisional powers. There was a process verbal received, and examinations taken by its authority, and a survey, sale and deposit of the proceeds ordered, and the agency is stated to have been established for such purposes. It also appears, that at the time of the bringing of the vessel into St. Jago as a prize, and at the time of the sale, Spain was a neutral power, and that there had not been any judicial condemnation of the cargo; but only an order of this agency for a provisional sale. I need not question a provisional sale in cases of necessity,⁴ under the orders of a competent

court; but I deny the legality of the power exercised at St. Jago. The object of such tribunals in neutral ports, is probably to facilitate the sale, and increase the profits of prizes; but the object is not to be attained by such means. *Ausis talibus istis non jura subserviunt*. Neutral ports are not intended to be auxiliary to the operations of the parties at war, and the law of nations has very wisely ordained that a prize court of a belligerent captor cannot exercise jurisdiction in a neutral country. All such assumed authorities are unlawful, and their acts void. This was so considered by the English court of admiralty in the case of *Flad Oyen*, (1 C. Rob. Adm. 135.) and by the court of K. B. in the case of *Havelock v. Rockwood*. (8 Term Rep. 268.) Lamfred⁵ lays down the same rule by saying that the judgment of condemnation ought to be rendered out of the territory of the neutral power. The proper and regular court to condemn, says the highly respected and authoritative Answer to the Prussian Memorial, is the court of that state to which the captor belongs; and that questions of prize are, and can be, cognisable only in such courts, and, consequently, that the erecting foreign courts, or jurisdictions elsewhere, to take cognisance thereof, is contrary to the known practice of all nations.⁶ The Austrian ordinance of neutrality of the 7th of August, 1803, art. 17. refers to and admits as valid, condemnations only by the judicial authorities of the countries of the captors; and the supreme court of the United States, in the case of *Glass v. The Sloop Betsey*, (3 Dallas, 6.) declared, that no foreign power could of right institute any prize court, or judicature of any kind, within the United States, unless warranted by treaty. From these cases, from the reason and fitness of the thing, and from the manifest inconvenience and abuse which would result to neutral rights, as well as to those of the powers at war, from the toleration of a contrary practice, I am satisfied, that the rule which I have stated is correct and just, and supported by the soundest authority. The proceedings of the French agency at St. Jago are, then, to be put out of view, as being *coram non judice*, and we are to consider the sale as made without any judicial sanction.

Such a naked sale by a captor even of property professedly belonging to an enemy, is void in law, and incapable of divesting the title of the original proprietor. It is requisite that a sentence of condemnation be given by a court of the sovereign of the captor, before a title to the prize can be transferred.⁷ This excellent rule has been long known and established in the English admiralty, as appears by

¹ De Commercio Neutrali, &c. sec. 14. See also Azum's Maritime Law of Europe, vol. 2. p. 254.

² Findlay v. The William, 1 Peters's Adm. Decis. 27. Jolly v. The Neptune, 2 Peters's Adm. Decis. 345, 346. The Kierlight, 3 C. Rob. Adm. Rep. 96. See also, Donaldson v. Thompson, 1 Campbell's N. P. Cases, 429.

³ See The Nostra de Conceiscas, 5 C. Rob. Adm. Rep. 294. The Falcon, 6 C. Rob. Adm. Rep. 194-195. Case of The Falcon, 1 Bee's Adm. Rep. 93. Sasportas v. Jennings, 1 Bay's S. C. Rep. 478.

¹ Traite du contrat de vente, part 1. n. 7.

² Institute of the law of Scotland, vol. 2. 481.

³ See Hiern v. Mill, 13 Vesey, jun. 121.

⁴ See Jennings v. Carson, 4 Cranch's Rep. 3. 16.

the case of *Thermolin v. Sands*; (Carth. 423, 12 Mod. 143.) and it seems now to be equally recognised on the continent as part of the law and practice of nations. (The case of the *Flad Oyen*, 1 C. Rob. 335, and of the *Henrick & Maria*, 4 C. Rob. 43. Heinec. de nav. ob. vet. mer. veh. comm. sec. 16. Azuni's Maritime Law, vol. 2, p. 242.) Our own government, also, adopted the rule during the revolutionary war, and bound itself to observe it. With respect to the capture of neutral vessels under the pretence of a violation of neutral duty, or of contravening the decrees of a foreign government, as was the instance in the case before us, the necessity of a previous trial and judgment is still more urgent and palpable, and that necessity is universally admitted.

We are next led to examine the effect of the sentence of condemnation at St. Domingo, subsequent to the sale at St. Jago. This sentence was intended to act retrospectively, and to cure all defects in the proceedings before the French agency, but it does not appear, and from the case we cannot intend, that the proceeds of the sale under the order at St. Jago were deposited in any other place than St. Jago, and the admiralty at St. Domingo proceeded to exercise jurisdiction over the cargo, and to adjudge it lawful prize, when the subject matter of their sentence was within the territory of a neutral power. An important and delicate question then arises, whether we are bound, in such cases, by the decision of a prize court.⁸ Such a court acts in rem only, and it cannot exercise a competent or efficient authority unless it have possession of the subject. Possession must be essential to its jurisdiction. It is the duty of a prize court to give a prompt and fair hearing to all parties, and to restore instantly, if upon a summary examination there does not appear sufficient ground to proceed. But how can this hearing be had, and this restoration made and enforced, when the subject matter is in controversy, and perhaps the captors and captured, are in a foreign country? The admission of a practice so incompatible with the very constitution of a prize court would lead to the greatest confusion. Suppose a foreign prize court should sustain a libel against a vessel lying within one of our own harbours, and should proceed to try, condemn, and sell the same; would any person hesitate to say that such a jurisdiction was inadmissible? that such a proceeding was *coram non iudice*? To sustain jurisdiction in such a case would be the height of injustice and absurdity. The old rule, mentioned by Bynkershoek, of allowing belligerents to carry their prizes into neutral ports, and to sell them there, was founded on the doctrine that bringing the prize *infra præsidia* did of itself work a transfer of title. But the alteration in the sense and practice of nations, by requiring a judicial condemnation before a change of title can take place, has done away the former indulgence, as incompatible with the new improvement; an improvement which

has become an essential and most salutary control over the exercise of the right of maritime capture. Valin, who published his Commentaries in 1760, considered it then as having become the law of nations, that prizes could not be carried into a neutral port, unless in cases of necessity, without a violation of neutrality, and this prohibition was in one of the established ordinances of the marine. (Ord. de la Marine des Prises, art. 14, and Valin, *ibid.*) Among the regulations of congress upon this subject, in the year 1781, they acknowledged their obedience to the law of nations according to the general usages of Europe; and they undoubtedly declared their understanding of those usages, when, in the same year, they ordered all prizes to be kept safe without sale, until they had been passed upon by a competent court, and that all prizes were to be brought for a judicial determination before a prize court within the United States, or within the dominion of an ally of America. (Journals of Congress, vol. 7, 68, 189.) The case cited from March, is interesting, inasmuch as it contains so early a recognition in England, of the modern rule, that a prize must be brought *infra præsidia* of the power by whose subject it was taken, or the property would not be altered, and the sale would be void.

Sir William Scott, in the case of the *Henrick & Maria*, (4 C. Rob. 43.) admitted, that upon principle, and according to the better opinion and practice, the prize ought to be brought within the ports of the sovereign of the captor, or within those of an ally of such sovereign, and that possession founded the jurisdiction; but he observed, that the English admiralty had gone too far in sanctioning condemnations in England, of prizes abroad in a neutral port, to permit him to recall the vicious practice of the court to the acknowledged principle. We are, fortunately, under no such embarrassment in the present case; and though precedents have controlled Sir William Scott, ego tamen seculo assentior;⁹ and we are at liberty to consider the condemnation at St. Domingo as void, for want of jurisdiction in the court over the subject.¹⁰

It has been strongly urged, that this court is concluded by the sentence, and has no authority to inquire into its extent and force, because the question of prize, and all questions incident thereto, belong to the exclusive cognisance of the admiralty courts. It is a sufficient answer to all this, to observe, that we are not inquiring into the question of prize. The plaintiffs prove a property in the coffee, and the defendants justify under a capture, condemnation and sale abroad; but before the defence can be received, it must appear that the condemnation was by a court having competent jurisdiction in the case, and so far we have, of necessity,

⁸ Cicero, Epist. ad fam. 7. 22.

⁹ See *The Sophie*, 6 C. Rob. Adm. Rep. 139, note. The decision in the case of the *Henrick & Maria* was affirmed in the high court of appeals. *The Comet*, 5 C. Rob. Adm. Rep. 285. *The Purissima Conception*, 6 C. Rob. Adm. Rep. 47. 8. P.

¹⁰ See *Rose v. Himely*, 4 Cranch's Rep. 241-293. *The Sophie*, 6 C. Rob. Adm. Rep. 138.

an incidental jurisdiction. It would be a monstrous doctrine, to hold that we were concluded by every assumed authority. We are not to examine into the validity of the capture, but we must look so far as to see whether the condemnation was by a tribunal competent to pronounce it in the given case, and if that is once ascertained, agree that we must admit the defence to be conclusive.¹¹ In the case of *Oldy v. Bovill*, (2 East, 473.) a similar question arose, as to the legality of a French prize court sitting in Spain, and no objection was raised as to the competency of the court of K. B. to sustain the inquiry; and in the case of *Havelock v. Rockwood*, 8 Term R. 268, the same court did not hesitate to declare, that the French court of admiralty at Bergen was illegal. It is the practice of the courts of law in cases of insurance, to reject the decisions of foreign prize courts, if it appear, that they proceeded upon local ordinances, or on grounds contrary to the law of nations. (*Mayne v. Walter*, 3 Doug. 79, and *Salucci v. Johnson*, 4 Doug. 224, cited in *Park*, and admitted as valid in *Geyer v. Aquilar*, 7 Term Rep. 696.) I cannot entertain a doubt but that we have authority to inquire, and are bound to say, whether the foreign court was, by the law of nations, competent to pass the sentence in question, and having determined that it was not, that such sentence cannot avail in the present case.

The only remaining point in the case is, whether damages ought to have been assessed for the moiety of the coffee which

belonged to the plaintiffs conjointly with the master. This question admits of no difficulty. It appears to be settled in the books, that in actions of trover and trespass, the plaintiff may sue separately for his aliquot share or proportion of interest in a chattel, and that the defendant may give the joint interest of others in evidence, in mitigation of damages, but that he cannot avail himself of the omission of the plaintiff, to unite the other tenants in common with him in the suit, otherwise than by pleading it in abatement. He cannot take advantage of it at the trial. (*Dockwray v. Dickenson*, *Skinner*, 640. *Addison v. Overend*, 6 Term Rep. 766. *Sedgworth v. Overend*, 7 Term Rep. 286. *Bloxam v. Hubbard*, 5 East, 420. *Scott v. Godwin*, 1 Bos. & Pull. 70-75.)

The hardship of this case upon a bona fide purchaser is calculated, upon the first impression, to strike the imagination. It was contended by the counsel, that such purchasers ought to have been favoured; but, as an English judge has somewhere observed, arguments upon the hardship of a case are only quicksands in the law, which, if admitted, would soon choke and destroy all established principles. A steady adherence to rule in these cases, by requiring the purchaser of captured property to look at his peril to the title, and to derive it under a competent sentence, will tend to check the intemperate avidity and irregular proceedings of belligerent captors.

The opinion of the court, therefore, is, that the defendants take nothing by their motion.

Judgment for the plaintiffs.

¹¹ See *Rose v. Himely*, 4 Cranch, 241. S. P.

WHITCOMB v. WHITNEY.

(24 Mich. 456.)

Supreme Court of Michigan. April 16, 1872.

Error to Wayne circuit.

D. B. & H. M. Duffield, for plaintiff in error. D. C. Holbrook, for defendant in error.

COOLEY, J. The main facts in this case are undisputed. On the sixteenth day of March, 1871, the parties made a contract evidenced by the following writing:

"Detroit, March 16, 1871. Received of D. Whitney Jr. five hundred dollars on account for all the upper qualities and select common and cutting up or fine common lumber that I make at Rock Falls in town of Sand Beach, Michigan, this season, at fair price, what said Whitney can afford to pay; the lumber is to be delivered on rail of vessel when lumber is ready to ship, or when vessel is ready to send for it. (Signed) "Hiram Whitcomb."

The defendant from time to time advanced moneys upon this agreement, and received one cargo of lumber, in respect to which no question arises. On September 22, 1871, plaintiff wrote defendant as follows: "I have all my logs now sawed; lumber ready to ship. The sooner you send a vessel the better I would like it. I think there will be seventy M. or more." On the receipt of this letter defendant sent an inspector to Rock Falls, who arrived there about the fourth of October, and inspected and approved of about sixty-four M. feet of the lumber, acting for both parties in so doing. The lumber when inspected was at plaintiff's mill, but as fast as the inspection proceeded, it was hauled on the dock, some forty rods, to be ready for delivery on the vessel when one should be sent for it. The inspection was completed on the sixth of October, and defendant was notified thereof on the eleventh of the same month. Two days before the time last mentioned, however, the lumber was destroyed by fire, without any fault, neglect or carelessness on the part of the plaintiff, and when this fact came to the knowledge of defendant, he refused to pay for the lumber, and this suit is brought for the value. The declaration contains a count for goods sold and delivered, and also a special count setting out the facts; averring plaintiff's readiness and willingness to deliver the lumber on the rail of the vessel when one should be sent for it, but that before defendant sent any vessel to take it, though he had ample time to do so, and to load and take away the same, the lumber was destroyed by fire without the fault, neglect or carelessness of plaintiff, by means whereof the defendant became liable to pay a fair price therefor, etc.

It does not seem to be necessary to set forth the various requests to charge which were made in the count below, nor the charges given; the question in this court is simply this whether, under the facts stated, the lumber at the time it was accidentally destroyed had or had not become the property of the defendant so as

to be at his risk. The circuit judge in effect held that it had not.

In support of the ruling of the circuit judge we are referred to several decisions, some of which present questions arising under the statute of frauds, and obviously have no application here. Others were decisions upon contracts for the manufacture and delivery of specific articles, under which no title could pass until the specific thing was completed and delivered, or in some manner identified and set apart by the act of the parties. *Johnson v. Hunt*, 11 Wend., 137, presented the question whether lumber which was being got ready by a builder to put into a house which he had contracted to put up for another, became the property of his employer before it was actually built into the house; and the court held that it did not. This was clearly correct, as up to that time the contractor had an undoubted right to use it for any other purpose if he pleased. *Comfort v. Kiersted*, 26 Barb., 472, was the case of a contract for shingles to be manufactured, and which by the terms of the contract were to be the property of the vendee, at eighteen shillings a thousand, on the vendor's premises as fast as manufactured; he, however, agreeing to deliver them at the store of the vendee, and to be paid three dollars a thousand at that place. The contract fixed the amount to be delivered at 100 M., but with the privilege, on the part of the vendee, to increase it to 150 M. The court held that the shingles did not become the property of the vendee until in some way designated and set apart so as to be capable of being identified as their property. The sale was not of all the party might make, but only of a specified quantity; and the court illustrates their view of the contract by saying, the vendor might have made precisely such a contract with another person, in which case the shingles "would have become the property of the one or the other of the parties to whom he had agreed to sell them, according to their designation." This case differs from *Comfort v. Kiersted* in two important particulars: First, the purchaser here was to have all the lumber of certain kinds which should be cut; and, second, the lumber coming within the terms of the contract was particularly identified and designated by the act of inspection. *Andrews v. Durant*, 11 N. Y., 35, presented the question whether, under a contract for the building of a vessel of certain specified dimensions, to be delivered complete by a day named, for a certain price, to be paid as the work progressed, any property in the vessel passed before the vessel was completed; and it was held it did not. That case also has very little bearing upon the one now under consideration.

What is the case here? The contract is for the purchase of all the lumber of certain grades that plaintiff shall manufacture at Rock Falls during the season. The plaintiff could not have sold a foot of it to any other person without a distinct violation of his contract obligations. From the time of its manufacture nothing

would need to be done to determine the right to the defendant in any particular parcel, but to have it properly settled that it fell within one of the grades contracted for. An agent duly authorized had determined that as to all the lumber in question, and had done what amounted to an acceptance of it on the part of the defendant. It had then been set apart and stored in a proper place for the defendant, and was subject to his order. Nothing remained to be done by the plaintiff except to deliver it on the rail of the vessel; and that he could not do until the vessel was sent. Everything now depended on the action of the defendant, which might be expedited or delayed as should suit his own convenience. Had this been a contract for the completion of a carriage from specified materials, to be delivered when sent for, and had it been fully completed and accepted, so that nothing remained to be done except to make the manual delivery when it should be called for, the setting apart of the property under the contract could not have been more complete and unquestionable than it was here.

Where the case is not within the statute of frauds, manual delivery of the article sold is not essential to the passing of the title unless made so by the understanding of the parties. They may agree when and on what conditions the property in the subject of such a contract shall pass to the prospective owner.—*Denio, J.*, in *Andrews v. Durant*, 11 N. Y., 42. Their intention must be the governing consideration in every case.—*Channell, B.*, in *Turley v. Bates*, 2 H. & C., 211. The title may pass notwithstanding the price is yet to be determined.—*Turley v. Bates*, supra; *Valpy v. Gibson*, 4 M. G. & S., 837. In *Olyphant v. Baker*, 5 Denio, 382, it is said to be "a general rule of the common law, that a mere contract for the sale of goods, where nothing remains to be done by the seller before making delivery, transfers the right of property, although the price has not been paid, nor the thing sold delivered to the purchaser." And of the numerous cases in which the expression is used, that if anything remains to be done by the seller the title does not pass, *Selden, J.*, in *Terry v. Wheeler*, 25 N. Y., 525, says they only go to the length of showing, that where something is to be done by the

seller to ascertain the identity, quantity or quality of the thing sold, or to put it in the condition which the terms of the contract require, the title does not pass. And he, therefore, holds with the approval of the whole court, that an agreement by the vendor of lumber to transport it to the cars and deliver it free of charge, did not prevent the title passing immediately where what was sold was selected and designated.

Suppose this lumber had not been destroyed and the defendant's vessel had called at the dock for it; could the plaintiff have refused to allow him to take the lumber away, and maintained replevin for it if he had done so? If the title had not passed, he could; if it had, he could not. If it was still his property and at his risk, he might have sold and conveyed a good title to a third person in the very presence of the defendant after his vessel had arrived to take it away; subjecting himself only to a liability to damages on his contract for a failure to perform it. But we think if he had attempted this, the defendant would not have hesitated to say: "This property is mine; it has been set apart specifically for me, by contract, by inspection, and by designation; by every act, in short, which the circumstances admitted of being done; the vendor owes a service to me in putting it on the rail of the vessel, which he can either perform or be liable for the value of; but if he performs it, it will be in respect to property previously identified as mine, and not at all by way of designation or measurement. Whoever buys this lumber of him, buys what has not only been previously bought by me, but what has been set apart for me and placed at my disposal by the most unequivocal acts; and I have therefore become vested with a title which I shall maintain and enforce." This is what he would have been likely to say had the unfortunate fire not occurred; and this the law would have justified him in saying. It follows that the plaintiff is justified in demanding payment from him on the purchase.

The judgment of the circuit court must be reversed, and a new trial ordered.

CHRISTIANCY, C. J., and CAMPBELL, J., concurred. GRAVES, J., did not sit in this case.



WHITE v. SPETTIGUE.

(13 Mees. & W. 603.)

Courts of Exchequer. Jan. 18, 1845.

Trover for books; to which the defendant pleaded not guilty, and that the plaintiff was not possessed.

At the trial before Rolfe, B., at the Middlesex sittings in this term, it appeared that the plaintiff, who was a solicitor, had missed from day to day several volumes of the Statutes at Large, which he suspected to have been stolen by a young man who was at that time a clerk in his office. The defendant, who was a bookseller carrying on business in London, became possessed of the books by a bona fide purchase of them on different days, from a young man who brought them to his shop and offered them for sale. The defendant having sold the books, this action was brought to recover the value of them. On the above facts appearing in evidence, it was objected for the defendant, that, as the plaintiff had done nothing to prosecute the person who had stolen the books, he could not maintain the action: *Gimson v. Woodfull*, 2 Car. & P. 41; *Peer v. Humphrey*, 2 Ad. & Ell. 495; 4 Nev. & M. 430. The learned judge, however, told the jury that there was evidence to show who stole the books, and that the property in the goods, being originally in the plaintiff, could not be taken out of him by any act of a third party; and he directed them to find for the plaintiff, unless they believed the defendant received the goods knowing them to have been stolen, in which case the right would then merge in the felony, and the plaintiff would not be entitled to recover. The jury having found for the plaintiff,

Merewether now moved for a new trial, on the ground of misdirection. The case of *Gimson v. Woodfull* is an authority against the correctness of the ruling of the learned judge. That was a case exactly similar to the present. It was an action of trover for a mare, which was proved to be the property of the plaintiff, and to have been stolen from him, and it appeared that the plaintiff had good reason to believe that she was stolen from him by the person from whom the defendant bought her. The plaintiff had taken steps, both before a magistrate and otherwise with a view to get back the mare, but had done nothing towards bringing the thief to justice. Best, C. J., there says, "I am of opinion that the plaintiff has done nothing that he ought to have done, and I doubt if a statement of facts before a magistrate would be enough. But he goes to get back the property and not to prosecute the felon. If I were to hold that this action could be maintained, under such circumstances, we should have no more criminal prosecutions. I take it the law is this—you must do your duty to the public before you seek a benefit to yourself, and then there is no necessity for a civil action. The decisions go not only to the case of an action against the felon, but as to actions against persons who derive their title under him. There is a case

in the Term Reports which says that the property is in doubt till after prosecution. I cannot send this case to a jury, there being no evidence of felony; I think the case should have gone to the grand jury." In *Peer v. Humphrey*, 2 Ad. & Ell. 495; 4 Nev. & M. 430, the plaintiff was held entitled to recover stolen property, but there he had prosecuted the thief to conviction. And *Littledale, J.*, says, "The law is, that no action shall be brought, under particular circumstances, until the owner has done his duty by prosecuting. Even that has been done here. In *Gimson v. Woodfull* the property must have been changed by a sale in market overt; besides, in that case the party had done nothing towards bringing the thief to justice; here he has actually prosecuted him to conviction." [POLLOCK, C. B.—The case of *Stone v. Marsh*, 6 B. & Cr. 55], is a direct authority against the doctrine you are contending for. In that case Lord Tenterden says, "There is, indeed, another rule of the law of England, viz., that a man shall not be allowed to make a felony the foundation of a civil action; not that he shall not maintain a civil action to recover from a third and innocent person that which has been feloniously taken from him, for this he may do if there has not been a sale in market overt, but that he shall not sue the felon; and it may be admitted, that he shall not sue others together with the felon, in a proceeding to which the felon is a necessary party, and wherein his claim appears, by his own showing, to be founded on the felony of the defendant: *Gibson v. Minet*, 1 H. Black. 612. This is the whole extent of the rule. The rule is founded on a principle of public policy, and where the public policy ceases to operate, the rule shall cease also. This point was very ably shown in the argument on the behalf of the plaintiffs. The authorities were quoted, and need not be repeated; and it was shown that the familiar phrase 'the action is merged in the felony,' is not at all times, and literally, true. Now, public policy requires that offenders against the law shall be brought to justice, and for that reason a man is not permitted to abstain from prosecuting an offender, by receiving back stolen property, or an equivalent or composition for a felony, without suit, and, of course, cannot be allowed to maintain a suit for such purpose. But it is not contended, that any such policy or rule is applicable to the present case; the offender has suffered the extreme sentence of the law for another offence of the same kind." That is a case precisely in point, and it is confirmed by the decision of the house of lords in the case of *Marsh v. Keating*, 1 Blng. N. C. 198; 1 Scott, 5.] Those cases are distinguishable from the present, for there the felon had been convicted and executed. The judgment of Lord Tenterden cannot be intended to be taken to the full extent of the language used, for the plaintiff is, at all events, bound to do his best to bring the guilty party to justice.

POLLOCK, C. B.—I am of opinion that no rule ought to be granted in this case. The court of king's bench correctly ex-

plained the law in the case of *Stone v. Marsh*, and the rule of public policy which prevents the assertion of a civil right in respect of which a felony has been committed, applies only to proceedings between the plaintiff and the felon himself, or, at the most, the felon and those with whom he must be sued, and does not apply to a case like the present, where the action is brought against a third party, who is innocent of the felonious transaction. Moreover, the defence sought to be raised is not admissible under these pleas.

PARKE, B.—I think there is not the least foundation for a rule in this case. In the first place, independently of the point of law, there are neither pleadings to warrant the defence, nor facts to support it. The only pleas on the record are not guilty which puts in issue the conversion, and not possessed, which puts in issue the plaintiff's title at the time of conversion. Secondly, the books in question in the action were not proved to have been the subject of a felony, nor, assuming a felony to have been committed, did it at all appear that the thief was amenable to justice. Thirdly, the cases which have been referred to, of *Stone v. Marsh* and *Marsh v. Keating*, are authorities, that the obligation which the law imposes on a plaintiff to prosecute the party who has stolen his goods, does not apply where the action is against a third party innocent of a felony. Those cases are subsequent to that of *Gimson v. Woodfull*.

ALDERSON, B.—I also think that these pleas do not warrant the proposed defence, and even if they did, I think it would be no defence to this action. Assuming that, under the plea of not possessed, a lien may be given in evidence (with respect to which some difficulty might be raised,) still if you admit evidence of a lien, you cannot exclude evidence to show that it had ceased to exist at the time of the conversion. So that, supposing the defendant had a lien on these books, and he should prove it under the plea of not possessed, the plaintiff would be entitled

to show that the lien had ceased at the time he converted them. The utmost extent of the defence set up in this case is, that the defendant was entitled to the possession of the books until the plaintiff had prosecuted the felon. He clearly had no right to sell the goods, as he had no property in them; he does sell the goods, and thereby puts an end to the lien, if any existed. I also think that this defence ought to be specially pleaded.

ROLFE, B.—I am of the same opinion. I cannot agree to the law as laid down by Best, C. J., in *Gimson v. Woodfull*, that a plaintiff is bound, in the first instance, to do his duty to the public by prosecuting; and that if actions like the one he was then trying could be maintained, there would be no more criminal prosecutions. I think that is too general, and I cannot accede to the doctrine. I think the true principle is, that where a criminal, and consequently an injurious act towards the public, has been committed, which is also a civil injury to a party, that party shall not be permitted to seek redress for the civil injury to the prejudice of public justice, and to waive the felony, and go for the conversion. I think the law, as laid down in that case, instead of advancing public justice, would be productive of very great injustice. It amounts to this, that another person, who has got possession of my goods, of which I have been robbed, may keep them until I prosecute some innocent person whom I may suspect or find out for that purpose. In this case there was no evidence that the plaintiff's clerk took the goods, and probably he did not, though he may have been cognisant of the robbery. I also agree, that the defendant has not pleaded so as to admit this defence. With respect to what I said at the trial, that if the defendant had been the guilty receiver of the books, he would be entitled to the verdict, I must retract that, and suspend my judgment on that point, as I entertain some doubt whether I was correct.

Rule refused.





WHITEHOUSE et al. v. FROST et al.

(12 East, 614.)

King's Bench, Trinity Term. July 6, 1810.

In trover to recover the value of some oil, the property of the bankrupt, which was tried at Lancaster, in March last, a verdict was found for the plaintiffs for £390, subject to the opinion of the court on the following case:—

The plaintiffs are assignees of John Townsend, late a merchant at Liverpool; the two Frosts are merchants and partners in Liverpool; and the other defendants, Dutton & Bancroft, are also merchants and partners in the same town. On the 7th of February, 1809, Townsend purchased from the defendants, J. & L. Frost, ten tons of oil, at £39 per ton, amounting to £390, for which Townsend was to give his acceptance payable four months after date; and a bill of parcels was rendered to Townsend by the Frosts, a copy of which is as follows:—

"Liverpool, 7th February, 1809. Mr. John Townsend, Bought of J. & L. Frost, Ten tons Greenland whale oil in Mr. Stanforth's cisterns, at your risk, at £39..... £390
Cr

1809. February 14. By acceptance.... £390

"For J. & L. F., Wm. Pemberton."

The said ten tons of oil at the time of his purchase were part of forty tons of oil lying in one of the cisterns in the oil-house at Liverpool, the key of which cistern was in the custody of the other defendants, Dutton & Bancroft, who had before that time purchased from J. R. & J. Freme, of Liverpool, merchants, the said forty tons of oil in the same cistern; and upon such purchase received from the Fremes the key of the cistern. Afterwards Dutton & Bancroft sold ten of the forty tons they had so bought (being the ten tons in question) to the defendants, the Frosts, who sold the same in the manner before stated to Townsend. On the 7th of February, the day on which Townsend bought the ten tons of oil, he received from the defendants, Frosts, an order on Dutton & Bancroft, who held the key of such cistern, they having other interests therein as aforesaid, to deliver to him, Townsend, the said ten tons of oil; a copy of which is as follows:—

"Messrs. Dutton & Bancroft, Please to deliver the bearer, Mr. John Townsend, ten tons Greenland whale oil, we purchased from you 8th November last."
(Signed) "J. & L. Frost."

The order was taken to Dutton & Bancroft by Townsend, and accepted by them upon the face of the order as follows: "1809. Accepted, 14th February. Dutton & Bancroft." Townsend according to the terms of the bill of parcels, namely, on the 14th of February, 1809, gave to the defendants, Frosts, his acceptance for the amount of the oil, payable four months after date; but which acceptance has not been paid. Townsend never demanded the oil from Dutton & Bancroft, who had the custody of it. The oil was not subject

to any rent; the original importer having paid the rent for twelve months, and sold it rent free for that time, which was not expired at Townsend's bankruptcy. On the 23d of May, 1809, about three months after the purchase of the ten tons of oil, a commission of bankrupt issued against Townsend, under which he was duly declared a bankrupt, and the plaintiffs appointed his assignees. At the time of the purchase, and also at the time of Townsend's being declared a bankrupt, the oil was lying in the cistern mixed with other oil in the same; and sometime afterwards the defendants refused to deliver the same to the plaintiffs, notwithstanding a demand was made for the same by the assignees, and a tender of any charges due in respect thereof. When the whole of the oil lying in any of the cisterns in the oil-house is sold to one person, the purchaser receives the key of the cistern, but when a small parcel is sold, the key remains with the original owner; and the purchaser is charged in proportion to the quantity of oil sold, with rent for the same, until delivered out of the oil-house, unless such rent be paid by the original importer, as was the fact in the present case. If the plaintiffs were entitled to recover, the verdict was to stand; if not, a nonsuit was to be entered.

There was a similar action by the same plaintiffs against J. R. Freme and J. Freme, Dutton, and Bancroft, the circumstances of which were in substance the same.

Jas. Clarke, for plaintiffs. Scarlett, contra.

Lord ELLENBOROUGH, C. J. This case presents a difference from the ordinary cases which have occurred where the sale has been of chattels in their nature several, and where the transfer of the property from the vendor by means of an order for delivery addressed to the wharfinger or other person in whose keeping they were, and accepted by him, has been held to be equivalent to an actual delivery; the goods being at the time capable of being delivered. Here, however, there is this distinguishing circumstance, that the ten tons of oil till measured off from the rest was not capable of a separate delivery; and the question is, whether that be a distinction in substance or in semblance only. The whole forty tons were at one time the property of Dutton & Bancroft, who had the key of the cistern which contained them; and they sold ten tons to the Frosts, who sold the same to Townsend, the bankrupt, and gave him at the same time an order on Dutton & Bancroft for the delivery to him of the ten tons. To that order Dutton & Bancroft attorn, as I may say; for they accept the order, by writing upon it "Accepted, 14th of February, 1809," and signing their names to it. From that moment they became the bailees of Townsend, the vendee; the goods had arrived at their journey's end, and were not in transitu; all the right then of the sellers was gone by the transfer, and they could no longer control that delivery to which they had

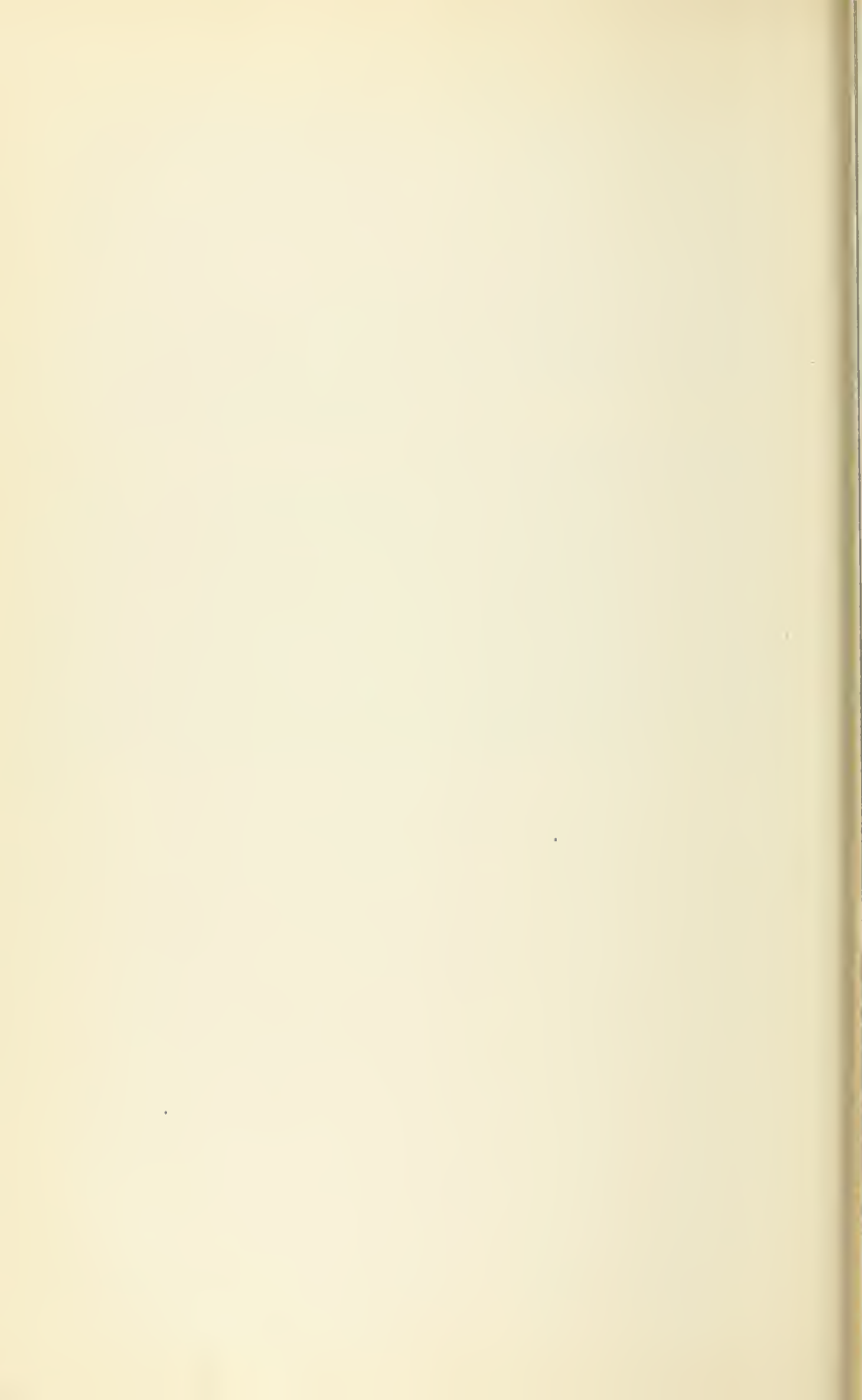
virtually acceded by means of their order on Dutton & Bancroft accepted by the latter. The question of stopping in transitu does not arise, taking the Frosts to be the original sellers, as between them and the bankrupt; the oil had never been in the hands of the Frosts; they only assigned a right to it in the hands of the common bailees, which before had been assigned to them.

GROSE, J. There can be no doubt that at the time of Townsend's bankruptcy the ten tons of oil in the cistern were at the risk of the bankrupt. All the delivery which could take place between these parties had taken place. Dutton & Bancroft, who had the custody of the whole in their cistern, had accepted the order of the sellers for the delivery to the bankrupt, and it only remained for Townsend, together with Dutton & Bancroft, to draw off the ten tons from the rest.

LE BLANC, J. Dutton & Bancroft had sold the ten tons of oil in question (which was part of a larger quantity, the whole of which was under their lock and key) to the Frosts, who sold the same to Townsend; and there is no claim on the part of the defendants, Dutton & Bancroft, to detain the oil for warehouse rent. The Frosts never had any other possession of the oil than through Dutton & Bancroft; but they gave to Townsend an order on these latter to deliver it to him; and after the acceptance of that order Dutton & Bancroft held it for his use. But something, it is said, still remained to be done, namely, the measuring off of the ten tons from the rest of the oil. Nothing, however, remained to be done in order to com-

plete the sale. The objection only applies where something remains to be done as between the buyer and seller, or for the purpose of ascertaining either the quantity or the price, neither of which remained to be done in this case; for it was admitted by the persons who were to make the delivery to Townsend, that the quantity mentioned in the order was in the cistern in their custody, for they had before sold that quantity to the Frosts, of whom Townsend purchased it, and had received the price. Therefore, though something remained to be done as between the vendee and the persons who retained the custody of the oil, before the vendee could be put into separate possession of the part sold, yet as between him and his vendors nothing remained to perfect the sale.

BAYLEY, J. There is no question of transitu here; the goods were at their journey's end. When, therefore, Dutton & Bancroft, who were then the owners of the whole, sold ten tons of the oil to the Frosts, those ten tons became the property of the Frosts; and when they sold the same to Townsend, and gave him an order upon Dutton & Bancroft for the delivery of the ten tons purchased of them, the effect of that order was to direct Dutton & Bancroft to consider as the property of Townsend the ten tons in their possession, which before was considered as the property of the Frosts; and by the acceptance of that order Dutton & Bancroft admitted that they held the ten tons for Townsend, as his property; and he had a right to go and take it, without the interference of the Frosts. Postea to the plaintiffs.



WHITMARSH v. WALKER.

(1 Metc. [Mass.] 313.)

Supreme Judicial Court of Massachusetts.
Sept. Term, 1840.

Assumpsit for money had and received, and on an agreement set forth with slight variations in different counts, but in all of them in substance as follows, viz., that in September, 1838, the plaintiff at the defendant's request bought of him a great number of multicaulis mulberry-trees at the rate of twenty-five cents per hill, to be delivered on the ground where they then were on demand by the plaintiff; that the plaintiff then paid \$10 in part of the price, and promised to pay the residue of the price on the delivery of the trees; and that in consideration thereof the defendant then promised to deliver the trees to the plaintiff on demand. A demand by the plaintiff was alleged, and also an offer of payment by him, and a refusal by the defendant to deliver.

It appeared at the trial before Wilde, J., that the agreement declared on was made, but not reduced to writing; that the price of the trees was more than \$50, but that the plaintiff paid \$10 as alleged in the declaration; and that the trees, at the time of the agreement, were growing in the defendant's close, and were nursery trees raised to be sold and transplanted.

The defendant objected that the agreement was void by the statute of frauds. The judge overruled the objection, and a verdict was found for the plaintiff. New trial to be had if the judge erred.

Huntington, for plaintiff. Wells, for defendant.

WILDE, J. This action is founded on a parol agreement, whereby the defendant agreed to sell to the plaintiff two thousand mulberry-trees at a stipulated price; the trees at the time of the agreement being growing in the close of the defendant. It was proved at the trial that the plaintiff paid the defendant in hand the sum of ten dollars in part payment of the price thereof, and promised to pay the residue of the price on the delivery of the trees, which the defendant promised to deliver on demand, but which promise on his part he afterwards refused to perform. And the defence is that the contract was for the sale of an interest in land, and therefore void by the Rev. Sts. c. 74, § 1.

In support of the defence it has been argued that trees growing and rooted in the soil appertain to the realty, and that the contract in question was for the sale of trees rooted and growing in the soil of the defendant at the time of the sale. On the part of the plaintiff it was contended that the trees contracted for were raised for sale and transplantation; and like fruit-trees, shrubs and plants, rooted in the soil of a nursery garden, are not within the general rule, but are to be considered as personal chattels. This question was discussed and considered in *Miller v. Baker* (1 Met. 27,) and we do not deem it

necessary to reconsider it in reference to the present case. We do not consider the agreement set forth in the declaration and proved at the trial as a contract of sale consummated at the time of the agreement; for the delivery was postponed to a future time, and the defendant was not bound to complete the contract on his part, unless the plaintiff should be ready and willing to complete the payment of the stipulated price. *Sainsbury v. Matthews*, 4 Mees. & Welsb. 347. Independently of the statute of frauds, and considering the agreement as valid and binding, no property in the trees vested thereby in the plaintiff. The delivery of them and the payment of the price were to be simultaneous acts. The plaintiff cannot maintain an action for the non-delivery without proving that he offered and was ready to complete the payment of the price; nor could the defendant maintain an action for the price without proving that he was ready and offered to deliver the trees. According to the true construction of the contract, as we understand it, the defendant undertook to sell the trees at a stipulated price, to sever them from the soil, or to permit the plaintiff to sever them, and to deliver them to him on demand; he at the same time paying the defendant the residue of the price. And it is immaterial whether the severance was to be made by the plaintiff or the defendant. For a license for the plaintiff to enter and remove the trees would pass no interest in the land, and would, without writing, be valid, notwithstanding the statute of frauds.

This subject was fully considered in the case of *Taylor v. Waters*, 7 Taunt. 374; and it was held that a beneficial license, to be exercised upon land, may be granted without deed and without writing; and that such a license, granted for a valuable consideration and acted upon, cannot be countermanded. The subject has also been ably and elaborately discussed by Chief Justice Savage in the case of *Mumford v. Whitney*, 15 Wend. 380, in which all the authorities are reviewed; and we concur in the doctrine as therein laid down, namely, that a permanent interest in land can be transferred only by writing, but that a license to enter upon the land of another and do a particular act or a series of acts, without transferring any interest in the land, is valid, though not in writing. And such is the license on which the plaintiff relies in the present case.

Chancellor Kent in his *Commentaries*, vol. iii. p. 452, 3d Ed., very justly remarks that "the distinction between a privilege or easement carrying an interest in the land, and requiring a writing within the statute of frauds to support it, and a license which may be by parol, is quite subtle, and it becomes difficult in some of the cases to discern a substantial difference between them." But no such difficulty occurs in the present case. The plaintiff claims no right to enter on the defendant's land by virtue of the license. It is admitted that he had a legal right to revoke his license. But if he exercised his legal right in violation of his agreement, to the plaintiff's prejudice, he is re-

responsible in damages. We think it therefore clear that, giving to the contract the construction already stated, the plaintiff is entitled to recover. If for a valuable consideration the defendant contracted to sell the trees and to deliver them at a future time, he was bound to sever them from the soil himself, or to permit the plaintiff to do it; and if he refused to comply with his agreement, he is responsible in damages.

Judgment on the verdict.



WIELER v. SCHILIZZI.

(17 C. B. 619.)

Court of Common Pleas. Jan. 15, 1856.

This was an action for an alleged breach of a contract for the sale of certain parcels of linseed described as Calcutta linseed.

The first count of the declaration stated, that, by agreement between the plaintiff and the defendant, the defendant agreed to sell to the plaintiff, and the plaintiff agreed to buy of the defendant, certain parcels of goods by certain ships, that is to say, amongst other ships, by the ships *Gloriosa*, *Albatross*, and *Highlander*, at certain prices, and by the said agreement the defendant warranted the said goods respectively to be Calcutta linseed; and that, although before the suit the plaintiff did and performed all matters and conditions, and all matters and conditions happened and were performed, and all time elapsed, which respectively were necessary to be done or performed or to elapse in order to entitle the plaintiff to have the said agreement and warranty performed by the defendant before this suit; and although the defendant caused to be delivered to the plaintiff the said parcels of goods by the said three ships above specified; yet the defendant, before this suit, disregarded his promise, and broke his said warranty, in this, that the said parcels so delivered, to wit, parcels by the said ships *Gloriosa*, *Albatross*, and *Highlander*, respectively, were not Calcutta linseed, and were respectively in great part composed of substances other than and inferior in value to Calcutta linseed, and the defendant never delivered to the plaintiff parcels of Calcutta linseed by or out of the said three ships above specified, or any of them, in pursuance of his said contract and warranty; and by reason of the premises part of the said goods so delivered were wholly valueless to and unsalable by the plaintiff, and, as to and in respect of the residue thereof, the plaintiff was unable to obtain the same prices that otherwise he would have done, and was obliged to and did before suit sell the same at greatly reduced prices.

There was also a count for money paid, money received, interest, and money due on accounts stated.

The defendant pleaded, to the first count, that he did not promise or warrant as alleged, and a denial of the breaches as alleged; and, to the second count, never indebted, payment, and set-off.

The cause was tried before Jervis, C. J., at the sittings in London after last term. The facts were as follows:—The defendants, who were merchants carrying on business at Calcutta and in London, on the 18th of November, 1854, through their brokers entered into the following contract with the plaintiff:—

"London, 18th November, 1854. Sold for account of Messrs. Schilizzi & Co., to Mr. W. Wier, the following parcels of Calcutta linseed, viz.,

Per *Thalestris*, about 210 tons, bill of lading dated July last.

Per *Mersapora*, about 100 tons, bill of lading dated July last.

Per *St. Abbs*, about 18 tons, bill of lading dated July last.

all at 65s. 6d. per quarter, and

Per *Gloriosa*, about 100 tons, bill of lading dated Sept. last.

Per *Albatross*, about 100 tons, bill of lading dated Sept. last.

Per *Highlander*, about 10 tons, bill of lading dated Sept. last.

all at 66s. per quarter, the cost, free on board, and the freight, insurance, and packages to London included,—tare quare. The amount of each invoice to be paid in fourteen days from each ship's reporting, by cash, less 2½ per cent. discount, in exchange for shipping documents and freight release. Buyer is to have craft alongside each ship as soon as each parcel of seed is ready to discharge, or it is to remain at his risk and expense. Buyer is to pay to sellers on the 20th instant, in part payment of the above-named seed, a deposit of £1000, which is to be apportioned and deducted from each invoice as follows, viz., 5s. per quarter on the July shipments, and the remainder in equal proportions on the September shipments. Should buyer fail to pay for the whole or any part of the above-named seed on arrival, as stated, sellers are to be at liberty to sell such part, without further notice, at buyer's risk; who is to make good any loss that may accrue in consequence of such sale. Interest at the rate of 5 per cent. per annum to be allowed on the deposit. Should any of the above-named ships be lost, the deposit on such parcels to be immediately returned, with interest, as stated.

"Laing & Campbell, Brokers. £1000 paid 20th Nov., 1854."

On the arrival of the seed, the buyer objected to the quality, complaining that it contained a large admixture of rape and mustard seed, and therefore was not, in accordance with the terms of the contract, "Calcutta linseed."

It appeared from the evidence that no seed comes to market without some mixture, the average being generally about two or three per cent.; but, according to the evidence of the plaintiff's witnesses, the linseed in question contained about fifteen per cent. of tares, rape, and mustard. The defendants' witnesses, on the other hand, stated, that, though of somewhat inferior quality, the seed did answer the description in the contract.

It further appeared, however, that the plaintiff had sold it as and for "linseed;" and the crushers to whom it was sold proved that it had been used by them as such, and that the cake was sold as linseed-cake.

On the part of the defendant, it was submitted, that the contract,—which contained no warranty, but which distinctly intimated to the purchaser that he was to take the seed as it was,—was satisfied by the delivery of that which was known in the market as, and which in point of fact was, "Calcutta linseed," however inferior in quality, and however adulterated.

For the plaintiff, it was insisted, that, to the extent of the mixture of foreign

seeds, the article delivered was not linseed at all within the meaning of the contract.

In submitting the case to the jury, the lord chief justice told them, that the question for them to consider, was, whether the plaintiff got what he bargained for,—whether there was such an admixture of foreign substances in it as to alter the distinctive character of the article, and prevent it from answering the description of it in the contract,—more, in truth, than might reasonably be expected.

The jury returned a verdict for the plaintiff,—the amount of damages being by agreement referred.

Montague Smith now moved for a new trial, on the ground of misdirection, and that the verdict was against evidence.—The defendant was guilty of no breach of his contract, if he supplied that which was known and usually sold in the market as Calcutta linseed. There was no warranty, and no fraud. No doubt it was of inferior quality. [CRESWELL, J.—What was inferior,—the linseed, properly so called? or the cargo?] The cargo. [JERVIS, C. J.—I left it to the jury, in substance, to say whether the article was so mixed as to lose its distinctive character, or whether it was such as to answer the description in the market, of Calcutta linseed.] His lordship went on to say,—and that is the direction complained of,—“was it (that is, the mixture or adulteration) more in truth than might reasonably be expected?” Now, there being no warranty, if this was Calcutta linseed of any quality, however inferior, the plaintiff got what he bargained for. The rule is well expressed by Lord Ellenborough in *Gardiner v. Gray*, 4 Camp. 144. That was the case of a contract for the sale of twelve bags of waste-silk, without any warranty that it should correspond with the sample. And his lordship, in leaving the case to the jury, said,—“I think the plaintiff cannot recover on the count alleging that the silk should correspond with the sample. The written contract containing no such stipulation, I cannot allow it to be superadded by parol testimony. This was not a sale by sample. The sample was not produced as a warranty that the bulk should correspond with it, but to enable the purchaser to form a reasonable judgment of the commodity. I am of opinion, however, that, under such circumstances, the purchaser has a right to expect a saleable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of caveat emptor does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination men-

tioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill. The question then is, whether the commodity purchased by the plaintiff be of such a quality as can be reasonably brought into the market to be sold as waste-silk. The witnesses describe it as unfit for the purposes of waste-silk, and of such a quality that it cannot be sold under that denomination.”

CRESWELL, J.—I am utterly unable to discover any misdirection in this case. It is suggested that my lord was wrong in telling the jury that the question for them to consider was, whether the linseed delivered contained a greater admixture of foreign substances than might reasonably be expected; and that he should have left it to them simply to say whether or not it answered the description of Calcutta linseed. But I think that what my lord meant, and what the jury must have understood, was, that they were to say whether the article delivered reasonably answered the description of Calcutta linseed, that is linseed with a reasonable amount of adulteration only. My lord does not express himself dissatisfied with the verdict: and I see no reason why we should be so. I think there should be no rule.

CROWDER, J.—I also think there was no misdirection. Looking at the whole course of the evidence, it appears to me that the jury were rightly told to consider whether the amount of adulteration was greater than the plaintiff might reasonably expect. That expression was not used, as Mr. Smith suggests, as a qualification of the rule of law. The jury in effect found that the article delivered did not reasonably answer the description in the contract: and, as my lord chief justice is not dissatisfied with the verdict, I see no ground for quarreling with it.

WILLES, J.—The jury have in substance found that the linseed in question was so mixed with seeds of a different and inferior description as to have lost its distinctive character and prevent its passing in the market by the commercial name of Calcutta linseed. The purchaser had a right to expect, not a perfect article, but an article which would be saleable in the market as Calcutta linseed. If he got an article so adulterated as not reasonably to answer that description, he did not get what he bargained for. As, if a man buys an article as gold, which every one knows requires a certain amount of alloy, he cannot be said to get gold, if he gets an article so depreciated in quality as to consist of gold only to the extent of one carat.

JERVIS, C. J., concurred.

Rule refused.



WILCOX v. MATTESON.

(9 N. W. Rep. 814, 53 Wis. 23.)

Supreme Court of Wisconsin. Sept. 27, 1881.

Appeal from circuit court, Jefferson county.

Statement by TAYLOR, J.:

This action was brought to recover the amount of a promissory note given by the defendant to the deceased husband of the plaintiff, payable to his order, and indorsed by him in blank. The answer denies the ownership of the note by the plaintiff. The question of ownership was the only question litigated on the trial. The plaintiff claimed upon the trial that the note in question had been given to her by her husband in his life-time. The only evidence tending to prove such ownership was the following:

Harriet Edgar, a witness for the plaintiff, testified that she attended the deceased husband in his last sickness, and that on the night of his death, and about three hours before his decease, the deceased "told me that his pocket-book was under the feather bed, just under his shoulders, and for me to take it, and give it to his wife when she came; that there was some money and papers in it that would be of value to her, as she would need them. He afterwards died at 1 o'clock in the morning. I continued there, remaining with his corpse until about 9 o'clock in the morning, eight hours after he died, when Mr. Dyer Williams came into the room, and Mr. Williams turned the corpse over, and I took the pocket-book referred to out from under his shoulder and gave it to Mr. Williams, telling him that Mr. Wilcox requested me to give the pocket-book to his wife; and Mr. Williams took the pocket-book, saying he would give the same to Mrs. Wilcox if she came, and if she did not come he would send it to her. From the time of his death until Mr. Williams came I had exclusive charge of the room in which the deceased lay, and was not out of the room five minutes during all that time."

Dyer Williams, a witness for the plaintiff, testified that he saw Wilcox about six hours after he died. "When I arrived in the room where the corpse was, Mrs. Harriet Edgar, his nurse, told me that Mr. Wilcox the night before had requested her to give a certain pocket-book under his shoulder to his wife, as he wanted his wife to have it, and that he wanted the nurse to see that his wife got it herself. I then moved the corpse so that the nurse could get the pocket-book, and then she gave it to me and requested me to give it to Mrs. Wilcox. I took the pocket-book and kept it in my possession until Mrs. Wilcox arrived, and then gave it to Mrs. Wilcox between 8 and 9 o'clock in the evening after her husband died, delivering the message the nurse had communicated to me concerning its disposition—that it was a gift from her husband."

The plaintiff herself testified that the note in suit was in the pocket-book when it was delivered to her, and that it was indorsed by the deceased in his own hand-

writing. She also testified that she had been duly married to the deceased, and that the deceased died without leaving any children or other lineal descendants.

Upon this evidence the learned circuit judge directed a verdict for the plaintiff. To this ruling the defendant duly excepted, and he appeals to this court from the judgment rendered upon such verdict.

Harlow Pense, for appellant. R. B. Kirkland, I. W. & G. W. Bird, and Wm. H. Rogers, for respondent.

TAYLOR, J., (after stating the facts as above.)

Upon this appeal the defendant alleges as error that the evidence produced on the trial shows affirmatively that the note upon which the action was brought was not owned by the plaintiff, but belonged to the estate of her deceased husband, and that the evidence offered for the purpose of showing a gift of the same by the deceased to the plaintiff during his life-time failed to show such gift. We are constrained to agree with the learned counsel for the appellant that there is no evidence in the case which shows any delivery of the possession of the pocket-book and its contents during the life of the husband to the plaintiff, or to any other person, for her use. If we construe the language of the deceased most favorably for the plaintiff, and that his request to the nurse Edgar was that she should immediately, and before his death, take the pocket-book into her possession and keep it for and deliver it to his wife when she came as her property, still the evidence fails to show that the possession passed from the deceased to the nurse for the use of the plaintiff until after his death. The nurse states that she did nothing, after the deceased instructed her what to do with the pocket-book, until several hours after his death. Admitting that the nurse might have received the possession of the property for the plaintiff in her absence, and that the actual receipt of it by her, in the life-time of the deceased, would have been effectual to pass the title to the plaintiff, the fact remains that she did not take possession during his life. If this can be upheld as a gift, then it must be upheld on the ground that the possession of the property passed by force of the words of the deceased, expressing a desire that it should pass.

We know of no case where a gift has been upheld when no act has been done tending to change the possession of the property which is the subject of the gift from the donor to the donee. The pocket-book was in the actual possession of the donor at the time when the conversation between him and the nurse took place, and it so remained until his death, without any change in its location, or any attempt to change the same. There is no doubt of the intent of the deceased to give the property to his wife, but there is an entire absence of proof of any act done either by him or by the nurse, standing in the place of the wife, which tends to show any surrender of the possession by the husband, or any taking possession thereof by the nurse, during the life of the

husband. To make a gift perfect, all the cases hold that the possession of the subject of the gift must pass from the donor to the donee. This has been so decided by this court, and it is therefore unnecessary to resort to the decisions of other courts to sustain our ruling in this case. See *Wilson v. Carpenter*, 17 Wis. 512; *Resch v. Senn*, 28 Wis. 286. In the first case cited, this court adopted the rule laid down by Chancellor Kent in his Commentaries, as follows: "Delivery in this, as in every other case, must be according to the nature of the thing. It must be an actual delivery, so far as the subject is capable of delivery. It must be *secundum subjectum materiam*, and be the true and effectual way of obtaining the command and dominion of the subject. If the thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part not only with the possession, but with the dominion of the property. If the thing given be a chose in action, the law requires an assignment or some equivalent instrument, and the transfer must be actually executed."

In the case at bar the subject of the proposed gift was of such a character that an actual delivery could have been made, but none was made. The possession remained in fact exactly the same after the direction given to the nurse as it was before, and so continued until the death of the donor.

We think the evidence clearly shows that the title to the note remained in the deceased husband at the time of his death, and that the learned judge erred in directing a verdict for the plaintiff.

Upon the argument in this court the learned counsel for the respondent claimed that the judgment might be upheld upon the ground that the widow was entitled to the note under the provisions of subdivision 1, § 3935, Rev. St. 1878, which provides that, upon the death of her husband, the widow shall be allowed certain specified property, and, in addition thereto, household furniture not exceeding in value \$250, and other personal property not exceeding in value \$200, to be selected by her.

The difficulty with this claim is that the note in question is not one of the specific articles of property which the statute allows to her, and there is no evidence that she had selected the note as a part of the other property, not exceeding \$200, to which she is entitled. In order to entitle the plaintiff to hold this note as a part of the property of her husband, which is given to her by the section of the statute above quoted, she must show that it has been selected by her. In the absence of any proof on that subject, we cannot say that the plaintiff acquired any title to it under said section. See *Resch v. Senn*, *supra*.

The judgment of the circuit court is reversed, and a new trial ordered.





WILLIAMS v. ALLEN et al.

(10 Humph. 336.)

Supreme Court of Tennessee. Dec., 1849.

Assumpsit in the circuit court of Sumner. Plea non-assumpsit. There was a verdict and judgment for the defendant. The plaintiff appealed.

J. C. Guild, for plaintiff. Baldridge and Head, for defendants.

McKINNEY, J. It appears from the bill of exceptions in this case, that in the latter part of the year 1847, the plaintiff bargained with the defendants for the purchase of a quantity of corn. Previous to the purchase, the corn had been put in pens, on the bank of Bledsoe's creek near its junction with Cumberland river. The bargain was for all the corn in the pens, at the price of \$1 per barrel; and the quantity, not being then known, was to be ascertained afterwards by actual measurement. It does not appear that any time was fixed either for the measurement of the corn, or payment of the price. In the month of December, 1847, before the corn was measured, it was swept off by a flood, and wholly lost. It appears from the proof that, after the purchase, the plaintiff assumed to be the owner of said corn, and forbade an officer to levy upon it as defendants' property, stating that it belonged to him, that he had bought it and paid part of the price, and was to pay the balance on his return from market. On the other hand, there is proof that when the flood began to threaten the loss of the corn, the defendant, Robert Allen, applied to some of the witnesses to aid him in saving it, "and called it his corn at the time." The witness, Mathews, heard a conversation between plaintiff and defendant, Robert Allen, some time after the contract for the purchase of the corn. Defendant "wished plaintiff to let him have a horse in part pay for the corn; plaintiff told him that the corn was not measured and delivered to him, and he was not bound to pay until this was done, yet, to accommodate him, he would let him have the horse."

It further appears from the proof, that between the time of the contract and the loss of the corn, plaintiff let the defendants have a horse, some pork, and a small amount of money, towards the payment of the price of said corn, to recover back the value of which, the present suit was brought.

On the trial in the circuit court, the judge instructed the jury, "that if the plaintiff bought a parcel of corn from defendants, which was in pens, separate and distin-

guishable from all other corn, at the price of one dollar per barrel, and there was nothing to be done by defendants but to measure it with plaintiff, and deliver it, the property in the corn vested unconditionally in the plaintiff, and the risk was of course his."

This instruction, we think, was incorrect. The general principle is well established, that no sale is complete, so as to vest an immediate right of property in the buyer, so long as anything remains to be done, as between the buyer and seller.

Where goods are sold by number, weight, or measure, so long as the specific quantity or measure is not separated and identified, the sale is not completed, and the goods are at the risk of the seller. Story on Con. § 800. The contract may be complete and binding in other respects, but the property in the goods remains in the vendor, and they are at his risk, if any act is to be done by him before delivery, either to distinguish the goods, or ascertain the price thereof. Chitty on Con. 375, note 1.

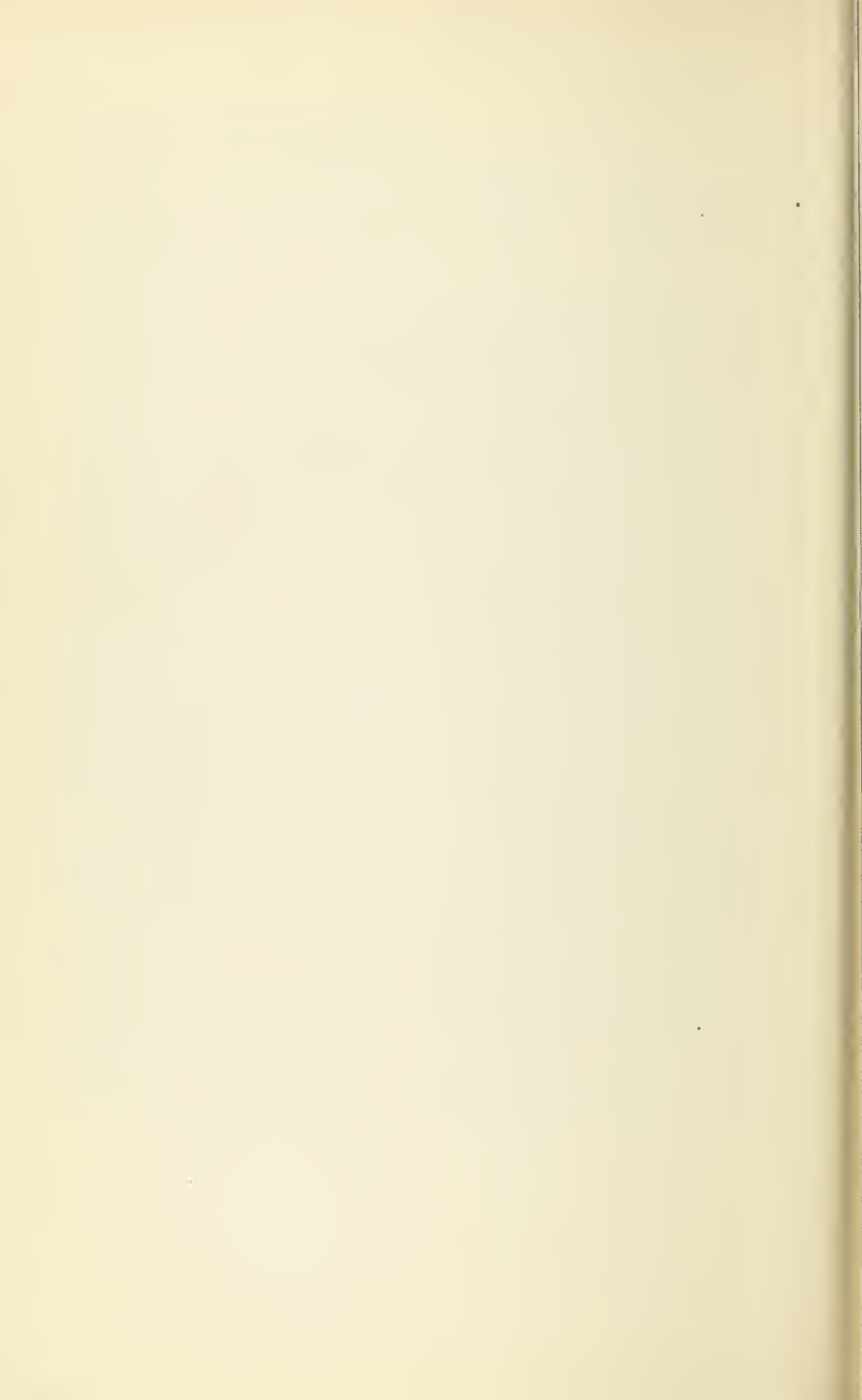
Though the subject-matter of the contract be clearly ascertained, yet if the price cannot be calculated until the parties have weighed the goods, no property there-in passes to the buyer till such act be done. Simmons v. Swift, 5 Barn. & C. 557; Chitty on Con. 377.

Where several bales of skins (stated in the contract to contain five dozen in each bale) were sold at a certain sum per dozen; but it was the duty of the seller to count over the skins, to see how many each bale actually contained, and before doing so, they were consumed by fire. Lord Ellenborough and Sir James Mansfield held, that no action could be maintained against the purchaser for the value of the skins, and that the loss fell entirely upon the seller. Zagury v. Furnell, 2 Camp. 242. See, also, Hanson v. Meyer, 6 East, 614; Rugg v. Minett, 11 East, 210; Simmons v. Swift, 5 Barn. & C. 557.

And a mere assumption of ownership, or control by the purchaser, will not be sufficient evidence of a delivery. At most, it affords merely a presumption of delivery, which may be repelled by evidence showing that the title remained in the vendor.

The foregoing authorities which, we think, lay down the law correctly, clearly show, that the circuit judge erred in directing the jury, that the property in the corn in question was vested in the plaintiff, notwithstanding the failure of the defendants to measure and deliver it. On the contrary, by reason of their failure to do so, the right of property remained unaltered, and consequently the risk and loss were exclusively theirs.

The judgment will be reversed.



WILLIAMS v. BACON et al.

(2 Gray, 387.)

Supreme Judicial Court of Massachusetts.
Oct. Term, 1854.

Action of contract. The declaration alleged that the defendants on or about the 1st of June, 1853, contracted to sell and deliver to the plaintiff, on board vessel at Philadelphia, on demand, 500 tons red ash egg and stove coal at the price of \$3.70 per ton; and 300 tons white ash coal at the following prices, namely, 100 tons white ash egg coal at \$3.45 per ton, 100 tons white ash stove coal at \$3.45 per ton, and 100 tons white ash lump coal at \$3.60 per ton; and that the plaintiff on the 16th of August, 1853, demanded said coal of the defendants at Philadelphia, but they then and ever since neglected and refused to deliver the same or any part thereof. The defendants in their answer denied any purchase of coal by the plaintiff of the defendants, or any agreement of the defendants to deliver coal; and also relied on the statute of frauds.

At the trial in the court of common pleas, Hale Remington, an agent residing at Fall River, of the defendants, who lived in Philadelphia, being called as a witness for the plaintiff, testified as follows: On the 3d of June, 1853, he made a verbal contract with the plaintiff at Taunton; and on the same day, at Fall River, his clerk by his order entered in his book of sales, on a page headed "Sales on account of F. Bacon & Company," the following memorandum (which was not signed): "Sold to B. F. Williams of Taunton 500 tons egg and stove red ash; 200 tons egg \$3.70; 300 tons stove \$3.70. Sold 200 tons egg and stove white ash; 100 lump \$3.60; 100 egg \$3.45; 100 stove \$3.45." On the same day he wrote a letter to the defendants (which was produced upon the call of the plaintiff), in which he said: "I sold this morning to B. F. Williams of Taunton, to be shipped to Dighton, Mass., as follows: \$3.70 for R. A., and \$3.45 for W. A.; 300 tons R. A. stove; 200 tons R. A. egg; 100 tons W. A. egg; 10 tons W. A. stove; 700 tons, all to be delivered before August 1st. You may ship it early in July, or before, if it suits better to do so." On the 11th of July he received a letter from the plaintiff, asking for "a statement of our coal engagement;" to which he replied by the following letter:—

"Fall River, 11 July, 1853. Benjamin F. Williams, Esq., Taunton. Dear Sir,—Your favor of this date is before us. In reply would say that I have agreed to sell you 200 tons red ash stove coal at \$3.70; 300 tons red ash egg at \$3.70; 100 tons white ash egg at \$3.45; 100 tons white ash stove \$3.45; 100 tons white ash lump \$3.60. The above prices to be charged deliverable on board vessel at Philadelphia. The coal is now ready for delivery, and you will please forward vessels as soon as you please, and we will put the coal on board. Our people will use all exertion to procure vessels at going rates of freight, and I presume they will succeed. If not, you must send vessels for it. Freight is now \$1.50 and \$1.45 to Fall River. Coal is now

worth at Philadelphia \$3.85, and I think the sooner you get your coal the safer for you. Yours truly, Hale Remington."

On the 8th of August he signed and gave the plaintiff an order addressed to the defendants, and thus expressed: "Please deliver the bearer, for B. F. Williams of Taunton, Mass., coal as he may order it from time to time,—red ash, egg or stove, as he may choose, 500 tons; white ash, 200 tons, one-half lump, balance egg or stove." And there was evidence that the plaintiff on the 16th of August presented this order to the defendants, who refused to accept it.

Upon this evidence, Hoar, J., ruled that the action could not be maintained, and directed a verdict for the defendants; and the plaintiff alleged exceptions.

E. H. Bennett, for plaintiff. T. D. Eliot, for defendants.

MERRICK, J. The presiding judge ruled at the trial that the evidence adduced by the plaintiff was insufficient to enable him to maintain this action, and directed a verdict, which was thereupon returned, for the defendants. To determine whether that ruling was correct, it is necessary to keep in view the distinction between evidence of a contract and evidence of a compliance with the provisions of the statute of frauds in relation to it; for the defendants in attempting to sustain the ruling do not now deny that the testimony of Hale Remington afforded adequate proof of a verbal contract between the parties, whereby the plaintiff agreed to purchase and the defendants to sell the quantity and various kinds of coal mentioned in the declaration; but they insist that no note or memorandum in writing was ever made of it and signed by themselves or by any authorized person in their behalf. And they contend that the letter of Remington of the 11th of July, 1853, which is relied on by the plaintiff as a sufficient compliance with the provisions of the statute to give validity to the contract and make it obligatory upon them, cannot properly be allowed to have that effect; first, because it was no part of the *res gestæ*, and constituted no part of the negotiation between the parties, and is only a narrative of a past transaction; and, secondly, because it does not purport on its face to be, and is not in fact, signed by them or by any duly authorized person in their behalf.

A note or memorandum in writing of an oral contract is essentially different from a written contract. The latter supersedes and takes the place of all preceding negotiations, and is conclusive evidence of the stipulations and bargain between the parties. But the former may be made at any time after the parties have entered into engagements with each other by a verbal agreement. *Sixewright v. Archibald*, 17 Ad. & El. N. S. 107, 114. In the very nature of such transactions, the memorandum must be posterior in point of time to the contract of which it is the record. And it has accordingly often been determined that documents and letters, though they were all

written subsequent to the conclusion of the bargain, may be coupled together, if it appear that they all had relation to it, for the purpose of shewing that a written memorandum of it was duly made and signed by the party to be charged. *Allen v. Bennet*, 3 Taunt. 169.

The evidence produced upon the trial in the present case had a direct tendency to prove that a verbal contract for the sale of coal, as is alleged in the declaration, was made by and between the parties at Taunton, on the 3d of June, 1853. In that negotiation Remington acted for the defendants. He was their duly constituted agent, and was authorized in that capacity to sell or to contract for the sale of coal on their account. Such an agency implied the right to do whatever act was necessary to make the engagements he entered into, in the exercise of the power it conferred upon him, binding and obligatory upon his principals. He was therefore legally competent; and it was lawful for him, after having verbally agreed with the plaintiff for the defendants to sell him certain quantities of coal at stipulated prices, to make a written note or memorandum of the bargain, and sign it for them and in their behalf. And this he might lawfully do at any time before his authority to sell, or to complete a contract of sale, was revoked or annulled. On the 11th of July he was asked by the plaintiff for "a statement of our coal engagement;" to which request he replied in his letter of that date. A jury would be well warranted in inferring from the evidence in the case—and indeed we think they could justly arrive at no other conclusion—that the request and answer both referred to the bargain which had been previously made by them on the 3d of June at Taunton. If so, the letter was a full and complete memorandum of the bargain. It states explicitly the agreement to sell, the price, quantities, and description of the different kinds of coal sold, the place where it was to be delivered, and the time when the payment for it was to be made.

This memorandum therefore, containing all the elements of a complete bargain, was sufficient to meet the requirements of the statute, if it was signed in behalf of the defendants by a person thereunto duly authorized. The letter was signed by Remington; and he does not name his principals, or express in terms that in doing it he acts as their agent. But interpreting certain expressions contained in it in the light afforded by a knowledge of the situation of the parties, there can be no doubt that he wrote it, not for himself, but for them. There is nothing in the case having any tendency to shew that he ever made any such bargain on his own account, or that he ever had any such coal of his own to sell; but it is certain that he did make such a bargain with the plaintiff on behalf of the defendants, and on the same day communicated to the defendants the fact that he had made it. They resided at Philadelphia, and the letter obviously refers to them when the plaintiff is told in it that the coal is ready

for delivery at that place; that "you will forward vessels as soon as you please, and we will put the coal on board. Our people will use all exertions to procure vessels at going rates of freight, and I presume they will succeed. If not, you must send vessels for it." These allusions could be to no persons but the defendants, who were thus distinctly pointed out as the party to be charged with the obligation of performing the contract referred to.

The signature of a memorandum which is a sufficient compliance with the provisions of the statute may be made by an agent, though he write his own name instead of that of his principal, if it was his intention that the latter should be bound by it. 2 *Parsons on Con.* 291; *Trueman v. Loder*, 11 Ad. & El. 589, and 3 P. & Dav. 267; *White v. Proctor*, 4 Taunt. 209.

There is a very slight variance in the statement of the terms of the contract between the letter of the 11th of July and the memorandum which Remington caused to be made of it on his book at Fall River. And in his letter of the 3d of June to the defendants, he omits to mention the 100 tons of lump coal which was embraced in it. But in reference to the question arising upon the bill of exceptions, these variances are unimportant. The plaintiff made a verbal agreement with the defendants for the purchase of a quantity of coal. He subsequently called upon their agent for "a statement of our coal engagement;" and the letter of the 11th of July was written in answer to this application. It was sent and was received as an authentic statement of the terms and provisions of the previous bargain. It is immaterial that it does not in all particulars correspond with the items contained in the communication of Remington to his principals under date of the 3d of June, or in the memorandum which he caused to be placed on his own book at Fall River. These latter are of importance only as they serve to corroborate the other evidence in the case adduced to prove that a verbal contract had in fact been previously made by the parties. But having been written without the knowledge of the plaintiff, he could not have recognized what was thus stated to be true, or assented to it as correct, and of course is not to be bound by it. On the other hand, it cannot be doubted that in preparing and furnishing to the purchaser, at his request, a written note of the verbal contract, the agent who made it would, with a vigilant and proper regard for the rights of his principals, be careful to fall into no error in his representations. The letter which he wrote to the plaintiff professed, and purported upon its face, to recite with precision and accuracy the terms of the contract, and was received and accepted, and has ever since been relied upon, by him as a true and correct statement of it. Both parties having thus affirmed it and assented to its correctness, the memorandum contained in the letter of the 11th of July must be considered as conclusive evidence of the previous verbal bargain.

Exceptions sustained.



WILLIAMS et al. v. JACKMAN et al.

(16 Gray, 514.)

Supreme Judicial Court of Massachusetts.
Nov., 1860.

Action of tort for the conversion of an unfinished ship. Answer, property in the defendants as assignees of Currier & Townsend, insolvent debtors. The case was submitted to the judgment of the court, with power to draw such inferences as a jury might, upon an agreed statement of facts, in substance as follows:—

On the 14th of March, 1856, an agreement in writing was made between the plaintiffs and Currier & Townsend, by which the latter undertook to build, finish, and complete, ready for sea, for the plaintiffs, a first-class copper-fastened ship, to be ready for sea, at a wharf in Newburyport, by the 1st of July, 1856; the plaintiffs agreed to pay to Currier & Townsend, "from time to time, while said ship is building, the sum of twenty to twenty-five thousand dollars, and when the ship is ready for sea, such amount as shall make altogether the sum of fifty-eight thousand dollars;" and it was agreed that "no interest is to be charged on the amounts advanced" to Currier & Townsend by the plaintiffs.

On the 22d of March, the plaintiffs further agreed in writing to pay Currier & Townsend, "till the amount of twenty to twenty-five thousand dollars is paid as per contract, one thousand dollars every week, Saturday."

The making of the first agreement was preceded by verbal negotiations, in the course of which the plaintiffs informed Currier & Townsend that Captain Israel P. Williams would superintend in their behalf the building of the ship, and Currier & Townsend gave their assent to this arrangement. Captain Williams had previously superintended the building of another ship by Currier & Townsend for the plaintiffs. On the 15th of March, the plaintiffs addressed a note to Currier & Townsend, stating that they had employed Captain Williams to superintend the building of the ship, and requesting that he might be considered their agent in all things pertaining to such superintendence. This note was delivered on the same day by Captain Williams to Currier & Townsend at their place of business. About the same time, Currier & Townsend began to build the ship, and carried on the work till the 9th of the following May. Every day during this time, Captain Williams was at the ship-yard where the ship was building, giving directions, making suggestions, talking with Currier & Townsend about the work, and devoting his whole time to superintending it; and the plaintiffs paid him his expenses, and three dollars a day for his services.

The plaintiffs paid three thousand dollars to Currier & Townsend on the 22d of March, and one thousand dollars on Saturday of every week thereafter, until the work was stopped. This money was

paid on one occasion by one of the plaintiffs, and on every other occasion by Captain Williams, who called at the plaintiffs' place of business on Saturday of every week to receive it, and at the same time reported to them the progress made in the work. Currier & Townsend signed receipts for the money as paid on account of a ship building by them for the plaintiffs.

On the 21st of May, Currier & Townsend petitioned for the benefit of the insolvent laws, and, upon due proceedings had, the defendants were chosen their assignees, and the ship came into their possession as such. The defendants, upon notice of the plaintiffs' claim, refused to deliver the ship to them, and finished and sold her for the benefit of all the creditors.

S. E. Sewall and S. H. Phillips, for plaintiffs. B. R. Curtis and C. T. Russell, for defendants.

BIGELOW, C. J. Under a contract for supplying labor and materials and making a chattel, no property passes to the vendee till the chattel is completed and delivered, or ready to be delivered. This is the general rule of law. It must prevail in all cases, unless a contrary intent is expressed or clearly implied from the terms of the contract.

In the case at bar, no such intent appears. The contract of the builders was to finish the vessel, and have her ready for sea at a specified place on or before a day certain. The vendees were to pay a fixed sum when the vessel was completed and ready for delivery. They were also to advance certain sums, from time to time, amounting to less than half the stipulated price, in anticipation of the completion of the work, but the sums so to be advanced were not graduated or measured by the amount of work done or of materials furnished or the progress made towards the final fulfilment of the contract. There was no stipulation to pay instalments at certain specified successive stages of the work; it was a mere agreement to make certain payments, by way of advance, which were fixed upon arbitrarily without reference to the extent of the labor and materials actually expended and used for the construction of the vessel at the time they were to be made. Nor was there any right reserved to the vendees to control or direct the work, or to exercise any superintendence or control over it, during its progress. It is true that the agent of the vendees was allowed to be present in the ship-yard where the vessel was building, but this was by permission only granted by the builders. It was no part of the original contract, and the builders might, at any time, have revoked this permission without violating any part of their agreement.

The case at bar is clearly distinguishable from the cases determined by the English courts, which have been cited in the argument. To say the least, some of those decisions rest upon very questionable grounds. They have been carefully reviewed, and the validity of the reasons by

which it is attempted to vindicate them has been impugned by approved text-writers, and in judicial decisions by courts in this country. The case of *Andrews v. Durant*, 1 Kernan, 35, contains an elaborate discussion of all the decided cases,

and an exposition of the application of the rule of law to contracts for the building of ships, adopted in the state of New York, and confirmed by subsequent decisions.

Judgment for the defendants.



WILLIAMS et al. v. MERLE.

(11 Wend. 80.)

Supreme Court of New York. Oct. 1833.

This was an action of trover, tried at the New-York circuit in October, 1831, before the Hon. Ogden Edwards, one of the circuit judges.

About the first of November, 1829, the master of a tow-boat took by mistake 4 barrels of pot-ashes from the warehouse of the plaintiffs, who, and the owners of the tow-boats, occupied the same building in Albany. The master, on his arrival in New-York, having discovered the mistake, delivered the articles to a clerk of the agents of his principals, who said he would take the ashes to an inspector's office and advertise them. The clerk accordingly took them to an inspector's office on the third of November, obtained a certificate of inspection, and on the sixth of November sold the ashes to the defendant, a produce broker, who purchased them for a Mr. Patterson, for a fair price, and received the inspector's certificate. On the tenth of November, the defendant took the ashes from the inspector's office, and shipped them to the order of his principal. About the first of September, 1830, the plaintiffs demanded the ashes of the defendant, who refused to account for them, saying he had purchased and paid for them a year preceding the demand. The judge intimated his opinion that if the defendant had acquired the ashes bona fide by purchase, in the regular course of his business as a broker, and had disposed of them bona fide, pursuant to the instructions of his principal before suit brought, that the action would not lie; he, however, refused to nonsuit the plaintiffs, and the jury, under his direction, found a verdict for the plaintiffs for the value of the ashes and the interest thereof, reserving the question as to the plaintiffs' right to recover, for the opinion of this court.

S. Stevens, for plaintiffs. C. Graham, for defendant.

SAVAGE, C. J. The question is whether the plaintiffs are entitled to recover upon the facts of this case. That they had title to the property does not admit of dispute. Has that title been transferred to the defendant, and in what manner? The owner of property cannot be divested of it but by his own consent, or by operation of law. Morgan, who took the property by mistake, certainly acquired no title. Shankland (the clerk) surely had no title. If the defendant has title, it comes to him from a person who had none. In the lan-

guage of Mr. Justice Sutherland, in *Everett v. Coffin*, 6 Wendell, 609, "The disposing or assuming to dispose of another man's goods without his authority, is the gist of this action; and it is no answer for the defendants that they acted under instructions from another, who had himself no authority." This same principle was asserted by this court in *Prescott v. De Forest*, 16 Johns. R. 159, where it was held that a landlord who distrained and sold the goods of his tenant, conveyed no title to the purchaser, the distress being unauthorized. The court said, that if Satterlee (the landlord) had no right to distrain and sell the goods, it necessarily follows that the defendant, though a bona fide purchaser for valuable consideration, acquired no title. So far, then, as the defendant's title depends upon the purchase by him in good faith, and for valuable consideration, it is still without foundation, so long as the seller had neither title nor authority to sell. The owners were not in fault; the property was taken without their consent or knowledge. The maxim *caveat emptor* applies; the purchaser must look to the seller for indemnity.

The defendant's counsel contends, that the act of the legislature in relation to the inspection of pot and pearl ashes has placed that article upon a different footing from other merchandize. The act declares that the certificate of the inspector shall be received as presumptive evidence of the facts contained therein; and that such ashes shall be sold in the city of New York by the weigh note of the inspector, except when sold by retail. 1 R. S. 548, §§ 66, 77. See, also, 2 R. L. 333, § 3. This act does not authorize the inspector to declare who is the owner; he gives the certificate to the person in possession of the ashes, but has no power to determine the question of title. The certificate is evidence of the facts of inspection and such other facts as he is required to state. He is to determine the quality; to mark the weight and the tare, and some other facts, such as crustings and scraplings; the damage appearing upon inspection and the cause thereof; and as to these facts the certificate is to be presumptive evidence, but surely of nothing more.

The defendant stands in no better situation than any other who purchases an article from a party without title or authority to dispose of such article; in such case, the purchaser acquires no title. The true owner has a right to reclaim his property and to hold any one responsible who has assumed the right to dispose of it.

The plaintiffs are therefore entitled to judgment upon the verdict.



WINDMULLER et al. v. POPE et al.¹

(14 N. E. Rep. 436, 107 N. Y. 674.)

Court of Appeals of New York. Dec. 6, 1887.

Appeal from general term, supreme court, first department.

Action brought by Louis Windmuller and Alfred Roelker against Thomas J. Pope and James E. Pope to recover damages from defendants for the breach of a written contract for the sale and delivery on the part of plaintiffs of about 1,200 tons of old iron Vignol rails, to be shipped from Europe. The cause was tried before Larremore, J., and a jury, and upon verdict for plaintiffs judgment rendered for \$19,439, the amount of principal and costs. On appeal, the general term affirmed the judgment against defendants, and they bring the case to the court of appeals.

Carlisle Norwood, Jr., and W. W. Niles, for appellants, Bernard Roelker and Cephas Brainerd, for respondents.

PER CURIAM. We think no error is presented upon the record which requires a reversal of the judgment. The defendants having on the twelfth of June, 1880, notified the plaintiffs that they would not receive the iron rails, or pay for them, and having informed them on the next day that if they brought the iron to New York they would do so at their own peril, and advised them that they had better stop at once attempting to carry out the contract, so as to make the loss as small as possible, the plaintiffs were justified in treating the contract as broken by the defendants at that time, and were entitled to bring the action immediately for the breach, without tendering the delivery of the iron, or awaiting the expiration of the period of performance fixed by the contract; nor could the defendants retract their renunciation of the contract after the plaintiffs had acted upon it, and by a sale of the iron to other parties change their position. *Dillon v. Anderson*, 43 N. Y. 231; *Howard v. Daly*, 61 N. Y. 362; *Ferris v. Spooner*, 102 N. Y. 12, 5 N. E. Rep. 773; *Hochster v. De La Tour*, 2 El. & Bl. 678; *Cort v. Railway Co.*, 17 Adol. & E. (N. S.) 127; *Crabtree v. Messersmith*, 19 Iowa, 179; *Benj. Sales*, §§ 567, 568.

The ordinary rule of damages in an ac-

tion by a vendor of goods and chattels, for a refusal by the vendee to accept and pay for them, is the difference between the contract price and the market value of the property at the time and place of delivery. *Dana v. Fiedler*, 12 N. Y. 40; *Dustan v. McAndrew*, 44 N. Y. 72; *Cahen v. Platt*, 69 N. Y. 348. The just application of this rule to the circumstances in this case requires that, in computing the damages, the defendants should be credited with the difference between the freight from Cronstadt to New York fixed by the charter-party, less the sum which it cost the plaintiffs to be released from the charter, and also with any other expenses which the plaintiffs would naturally have incurred in performing their contract to deliver the iron in New York. The contract price being known, and the market price of the iron in New York at the time of the breach and subsequently having been proved, as also the sum which the plaintiffs paid for damages and expenses on account of the charter and the customary rate of insurance, the computation of the damages was a simple arithmetical problem. All these elements were before the jury, and the verdict does not exceed, indeed it is less, than the sum which, on the view of the evidence most favorable to the defendants, the plaintiffs were entitled to recover. The plaintiffs on the trial proved the market value of the iron at St. Petersburg, where it was at the time of the breach, and also that they sold it on the twelfth of July at a certain price. The plaintiffs also gave evidence of various expenditures made by them, which it is unnecessary to recapitulate. It is claimed that some of these items could not properly be considered in estimating the damages. Assuming that this may be true, the fact remains nevertheless that the verdict is fully warranted by the competent and uncontradicted evidence. The amount of the verdict is justified, whether the market value of the iron in St. Petersburg or New York is taken as a basis. The evidence also shows without contradiction that, on the resale, the iron brought its full market value, irrespective of storage, and it is not important to determine whether the plaintiffs could fix the market price by a sale without notice to the defendants.

There is no merit in the defense, and the exceptions are in the main technical and frivolous, and none of them, we think, require a reversal of the judgment. The judgment is therefore affirmed. All concur, except RAPALLO, J., absent.

¹An extract from this opinion is reported in 107 N. Y. 674; but the opinion is here given in full, as reported in 14 N. E. Rep. 436.



WINFIELD *v.* DODGE.

(7 N. W. Rep. 906, 45 Mich. 355.)

Supreme Court of Michigan. Jan. 19, 1881.

Error to Jackson.

Hewlett Bros. and Austin Blair, for plaintiff in error. Thomas A. Wilson, for defendant in error.

GRAVES, J. The parties traded horses on Sunday. The exchange was even and there was immediate delivery. The plaintiff became dissatisfied and wishing to trade back went the next morning to the defendant's place and made several offers of money to induce him to do so, but he refused. After some bantering however the defendant gave the plaintiff five dollars and a tobacco pipe, for the purpose, as explained at the time, of averting ill feeling. The plaintiff then returned home, but wishing on further consideration to undo what had been done he again called on the defendant and peremptorily insisted on trading back and he offered to restore the money he had received and something more than the value of the pipe. The defendant refused to listen to any overture.

The plaintiff then brought replevin before a justice and obtained judgment and

the defendant appealed. The circuit judge, on the close of the evidence, took the case from the jury and ordered a verdict for the defendant. This ruling went on the theory that the transaction on Monday amounted to a new contract by which the title became established in defendant and that no room for any other view existed. We think this was error. The case made by the evidence was not necessarily of the character assumed. The transaction on Sunday passed no title. As a trade it was void, and the evidence of what took place on Monday was not conclusive that there was anything more than an attempt to ratify and validate the Sunday negotiation; and of course a ratification of that trade was impossible; unless there was a new contract the plaintiff was entitled to reclaim his horse against the void negotiation. No new contract could be made without a mutual assent of the parties, and unless the plaintiff intended to make one the title was not affected by the occurrences subsequent to the transaction on Sunday, and whether there was such new contract was a question for the jury on the whole evidence under proper instructions.

The judgment must be reversed with costs and a new trial granted.

(The other justices concurred.)



WING v. MERCHANT.

(57 Me. 383.)

Supreme Judicial Court of Maine. Middle District, 1869.

On report. Assumpsit by the executor of Timothy Woodward, deceased, to recover \$200 left with defendant, for investment, by deceased. Defendant claimed that the money was the property of his wife, the daughter of the deceased, under a gift to her by her father about three years before his decease. There was evidence that in 1862 Timothy Woodward left with his daughter Mrs. Merchant some notes payable to himself, amounting to about \$200, for safe-keeping. She collected interest, and let her father have money, as he called for it, until about three years before he died, when, as she testified, "my father gave the money to me. He said he did not think this would be any help to my insane sister, Mary, if he should save it for her support, and I had done more for him than all the rest of his children, and staid with him longer, and he gave it to me. There was no one present when the notes were given to me. He was at my house at the time, in the sitting-room. The notes were at the time in a box in a chest, and the chest in my sleeping-room. Do not know as father did any thing at the time any more than to tell me that he gave them to me for my labour, and what I had done for him." After the notes were given to Mrs. Merchant, her sister, becoming insane, was supported at the insane hospital, and the money from the notes was paid by Mrs. Merchant for her support.

A. Libby, for plaintiff. S. Lancaster, for defendant.

BARROWS, J. The circumstances which oblige us in some cases to look with suspicion upon a defense which asserts that property claimed by an executor or administrator in his representative capacity, has passed by a gift from the deceased to one of his heirs, are not found in the case at bar. The defendant, with the consent of his wife to whom it is claimed the property was given, has appropriated it already for the benefit and support of an insane sister of the wife, a daughter of the deceased, and he is indemnified against ultimate liability in this suit. The testimony comes free from selfish bias; and the naked question is, whether enough was said and done by Timothy Woodward, the plaintiff's testator, to constitute a valid gift. The money and notes, amounting to about \$200, had been placed by the testator, several years before his death, in the hands of the defendant for safe-keeping; and for some time subsequently he was accustomed to call on the defendant and his wife for such little sums as he wanted on account of them, and the defendant kept an account of what was thus repaid. The wife personally had the charge of the notes and kept them in a box, which was placed in a chest in her sleeping-room, and she seems to have made most of the small payments to her father which he called for. While the matter stood thus, three

or four years before the testator's death, as Mrs. Merchant, the defendant's wife testifies, he said, in conversation with her about the money represented by these notes, that she had done more for him than all the rest of his children; had staid with him longer; and that he gave it to her. The notes were then in the box in her sleeping-room; they were not indorsed, they were payable to her father. She says, "I do not know as father did anything at the time any more than to tell me that he gave them to me for my labor and what I had done for him. . . . After he gave me the notes he never called on me for any money."

It would seem that there was no selfish solicitation for the gift, but, on the contrary, that Mrs. Merchant, in this conversation, and the defendant in another talk with the testator about the same time, suggested to him that it ought to be appropriated for the support of the insane sister, and that when he gave the notes to Mrs. Merchant, he said, apparently in reply to these suggestions, that he "did not think this would be any help to her if he should save it for her support."

Now it is insisted, on the part of the plaintiff, that here was no indorsement of the notes, and no delivery of them to Mrs. Merchant at the time of the conversation, and consequently no valid gift.

But it has been settled, that a valid gift of a negotiable promissory note may be made, either *inter vivos* or *causa mortis*, without indorsement or other writing. *Grover v. Grover*, 24 Pick. 261; *Borneman v. Sidelinger*, 15 Me. 429.

To perfect the gift in either case, delivery to the donee or to some person for him is necessary, such delivery as the subject of the gift is capable of. But, in case of a gift, *inter vivos*, where the property has passed into the possession of the donee, and has been held by him in a manner indicating a change of the title to the property, and a recognition of the donee's title by the donor, proof of actual manual tradition at the time of making the gift may well be dispensed with.

No particular ceremony is necessary to constitute a delivery when there is actual possession by the donee, accompanied by satisfactory evidence that the donor has relinquished all control of, and claim to the subject of the gift, in her favor. I borrow a book of my friend, and, while it is in my possession, he says, "I make you a present of it," and I hold it thereafter, as mine; it cannot be essential to the validity of the gift that I should first put it into his hands in order that it may be returned to mine. *Lex non cogit ad vana seu inutilia*.

The actual transfer of possession to the donee whenever and however accomplished, if supplemented by pendency evidence of an intentional release to the donee, on the part of the donor, *per verba de presenti* of any and all right or claim ever to resume the possession, or to deprive the donee of it, will make a complete gift *inter vivos*. It matters not whether the change of possession takes place before or after, or at the time of the utterance of the words importing a gift, if there

is a manifest design on the part of the donor that the donee should thereafterwards hold such possession absolutely as of his own property. Thenceforward, the possession and the right are concurrent in the same person, and the gift is perfect and irrevocable.

These elements we find in the case at bar. The notes were already in the possession of Mrs. Merchant, when the testator, in conversation with her respecting them, used language importing a present, absolute, unconditional gift, and a making over of all his interest in them to her. From that time during the remaining three or four years of his life, he never called upon her or her husband for small sums on account of them, as he had before been accustomed to do. The defendant exchanged the notes for others, and paid, not to the testator, but to Mrs. Merchant, such sums on account of them as she called for.

There is an essential difference between this case and that of *Shower v. Pilck*, 4 Exch. 478, relied on for the plaintiff.

There, though the silver plate was in the possession of the alleged donee, the language of the testator implied nothing beyond a promise to give in the future. Judgment for the defendant.

KENT, WALTON, DANFORTH, and
TAPLEY, JJ., concurred.

APPLETON, C. J. I concur in the opinion. Delivery is essential to pass the title to a chattel by gift; but if, at the time, the donee is in possession, as the donor's agent, he need not surrender it for a redelivery; if the donor relinquishes all dominion and control, and recognizes the donee's possession as being in his own right, and the donee so accepts and releases possession with the donor's consent, it is sufficient. *Tenbrook v. Brown*, 17 Ind. 410.

WINSOR et al. v. LOMBARD et al.

(18 Pick. 57.)

Supreme Judicial Court of Massachusetts. Suffolk and Nantucket. April 5, 1836.

Assumpsit on a warranty alleged to have been given, upon the sale of a quantity of mackerel by the defendants to the plaintiffs. Trial before Shaw, C. J.

The bill of parcels, which was receipted and was dated May 22d, 1834, set forth, that the plaintiff Winsor bought of the defendants 199 barrels and 69 half barrels No. 1 mackerel, and 376 barrels and 196 half barrels No. 2 mackerel.

The plaintiffs introduced evidence for the purpose of showing, that they were joint purchasers; but having failed to prove that they were jointly interested in the purchase, their counsel moved for leave the strike out the name of Peleg Churchill, one of the plaintiffs. This was allowed, although objected to by the defendants; and the trial proceeded as if the action had been originally commenced in the name of Winsor alone. The defendants excepted to this ruling.

There was evidence tending to show, that the fish were damaged, but that the damage proceeded principally from rust; that this is caused by the leaking out of the pickle, after the fish have been packed, inspected and branded; and that although fish affected by rust are greatly deteriorated, and are never marked by the inspector as No. 1 or No. 2, yet that they are not wholly unmerchantable, but are allowed to pass inspection as No. 3. All claim for damage arising from any other cause than rust, was expressly waived by the plaintiff.

The jury were instructed, that, upon a sale by a bill of parcels, like that in this case, although the article sold was one required, by the statutes of the commonwealth, to be inspected by a public inspector, and although the mackerel were inspected and branded No. 1 and No. 2, in pursuance of the statutes, yet as to damage arising from causes originating after they were so inspected and branded, there was an implied warranty, that the fish were in a good condition, and of a merchantable quality of mackerel of those brands respectively, at the time of the sale; and that, therefore, if the jury were of opinion, that the fish were damaged by rust, and that this was occasioned by causes originating after the mackerel had been inspected and branded, and further, if according to the known usage of the trade, mackerel affected by rust are not considered as No. 1 or No. 2, though they may pass as No. 3, there was a breach of the implied warranty, for which the plaintiff was entitled to recover damages.

To this instruction the defendants excepted.

There was also evidence tending to show, that the fish in question were packed, inspected and branded in the autumn of 1833; that the casks were then well filled with pickle; and that the sale took place in the following May.

In reference to this evidence, the jury were instructed, that if the damage arose from rust, and the cause of the rust was the want of pickle, commencing after the inspection and before the time of the sale, it was one of those things against which the defendants warranted, even although they believed that the mackerel were, at the time of the inspection, what the brands on the casks indicated, and that for aught they had known to the contrary, these brands had been truly and faithfully applied, and that no alteration or change had happened within their knowledge.

To this instruction the defendants excepted.

If either of these instructions was incorrect, the verdict, which was for the plaintiff, was to be set aside, and a new trial granted.

Dexter and English, for plaintiffs.
Washburn, for defendants.

SHAW, C. J. The court are of opinion, that the amendment in striking out the name of one of the plaintiffs, was admissible.

But the main question arises upon the supposed implied warranty, that the fish, at the time of the sale, were merchantable.

This was a sale of inspected fish, and there is nothing in the bill of parcels importing an express warranty. Then the question is, whether there was an implied warranty that the fish were merchantable or free from damage at the time of the sale? It was ruled at the trial, that there was, for the purpose of receiving the evidence, so that all the questions might be brought before the court at once; but upon a revision of the case, the court are all of opinion, that the action cannot be maintained.

The old rule upon this subject was well settled, that upon a sale of goods, if there be no express warranty of the quality of the goods sold, and no actual fraud, by a willful misrepresentation, the maxim, caveat emptor, applies. Without going at large into the doctrine upon this subject, or attempting to reconcile all the cases, which would certainly be very difficult, it may be sufficient to say that, in this commonwealth, the law has undergone some modification, and it is now held, that without express warranty or actual fraud, every person who sells goods of a certain denomination or description, undertakes as part of his contract, that the thing delivered corresponds to the description, and is in fact an article of the species, kind and quality thus expressed in the contract of sale. *Hastings v. Lovering*, 2 Pick. 214; *Hogins v. Plympton*, 11 Pick. 97.

Indeed this rule seems to be now well settled in England. In an action for a breach of warranty, a vessel was advertised and sold as a copper-fastened vessel, but sold as she lay with all faults. It appeared that she was only partially copper-fastened, and not what is known to the trade as a copper-fastened vessel. It was held that, "with all faults," must be un-

derstood, all faults which a copper-fastened vessel may have. *Shepherd v. Kain*, 5 Barn. & Ald. 240.

The rule being, that upon a sale of goods by a written memorandum or bill of parcels, the vendor undertakes, in the nature of warranting, that the thing sold and delivered is that which is described, this rule applies whether the description be more or less particular and exact in enumerating the qualities of the goods sold.

In applying this rule to the present case, the question is, what did the parties mutually understand by their contract, as it was reduced to writing. It purported to be a sale of certain barrels and half barrels of No. 1, and others of No. 2 mackerel. It is a familiar rule, that every contract is to be construed according to the subject, and with reference to those circumstances which are so notorious, that all persons conversant with the branch of trade, to which the sale relates, must be presumed to be acquainted with them. In the sale of mackerel, both parties must be presumed to be acquainted with the inspection laws, both must be understood to know the season of the year when this species of fish are caught, packed, and branded, and the species of damage and deterioration, to which they are liable, and that if mackerel are sold in the spring, they cannot be of an inspection more recent, than that of the preceding autumn. With these circumstances mutually understood, we have no doubt, that when these fish were sold as No. 1 and 2, the understanding of the parties was, that they were fish, packed, inspected and branded as of those numbers respectively.

It was in evidence, that fish infected with that species of damage called rust, a damage contracted by the leaking out of the pickle, after the fish have passed under the brand of the inspector, may be packed and inspected as No. 3, but that however good in other respects, they cannot be considered or marked as No. 1 or 2. Upon this ground it was contended by the plaintiffs, that the effect of the contract of the defendants was, that the mackerel were, at the time of the sale, fish of the quality known as No. 1 and 2; that as they could not be of those qualities, if they were rusty, it was describing them by a quality which they did not then possess; and that this was a breach of warranty. But we are all of opinion, that this would be a forced and erroneous construc-

tion of the instrument. Construed with reference to the subject matter, we think they must have understood, that the fish were inspected and branded as No. 1 and No. 2. In this respect the parties referred to the brand, and to this extent they acted upon the faith of it. Then, as there was no express warranty of their actual condition, or of the manner in which they were kept and taken care of, after the inspection, and from that time to the sale, and as there was no description embracing these particulars, it must be presumed, that both parties relied upon the faith of the inspection and brand. But if the plaintiff would hold the defendants responsible, as upon a fraud, he must show that they knew that the brand was falsely applied, or that after the inspection and before the sale, they had become damaged by rust; but no such evidence being given, and no such case suggested, the action cannot be supported.

It is supposed that a different rule applies to the case of all provisions from that applicable to other merchandise. This matter is well explained by Mr. Justice Sewall, in *Emerson v. Brigham*, 10 Mass. R. 197. In a case of provisions, it will readily be presumed that the vendor intended to represent them as sound and wholesome, because the very offer of articles of food for sale implies this, and it may readily be presumed that a common vendor of articles of food, from the nature of his calling, knows whether they are unwholesome and unsound or not. From the fact of their being bad, therefore, a false and fraudulent representation may readily be presumed. But these reasons do not apply to the case of provisions, packed, inspected, and prepared for exportation in large quantities as merchandise. The vendee does not rely upon the supposed skill or actual knowledge of the vendor, but both rely upon the skill and responsibility of the inspector, as verified by the brand, for all qualities which the brand indicates; and for damage which may happen afterwards, and against which, therefore, the brand offers no security, the vendee must secure himself by the terms of the contract; and unless he does so, or unless he is deceived by a false representation of the present and actual condition of the commodity, on which he would have a remedy of a different character, he must be supposed to have been content to take the risk on himself.

New trial granted.



WOOD v. BOYNTON et al.

(25 N. W. Rep. 42, 64 Wis. 265.)

Supreme Court of Wisconsin. Oct. 13, 1885.

Appeal from circuit court, Milwaukee county.

Johnson, Rietbrock & Halsey, for appellant. N. S. Murphey, for respondents.

TAYLOR, J. This action was brought in the circuit court for Milwaukee county to recover the possession of an uncut diamond of the alleged value of \$1,000. The case was tried in the circuit court, and after hearing all the evidence in the case, the learned circuit judge directed the jury to find a verdict for the defendants. The plaintiff excepted to such instruction, and, after a verdict was rendered for the defendants, moved for a new trial upon the minutes of the judge. The motion was denied, and the plaintiff duly excepted, and after judgment was entered in favor of the defendants, appealed to this court. The defendants are partners in the jewelry business. On the trial it appeared that on and before the twenty-eighth of December, 1883, the plaintiff was the owner of and in the possession of a small stone of the nature and value of which she was ignorant; that on that day she sold it to one of the defendants for the sum of one dollar. Afterwards it was ascertained that the stone was a rough diamond, and of the value of about \$700. After learning this fact the plaintiff tendered the defendants the one dollar, and ten cents as interest, and demanded a return of the stone to her. The defendants refused to deliver it, and therefore she commenced this action.

The plaintiff testified to the circumstances attending the sale of the stone to Mr. Samuel B. Boynton, as follows: "The first time Boynton saw that stone he was talking about buying the topaz, or whatever it is, in September or October. I went into his store to get a little pin mended, and I had it in a small box,—the pin,—a small ear-ring; * * * this stone, and a broken sleeve-button were in the box. Mr. Boynton turned to give me a check for my pin. I thought I would ask him what the stone was, and I took it out of the box and asked him to please tell me what that was. He took it in his hand and seemed some time looking at it. I told him I had been told it was a topaz, and he said it might be. He says, 'I would buy this; would you sell it?' I told him I did not know but what I would. What would it be worth? And he said he did not know; he would give me a dollar and keep it as a specimen, and I told him I would not sell it; and it was certainly pretty to look at. He asked me where I found it, and I told him in Eagle. He asked about how far out, and I said right in the village, and I went out. Afterwards, and about the twenty-eighth of December, I needed money pretty badly, and thought every dollar would help, and I took it back to Mr. Boynton and told him I had brought back the topaz, and he says, 'Well, yes; what did I offer you for

it?' and I says, 'One dollar;' and he stepped to the change drawer and gave me the dollar, and I went out." In another part of her testimony she says: "Before I sold the stone I had no knowledge whatever that it was a diamond. I told him that I had been advised that it was probably a topaz, and he said probably it was. The stone was about the size of a canary bird's egg, nearly the shape of an egg,—worn pointed at one end; it was nearly straw color,—a little darker." She also testified that before this action was commenced she tendered the defendants \$1.10, and demanded the return of the stone, which they refused. This is substantially all the evidence of what took place at and before the sale to the defendants, as testified to by the plaintiff herself. She produced no other witness on that point.

The evidence on the part of the defendant is not very different from the version given by the plaintiff, and certainly is not more favorable to the plaintiff. Mr. Samuel B. Boynton, the defendant to whom the stone was sold, testified that at the time he bought this stone, he had never seen an uncut diamond; had seen cut diamonds, but they are quite different from the uncut ones; "he had no idea this was a diamond, and it never entered his brain at the time." Considerable evidence was given as to what took place after the sale and purchase, but that evidence has very little if any bearing, upon the main point in the case.

This evidence clearly shows that the plaintiff sold the stone in question to the defendants, and delivered it to them in December, 1883, for a consideration of one dollar. The title to the stone passed by the sale and delivery to the defendants. How has that title been divested and again vested in the plaintiff? The contention of the learned counsel for the appellant is that the title became vested in the plaintiff by the tender to the Boyntons of the purchase money with interest, and a demand of a return of the stone to her. Unless such tender and demand reversed the title in the appellant, she cannot maintain her action. The only question in the case is whether there was anything in the sale which entitled the vendor (the appellant) to rescind the sale and so re-vest the title in her. The only reasons we know of for rescinding a sale and re-vesting the title in the vendor so that he may maintain an action at law for the recovery of the possession against his vendee are (1) that the vendee was guilty of some fraud in procuring a sale to be made to him; (2) that there was a mistake made by the vendor in delivering an article which was not the article sold,—a mistake in fact as to the identity of the thing sold with the thing delivered upon the sale. This last is not in reality a rescission of the sale made, as the thing delivered was not the thing sold, and no title ever passed to the vendee by such delivery.

In this case, upon the plaintiff's own evidence, there can be no just ground for alleging that she was induced to make the sale she did by any fraud or unfair dealings on the part of Mr. Boynton. Both were entirely ignorant at the time of the

character of the stone and of its intrinsic value. Mr. Boynton was not an expert in uncut diamonds, and had made no examination of the stone, except to take it in his hand and look at it before he made the offer of one dollar, which was refused at the time, and afterwards accepted without any comment or further examination made by Mr. Boynton. The appellant had the stone in her possession for a long time, and it appears from her own statement that she had made some inquiry as to its nature and qualities. If she chose to sell it without further investigation as to its intrinsic value to a person who was guilty of no fraud or unfairness which induced her to sell it for a small sum, she cannot repudiate the sale because it is afterwards ascertained that she made a bad bargain. *Kennedy v. Panama, etc., Mail Co., L. R. 2 Q. B. 580.* There is no pretense of any mistake as to the identity of the thing sold. It was produced by the plaintiff and exhibited to the vendee before the sale was made, and the thing sold was delivered to the vendee when the purchase price was paid. *Kennedy v. Panama, etc., Mail Co., supra, 587; Street v. Blay, 2 Barn. & Adol. 456; Gompertz v. Bartlett, 2 El. & Bl. 849; Gurney v. Womersley, 4 El. & Bl. 133, Ship's Case, 2 De G. J. & S. 544.* Suppose the appellant had produced the stone, and said she had been told that it was a diamond, and she believed it was, but had no knowledge herself as to its character or value, and Mr. Boynton had given her \$500 for it, could he have rescinded the sale if it had turned out to be a topaz or any other stone of very small value? Could Mr. Boynton have rescinded the sale on the ground of mistake? Clearly not, nor could he rescind it on the ground that there had been a breach of warranty, because there was no warranty, nor could he rescind it on the ground of fraud, unless he could show that she falsely declared that she had been told it was a diamond, or, if she had been so told, still she knew it was not a diamond. See *Street v. Blay, supra*.

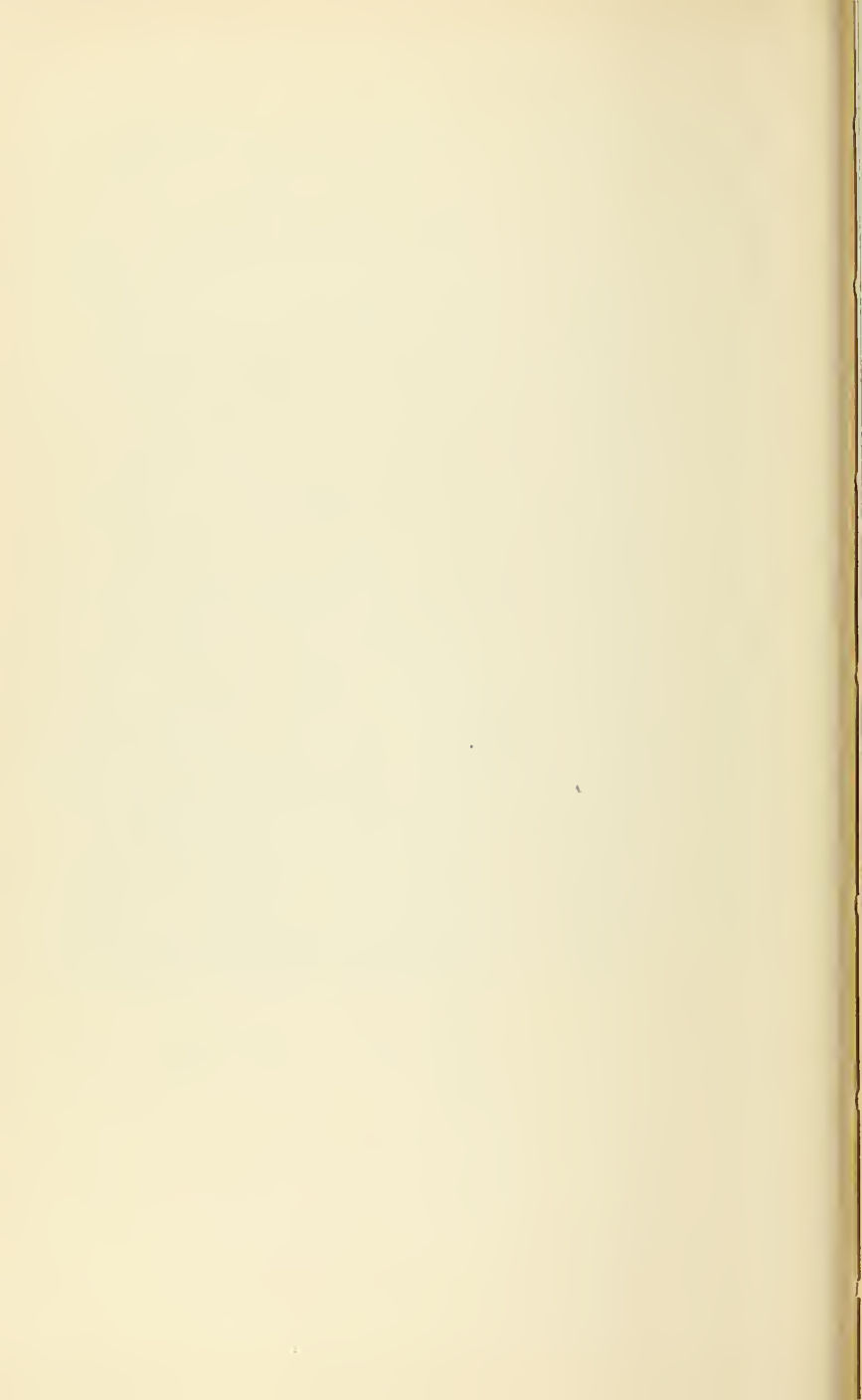
It is urged, with a good deal of earnestness, on the part of the counsel for the appellant that, because it has turned out that the stone was immensely more valuable than the parties at the time of the sale

supposed it was, such fact alone is a ground for the rescission of the sale, and that fact was evidence of fraud on the part of the vendee. Whether inadequacy of price is to be received as evidence of fraud, even in a suit in equity to avoid a sale, depends upon the facts known to the parties at the time the sale is made. When this sale was made the value of the thing sold was open to the investigation of both parties, neither knew its intrinsic value, and, so far as the evidence in this case shows, both supposed that the price paid was adequate. How can fraud be predicated upon such a sale, even though after-investigation showed that the intrinsic value of the thing sold was hundreds of times greater than the price paid? It certainly shows no such fraud as would authorize the vendor to rescind the contract and bring an action at law to recover the possession of the thing sold. Whether that fact would have any influence in an action in equity to avoid the sale we need not consider. See *Stettinheimer v. Killip, 75 N. Y. 287; Etting v. Bank of U. S., 11 Wheat. 59.*

We can find nothing in the evidence from which it could be justly inferred that Mr. Boynton, at the time he offered the plaintiff one dollar for the stone, had any knowledge of the real value of the stone, or that he entertained even a belief that the stone was a diamond. It cannot, therefore, be said that there was a suppression of knowledge on the part of the defendant as to the value of the stone which a court of equity might seize upon to avoid the sale. The following cases show that, in the absence of fraud or warranty, the value of the property sold, as compared with the price paid, is no ground for a rescission of a sale. *Wheat v. Cross, 31 Md. 99; Lambert v. Heath, 15 Mees. & W. 487; Bryant v. Pember, 45 Vt. 487; Kuelkamp v. Hidding, 31 Wis. 503-511.* However unfortunate the plaintiff may have been in selling this valuable stone for a mere nominal sum, she has failed entirely to make out a case either of fraud or mistake in the sale such as will entitle her to a rescission of such sale so as to recover the property sold in an action at law.

The judgment of the circuit court is affirmed.





WOOD v. MANLEY.

(11 Adol. & E. 34.)

Court of Queen's Bench. Michaelmas Term, 1839.

Trespass for breaking and entering plaintiff's close. Plea, (besides others not material here,) as to entering the close, that defendant, before the time when, &c., was lawfully possessed of a large quantity of hay, which was upon plaintiff's close, in which, &c., and that defendant, at the times when, &c., by leave and license of the plaintiff to him for that purpose first given and granted, peaceably entered the close, to carry off the said hay and did then and there peaceably take his said hay from and out of the said close, as he lawfully, &c., which are the said alleged trespasses, &c. Replication, de injuria.

On the trial, before Erskine, J., at the last Somersetshire assizes, it appeared that the plaintiff was tenant of a farm, including the locus in quo; and that, his landlord having distrained on him for rent, the goods seized, comprehending the hay mentioned in the plea, were sold on the premises; the conditions of the sale being, that the purchasers might let the hay remain on the premises till the Lady-day following, (1838,) and enter on the premises in the meanwhile, as often as they pleased, to remove it. The defendant purchased the hay at the sale: and evidence was given to show that the plaintiff was a party to these conditions. After the sale, on 26th January, 1838, plaintiff served upon defendant a written notice not to enter or commit any trespass on his, the plaintiff's, premises. In February following, defendant served plaintiff with a written demand to deliver up the hay, or to suffer him, defendant, to have access thereto and carry it away; threatening an action in default thereof. The plaintiff, however, locked up the gate leading to the locus in quo, where the hay was; and the defendant, on 1st March, 1838, broke the gate open, entered the close, and carried away the hay. The learned judge told the jury that, if the plaintiff assented to the conditions of sale at the time of the sale, this amounted to a license to enter and take the goods, which license was not revocable: and he therefore directed them to find on this issue for the defendant, if they thought the plaintiff had so assented. Verdict for the defendant.

Crowder now moved for a new trial, on the ground of misdirection. The learned judge appears to have considered that this case fell within the principle laid down in *Winter v. Brockwell*, 8 East, 308, that a license executed cannot be revoked. There the execution of the license took place by the defendant building in pursuance of the plaintiff's permission; so that the defendant had incurred an expense, upon the faith of the license, in doing the very thing which was licensed: and the action was for the thing so done. But this is not the case of a license executed before revocation: the plaintiff revoked the permission before the defendant acted upon it at all. On these pleadings, the only question is, whether the act done by the plaintiff was licensed by the defendant. It may be that

the defendant was entitled to bring trover, or perhaps to sue for breach of the conditions: but the license was revoked before it was executed. [Lord DENMAN, C. J. If a man buys a loaf, and part of the bargain is, that he shall leave it at the baker's shop, and call for it, can the baker prevent his entering the shop to take the loaf?] Suppose a party agrees to sell merchandise; if he afterwards refuse to sell, the buyer cannot take it. [Lord DENMAN, C. J. But here the sale was completed.] The ruling of the learned judge, if correct, would show that every case of contract created an irrevocable license. [Lord DENMAN, C. J. Here the question is on the fact of the license.] The revocation of a license need not be specially replied: it may be shown under a traverse of the license. Besides, the replication here puts the whole plea in issue; and the plea alleges a quiet entry, which is negatived by the gate being broken. A right of way may, perhaps, in some cases be enforced by violence, but not a license. [PATTESON, J., referred to *Taylor v. Waters*, 7 Taunt. 374, (2 E. C. L. R. 405.)] The question there was, whether a license to use real property could be given without writing; and it was decided that it could. *Liggins v. Inge*, 7 Bing. 682, (20 E. C. L. R. 304,)¹ is to the same effect.

Lord DENMAN, C. J. Mr. Crowder's argument goes this length:—that, if I sell goods to a party who is, by the terms of the sale, to be permitted to come and take them, and he pays me, I may afterwards refuse to let him take them. The law countenances nothing so absurd as this: a license thus given and acted upon is irrevocable.

PATTESON, J. *Taylor v. Waters*, 7 Taunt. 374, (2 E. C. L. R. 405,) shows that a license to use a seat at the opera-house, paid for and acted upon by sitting there, cannot be countermanded. Here the conditions of sale, to which the plaintiff is a party, are, that any one who buys shall be at liberty to enter and take. A person does buy; part of his understanding is that he is to be allowed to enter and take. The license is therefore so far executed as to be irrevocable equally with that in *Taylor v. Waters*. The case put by Mr. Crowder is different. I do not say that a mere purchase will give a license: but here the license is part of the very contract.

WILLIAMS, J. The plaintiff, having assented to the terms of the contract, puts himself into a situation from which he could not withdraw.

COLERIDGE, J. The pleadings raise the issue whether, when the act complained of was done, the leave and license existed: it did exist if it was irrevocable; and I think it was irrevocable. Although no one of the cases referred to is exactly the same as this, yet all proceed on the principle that a man, who, by consenting to certain terms, induces another to do an act, shall not afterwards withdraw from those terms.

Rule refused.

¹ See *Bridges v. Blanchard*, 1 A. & E. 530, (28 E. C. L. R. 43.)



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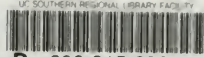
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